STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

THREE RIVERS COMMUNITY SCHOOLS,
Public Employer,

Case No. R14 G-048

-and-

Docket No. 14-022209-MERC

THERESA SUSSDORF,
Petitioner,

-and-

MICHIGAN EDUCATION ASSOCIATION,
Incumbent Labor Organization.

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APPEARANCES:

Jean Logan, Superintendent, for the Public Employer

Theresa Sussdorf as Petitioner

White, Schneider, Young and Chiodini, P.C., by Erin M. Hopper, for the Labor Organization

DECISION AND ORDER ON CHALLENGE TO TABULATION OF ELECTION RESULTS

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201-423.217, this case was assigned to Travis Calderwood, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission or MERC). This case involves objections to a mail ballot election conducted as a result of a decertification petition filed on July 7, 2014. The election was conducted pursuant to a consent election agreement, which provided that ballots would be mailed to all eligible voters on August 7, 2014; they were to be returned to the Commission's Detroit office no later than 5 p.m. on August 21, 2014. Counting of the ballots would take place at 10 a.m. on August 22, 2014 in the Commission offices. Of the 24 ballots received timely, 22 were counted and 2 were deemed spoiled by the Commission's Election Officer because they were not signed. The final tally indicated 11 votes in support of the Incumbent labor organization, the Michigan Education Association ("MEA" or "Incumbent") and 11 votes opposing the Incumbent. One signed ballot that arrived at the Commission offices after the count took place has not been opened and is the subject of this challenge. Based upon

the entire record, including a brief filed by the Incumbent MEA Labor Organization, with both of the other parties waiving briefing and no party requesting oral argument, the Commission finds as follows:

The Objections and Procedural History:

The Incumbent MEA contends that because Glen Carlson, an eligible voter, did not receive his ballot until August 20, 2014, his ballot, received by the Commission after 5 p.m. on August 21, 2014, should be included with the tally or, alternatively, that the election should be set aside and a new one conducted.

On September 23, 2014, a telephone pre-hearing conference was conducted by ALJ Calderwood with the interested parties. It was determined at that time that there was no dispute regarding the relevant facts and conducting an evidentiary hearing would be unnecessary. The parties agreed to provide a stipulation of facts and despite each party being given the opportunity to file briefs in support of their respective positions, the Incumbent MEA was the only party to do so.

Findings of Fact:

The following findings of fact are predicated on the stipulated facts and exhibits agreed to by the parties, as well as internal Commission records.

On July 7, 2014, Theresa Sussdorf filed a decertification petition seeking to remove the Incumbent as the certified bargaining representative for the support personnel at the Three Rivers Community Schools. This bargaining unit is currently represented by the MEA – specifically, the Three Rivers Educational Support Personnel Association, TRESPA/SMEA/MEA/NEA. On July 9, 2014, the Commission's Election Officer, provided notice to all interested parties that a telephone conference would be conducted on July 23, 2014. That notice requested that the Employer provide, among other things, "[a]n alphabetical list of employees and their classifications as of the filing date of the [petition]." On July 21, 2014, the Election Officer received from Jean E. Logan, the Superintendent of Three Rivers Community Schools, a list of forty-five (45) names representing the members of the bargaining unit. Following the telephone conference, the parties agreed to a consent election to be conducted by mailed ballot. Pursuant to that consent agreement, the Election Officer would prepare and provide copies of both a Notice of Election and sample ballot to the parties. The Employer would then post the Notice and sample ballots in a prominent place or places generally accessible to voters. As part of the agreement, the Employer was to provide to both the Commission and the labor organizations involved, with an accurate list of the names and addresses of all eligible voters. Finally, the agreement specified that ballots were to be mailed to the voters on August 7, 2014, and ballots were to be returned to and received at the Commission's offices in Detroit, Michigan, no later than 5 p.m., on August 21, 2014.

The Notice of Election that was to be posted by the Employer pursuant to the Consent Agreement provided information regarding when ballots were to be mailed, the date by which ballots were to be received and the date and time that the ballots would be tallied. That Notice

also provided the main telephone number for the Bureau of Employment Relations should anyone have questions regarding the election.

Sometime prior to the mailing of ballots on August 7, 2014, the Commission received a list of forty-six (46) names and addresses, dated July 29, 2014, identifying those employees in the bargaining unit eligible to vote.

On August 7, 2014, ballots were mailed to the eligible voters as identified by the Employer's July 29, 2014, list. On August 14, 2014, Glen Carlson, a member of the bargaining unit whose name did not appear on either the July 21, 2014 or the July 29, 2014, list, notified the Incumbent that he had not received a ballot. All parties concede that Carlson was an eligible voter at that time. [1] That same day, Sharon Janes, a representative for the Incumbent, notified the Election Officer, by e-mail, that Carlson had not received a ballot and requested the Officer to "send/re-send a ballot" to Carlson. Unbeknownst to the parties at the time, the Election Officer was out of the office unexpectedly on August 14 and August 15. Upon her return to the office on August 18, 2014, she mailed a ballot to Carlson. On August 20, 2014, the Election Officer responded to Janes' e-mail by stating, "[t]he ballot was sent earlier by challenged ballot since he was not on the list." That same day, August 20, 2014, Carlson received his ballot, filled it out and placed it in the U.S. mail to be returned to the MERC offices.

On August 21, 2014, at 9:11 a.m., Janes sent an e-mail to the Election Officer stating that Carlson had received the ballot the previous day. That e-mail stated in relevant part:

> Glen Carlson the individual with Three Rivers that you sent the challenged ballot just received the ballot in the mail yesterday. If he puts it in the mail today, it will not arrive in time for the count. Can you please advise what we should do so his ballot is included in the count tomorrow? Are there any options other than incurring the expense of shipping it overnight (A.M. delivery)?
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The Election Officer responded by e-mail that same day at 11:39 a.m., and stated "[a]ll ballots must be received by mail or in person (with identification)."[2]

On August 22, 2014, the Election Officer, in the company of an MEA representative, opened twenty-two (22) of the twenty-four ballots received, deeming two (2) ballots spoiled. The final tally was eleven (11) for the Incumbent and eleven (11) for the decertification.

On August 24, 2014, at 11:32 a.m., Carlson's ballot was received at the Commission's Detroit office. That ballot has not been opened. On August 29, 2014, the Incumbent timely filed its objection and challenge to the tabulation of election results.

[1] At no point in this proceeding has any party disputed that Carlson is eligible to vote; nor has anyone provided an explanation for his omission from either the July 21, 2014, or July 29, 2014, list.

[2] It is unclear what action could have been taken as a result of Incumbent's e-mail on August 21, 2014, because, as stipulated to by the parties, Carlson had already placed his ballot in the mail the night before.

Discussion and Conclusions of Law:

Simply put, Incumbent MEA either wants Carlson's ballot to be opened and included in the final tally or the entire election set aside and a new one ordered. Incumbent argues that because Carlson did not receive his ballot until August 20, 2014, despite a request being made on August 14, 2014 for one to be sent to him, he should not be denied the opportunity to cast his vote. It is clear that Carlson's ballot could change the results of the election since of the ballots that were counted, an equal number was for and against Incumbent's continued representation. Carlson's ballot, if cast for Incumbent, would allow the MEA to remain the authorized bargaining agent.

Among the many rights guaranteed to public employees by Section 9 of PERA, is the right to bargain collectively with their public employers through representatives of their own free choice. MCL 423.219. Accordingly, the starting premise of any decision in a representation proceeding is the reaffirmation that the fundamental function of the adoption of PERA in 1965 was to recognize and codify the right of public employees to collectively designate an exclusive bargaining agent through whom their employer must deal with the workforce collectively, rather than individually. See *City of Detroit*, 23 MPER 94 (2010); MCL 423.209 & 423.211. PERA was enacted at the specific command of the people of Michigan, acting through their Constitutional Convention to adopt Const 1963, art 4, § 48. The statute was described by the Legislature as intended to "declare and protect the rights and privileges of public employees," with the fundamental Section 9 right being the right of employees to act through "representatives of their own free choice." The Commission is "the state agency specially empowered to protect employees' rights." *Ottawa Co v Jaklinski*, 423 Mich 1, 24 n10 (1985).

In construing PERA, this Commission has been guided at times by the construction placed on analogous provisions of the National Labor Relations Act (NLRA). *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540 (1998); *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616 (1975). With regard to representation elections conducted by this Commission, we have adopted the National Labor Relations Board's (NLRB or Board) "laboratory conditions" standard, pursuant to which it is our obligation to provide an atmosphere in which an election can be conducted under "conditions as nearly ideal as possible" so that the uninhibited desires of the employees in the proposed bargaining unit may be determined. *Iosco Co Medical Care Facility*, 1999 MERC Lab Op 299; *Huron Co Medical Care Facility*, 1998 MERC Lab Op 670, 677. In an objections proceeding, the burden of proof is on the party filing the objections to establish grounds for setting aside the election; there is no burden on the Commission to show that the election was fairly conducted. *Iosco Co Medical Care Facility; City of Detroit*, 1971 MERC Lab Op 892.

In order to assist us in our above obligations, we have promulgated rules pursuant to MCL Sections 12 and 14 of PERA governing the elections process. Rule 147(2) requires an employer to provide the Commission and other interested parties a list of the names and addresses of all eligible voters "not less than 7 days before the date of an election, or the date of the mailing of the ballots in a mail ballot election, excluding Saturdays, Sundays, and legal

holidays."[3] The reason for the rule is to provide the union(s) with the means to contact eligible voters before the election. An employer's failure to submit an eligibility list within the time limits set forth above is grounds for setting aside the election without a specific showing by the union that it needs the names and addresses, although an election will not be set aside if the employer has substantially complied with the rule. *Northwest Guidance Clinic*, 1986 MERC Lab Op 771, 776; *Utica Cmty Schs*, 19 MPER 85 (2006). The Incumbent has not offered any indication that it did not receive the list required under Rule 147(2). Rather, it appears that for some unknown reason, Carlson's name was omitted from the lists provided to the Election Officer by the Employer and that no one noticed the omission until Carlson himself contacted the Incumbent a week after the ballots were mailed out.

In previous cases before us challenging election results from a mail ballot election, we have focused on the actions of those actually casting ballots to guide us in reaching a decision. In *City of Detroit and City of Detroit Registered Nurses, Organization Unit II and Michigan Nurses Association*, 1971 MERC Lab Op 892, we were presented a situation in which three members of the unit testified that they either did not receive ballots or had received them too late to vote in the election. *Id.* at 894. We determined that the unit members had notice of the election, yet failed to contact us with regard to the missing ballots. We held that it was incumbent upon the employees who did not receive ballots to communicate that fact. As part of our decision, we recognized that neither this Commission nor the parties to an election can "require eligible voters to participate in the democratic process of the selection of a labor representative." *Id.* at 897. Ultimately, we over-ruled the objections and did not set aside the election finding that the employees failed to take action and contact the Commission regarding the fact that they had not received ballots.

In *Utica*, we were once again presented with a situation where several eligible voters did not receive ballots. We recognized in our decision that the federal courts have taken a nearly identical approach in reviewing challenges to the conduct of mail ballot elections as the one we undertook in *City of Detroit, supra*. Specifically, we cited *Antelope Valley Bus Co, Inc v NLRB*, 275 F3d 1089 (2002), in which the union filed a petition with the NLRB seeking to represent the employer's bus drivers. The parties agreed to conduct the election by mail ballot. The employer posted standard election notices throughout its facility. Following the election, the employer filed timely objections, alleging that four eligible employees had not received ballots during the election period. Despite this, the NLRB concluded that because the four employees had notice and an opportunity to vote, it would not set aside the election. The Court of Appeals agreed,

[3] Rule 147(2) is modeled on a similar rule first announced by NLRB in *Excelsior Underwear, Inc*., 156 NLRB 1236, 1240 (1966). In that case, the Board explained the rationale for the rule as follows: The control of the election proceeding and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone. In discharging that trust, we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice.

finding that the Board had properly applied the "adequate notice and opportunity to vote" test as established previously in *Lemco Constr, Inc*, 283 NLRB 459, 460 (1987).

In *Utica*, the incumbent union claimed that the mail ballot election should be set aside on the ground that the ballots were not mailed on the date specified in the consent election agreement and that some of the eligible voters received envelopes that did not contain ballots. As to the first argument, we indicated that "we are unaware of any Commission decision standing for the proposition that a delay in the mailing of the ballots is a per se violation of the laboratory conditions standard." *Id.* With regard to the second issue, we determined that the Commission's Election Officer at the time had supplied to the parties a notice of election and sample ballots, along with instructions to the Employer to post those documents prominently on its premises at least five working days prior to the election. There was no indication in the record that those instructions were not followed, nor did the incumbent make such an allegation. The record established that after the ballots were mailed out, it became apparent to the parties that some voters had received empty envelopes. The incumbent then sent an e-mail to unit members advising those employees who were affected by the problem to contact the MEA office. A short time later, the Incumbent sent a second e-mail directing voters to contact the Commission's Election Officer if they had not yet received a ballot. That e-mail specified that the May 24, 2006, deadline for returning the ballots would not be extended and included contact information for the Election Officer. The Officer promptly provided those employees who had not initially received mail ballots with the opportunity to vote by replacement ballot, and all the affected employees who contacted MERC returned their ballots in a timely manner. In keeping with *City of Detroit* and *Antelope Valley Bus Co.*, we concluded that all eligible voters "had adequate notice of the mail ballot election and an opportunity to vote therein" and that it was "incumbent upon employees who did not receive ballots to communicate with the Commission and request a replacement ballot." *Id.*

The facts in the instant case are unusual when compared to *Utica* and *City of Detroit.* In the instant case, it is undisputed that Carlson did not receive a ballot by August 14, 2014, and that he promptly contacted the Incumbent for assistance. Incumbent then e-mailed the Election Officer in an effort to get a ballot to Carlson. However, Incumbent claims in its brief that "when Mr. Carlson did not receive his ballot in a timely manner, a replacement ballot was requested for him two weeks before the close of the election." Incumbent also states that the Election Officer "did not even respond to this request until the day before the election closed." Both of these statements contradict the facts as stipulated to by the parties; Carlson, through Incumbent, requested that a ballot be sent one week before the close of the election, not two weeks, and the Election Officer did respond to that request by sending a ballot to Carlson upon her return to the office on August 18, 2014. However, we hold that these contradictions between the Incumbent's position and the facts as stipulated by the parties are not dispositive to this case. Unlike the employees in *City of Detroit* and *Utica*, Carlson did attempt to secure a ballot prior to the tabulation of results. It is no matter that he chose to work through his Union, the Incumbent, as opposed to contacting the Commission directly by the using phone number provided on the Notice of Election. Whether he would have been more successful by contacting the Commission himself is immaterial and to consider this as dispositive here would deny Carlson the opportunity to cast his vote - something that he had tried to secure. What is material and dispositive to this matter is that Section 9 of PERA provides Carlson, along with all other public employees

covered under the Act, the right to be represented by a representative of his choosing, and that he attempted, albeit by less than ideal methods, to cast a vote evidencing his choice. Carlson, through no fault of his own, was denied the opportunity to exercise his rights as provided under Section 9 of PERA. Accordingly, we hold that the vote cast by Carlson should be included in the tabulation of results.

CONCLUSION

In summary, we find that the objections filed by the Incumbent do not warrant the drastic action of setting aside the election, but rather warrant the opening and inclusion of Carlson's ballot in the tabulation results. Significantly, no party can provide any explanation as to why Carlson was left off of two lists of eligible voters, a fact overlooked by both the Employer and Incumbent, and only remedied by Carlson himself.

Based upon the foregoing, we order that Carlson's ballot be opened and included in the tabulation of election results and that an appropriate certification be issued thereafter.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: February 12, 2015