STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OGEMAW COUNTY AND THE OGEMAW COUNTY SHERIFF,
Public Employers-Petitioners,

Case No. UC14 E-007
-and- Docket No. 14-015332-MERC

TEAMSTERS LOCAL 214,
Labor Organization.
_____/

APPEARANCES:

Employment Relations Advisors, L.L.C, by W.P. Borushko, for the Public Employers-Petitioners

Robert Donick, Business Agent, Teamsters Local 214, for the Labor Organization

DECISION AND ORDER ON PETITION FOR UNIT CLARIFICATION

On May 15, 2014, Ogemaw County and the Ogemaw County Sheriff filed this petition for unit clarification with the Michigan Employment Relations Commission pursuant to § 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213. Petitioner seeks an order dividing a unit of employees of the Sheriff's Department represented by Teamsters Local 214 (the Union) into two units. One of the proposed units would consist of Sheriff's deputies eligible for arbitration of their labor disputes under § 2 of the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act, 1969 PA 312 (Act 312), MCL 423.232. The other unit would comprise all other positions currently included in the Union's bargaining unit, including corrections officers, cooks, and secretaries.

The petition was assigned to be heard on the Commission's behalf by Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System. The parties agreed that an evidentiary hearing was not necessary as there was no material dispute of fact. They also agreed to waive oral argument and submit their arguments in writing. Based on facts not in dispute as set out in the parties' position statements and additional statements submitted on December 1, 2014, we find as follows:

The Petition and Positions of the Parties:

As noted above, Petitioners seek to split an existing unit of Sheriff's Department employees into separate units of Sheriff's deputies and all other employees. There is no dispute that the deputies are eligible for Act 312 arbitration and that the other positions in the unit are not. Petitioners argue that recent changes to PERA, the recent bargaining history between the parties, and other facts set forth below establish that the interests of all concerned would be best served by the separation of these groups into two units. The Union asserts that neither the recent changes in PERA nor the parties' bargaining history justifies the disruption of an established bargaining unit. It also argues that the employees in this relatively small unit share a community of interest.

Facts:

The Bargaining Unit

In 2014, the Union's bargaining unit consisted of eleven deputies, twenty-two corrections officers including fourteen part-time officers, cooks, and one secretary. The deputies work from the Ogemaw County Sheriff's Office. The other employees in the unit work at the Ogemaw County Correctional Facility. The Sheriff's Office and Correctional Facility are located on opposite sides of a four-lane highway in West Branch, Michigan.

History of Bargaining Between the Parties

The parties provided no information regarding the origins of this bargaining unit or how long it has existed in its present form. Petitioners do not contend, however, that prior to 2012 the parties had difficulty negotiating contracts due to the inclusion in the unit of both Act 312-eligible and non-eligible positions. In 2012, while the parties were attempting to negotiate a successor to an agreement expiring that year, the Union raised the issue of splitting the unit into two separate units. However, the Union did not pursue the issue, and the parties continued negotiating in an effort to reach a single successor agreement. In February 2013, the parties reached agreement on all contract terms, including wages, applicable to the non- Act 312-eligible group. However, they were not able to reach accord on wages and other terms, applicable only to deputies. A petition for Act 312 arbitration was filed to settle the issues remaining in dispute. In July 2013, an Act 312 award was issued for a contract expiring on September 30, 2014. Wage increases effective on the date of the award were then implemented for all unit employees.

Negotiations for a successor to that contract began in the early part of 2014. Ogemaw County's jail operations are heavily supported by fees paid from other counties to house their prisoners. However, its road patrol operations are largely paid for by general tax dollars. In early 2014, Ogemaw County was having difficulty supporting its road patrol and was considering asking voters for a dedicated police millage and/or eliminating deputy positions. One of Petitioners' concerns at the beginning of negotiations was language in the existing contract that required part-time, temporary, and

probationary employees to be laid off prior to any layoff of permanent employees. Petitioners feared that if the Union did not agree to eliminate or modify this language, Petitioners could not continue to employ part-time corrections officers if they were forced to eliminate full-time deputy positions. Petitioners also wanted to eliminate or modify language in the expired contract that gave laid off deputies the right to bump into corrections officer positions based on their departmental seniority. Prior to the beginning of actual negotiations, Petitioners proposed that the parties bargain separately for Act 312-eligible and non-eligible employees. The Union rejected this proposal.

In May 2014, Petitioners filed this unit clarification petition. The parties continued to bargain toward a single contract. They were not able to reach a contract by the end of 2014, although they did agree on a solution to Petitioners' concern about the bumping language. On November 12, 2014, the Union filed both a petition for fact finding and a petition for Act 312 arbitration. The major barrier to reaching agreement at that time was the parties' inability to agree on health insurance, a benefit provided equally to the deputies and the non-312 eligible group. According to Commission records, the parties reached a settlement in both cases, and presumably reached a contract, in February 2015.

Changes to PERA Creating Distinctions
Between Act 312-Eligible and Non-Eligible Employees

On December 11, 2012, the Legislature passed 2012 PA 349. That Act, which became effective on March 28, 2013, amended §§ 9 and 10 of PERA to outlaw, for most public employees covered by PERA, the union security agreements that had previously been a standard feature of most public sector collective bargaining agreements. As of March 28, 2013, it became unlawful to require most public employees, as a condition of continuing their employment, to pay dues, fees, assessments, or provide anything of value to a labor organization or bargaining representative or pay to a charitable organization or third party any amount in lieu of union dues, fees, or assessments.

However, § 10(4)(a)(i) of PERA exempts Act 312-eligible employees, and those who seek to become employed in Act 312-eligible positions, from this prohibition. Section 10(4)(b) further provides that labor organizations and public employers may lawfully enter into agreements requiring Act 312-eligible employees to pay dues or agency fees as a condition of employment. The parties agree that § 10 of PERA permits them to agree in their contract to require the deputies to pay dues or agency fees to the Union, but that a union security agreement covering the non-Act 312-eligible employees in the unit would be unlawful.

In 2011, the Legislature passed 2011 PA 54 which added § 15b to PERA. Effective October 14, 2014, it amended § 15b to include a new subsection 4. Section 15b now reads as follows:

> Sec. 15b. (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor

collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased costs of maintaining those benefits that occur after the expiration date. The public employer may make payroll deductions necessary to pay the increased costs of maintaining those benefits.

(2) Except as provided in subsection (3) or (4), the parties to a collective bargaining agreement shall not agree to, and an arbitration panel shall not order, any retroactive wage or benefit levels or amounts that are greater than those in effect on the expiration date of the collective bargaining agreement.

(3) For a collective bargaining agreement that expired before June 8, 2011, the requirements of this section apply to limit wages and benefits to the levels and amounts in effect on June 8, 2011.

(4) All of the following apply to a public employee eligible to submit labor disputes to compulsory arbitration under 1969 PA 312, MCL 423.231 to 423.247:

(a) Subsection (1) does not prohibit wage or benefit increases, including step increases, expressly authorized under the expired collective bargaining agreement.

(b) The increase in employee costs for maintaining health, dental, vision, prescription, or other insurance benefits after the collective bargaining contract expiration date that the employee is required to bear under subsection (1) shall not cause the total employee costs for those benefits to exceed the amount of the employee's share under the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.561 to 15.269. If the public employer is exempt from the limitations of that act, the total employee costs for those benefits shall not exceed the higher of the minimum required employee share under section 3 or 4 of the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.563 and 15.264, calculated as if the public employer were subject to that act.

(c) Subsection (2) does not prohibit retroactive application of a wage benefit increase if the increase is awarded in the decision

> of the arbitration panel under 1969 PA 312, MCL 423.231 to 423.247, or included in a negotiated bargaining agreement.
>
> (5) As used in this section:
>
> (a) "Expiration date" means the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.
>
> (b) "Increased costs" in regard to insurance benefits means the difference in premiums or illustrated rates between the prior year and the current coverage year. The difference shall be calculated based on changes in costs by category of coverage and not on changes in individual employee marital or dependent status.

The parties agree that under § 15b, as amended, the parties may lawfully agree in their collective bargaining agreement to give deputies a retroactive wage increase, but may not agree to retroactive wage increases for the remainder of the unit. In addition, Petitioners are barred by § 15b from paying step increases to non-Act 312-eligible employees in the interim between two contracts, while the deputies are entitled to any step increases provided for in the expired contract. Finally, Petitioners are required, under § 15b(1), to pass along to non-Act 312-eligible employees the full amount of any increase in their health benefits occurring in the hiatus between collective bargaining agreements even if this raises the employees' contribution to their health costs above the "employee's share" for that medical benefit plan coverage year as set out in §§ 3 and 4 of the Publicly Funded Health Insurance Contribution Act, 2011 PA 152, MCL 15.561 et seq. See *Shelby Twp*, 28 MPER 21 (2014). For the deputies in the unit, however, § 15b(4)(b) caps the amount of their contribution at the "employee's share." [1]

Discussion and Conclusions of Law:

Since the 1980s, we have recognized the availability of Act 312 arbitration to be a significant factor in defining the appropriate unit. We had previously held that police and fire fighting employees had an "an extreme divergence in community of interest" which justified permitting them to sever from non-public safety units. See, e.g., *City of Cheboygan*, 1978 MERC Lab Op 251. In *City of Dearborn Heights*, 1984 MERC Lab Op 1079, we announced that we would no longer include unrepresented Act 312-eligible positions in the same bargaining unit with non-eligible positions where any party objected to their inclusion. We also announced, in *City of Fenton*, 1984 MERC Lab Op 1086, that despite our reluctance to disturb existing bargaining units, we would entertain

[1] The term "employee's share" does not appear in 2011 PA 152. However, § 3 places a dollar amount "hard cap" on the total amount that a public employer may pay during a medical benefit plan coverage year, while § 4 states that an employer may not pay more than 80% of the total annual costs of all medical benefit plans it offers to its employees during a medical benefit plan coverage year.

representation petitions by unions seeking to sever Act 312-eligible employees from units including non-eligible employees and represent the Act 312-eligible classifications as part of another existing unit of Act 312-eligible employees. In *Fenton,* we directed an election in which emergency dispatchers were allowed to vote to be represented by the union representing police officers as part of that unit or to remain in their existing unit of clerical employees represented by another labor organization. In a third case, *Berrien Co,* 1984 MERC Lab Op 1072, we declared that units including all Act 312-eligible employees of an employer are presumptively appropriate. See also *City of Grand Rapids,* 1987 MERC Lab Op 193, 195, in which we found that the interests of Act 312-eligible emergency dispatchers diverged sufficiently from those of non-312 eligible employees to justify permitting the dispatchers to sever from their existing unit and be represented either as part of an existing Act 312-eligible unit or separately by their current bargaining representative.

Since those decisions, as we declared in *City of Walker,* 1991 MERC Lab Op 60, 64, our policy has been "to include all Act 312-eligible employees in bargaining units with other Act 312-eligible employees whenever possible." However, we have also repeatedly stated that units including both Act 312-eligible and non-eligible employees are not per se inappropriate, *Genesee Twp,* 1994 MERC Lab Op 210, 216; *Ottawa Co,* 1992 MERC Lab Op 370, 372-374; *Wayne Co Airport Police Dept,* 2001 MERC Lab Op 163, 167.

In *Ottawa Co,* in what we described as a case of first impression, we refused to entertain an employer's unit clarification petition seeking to split an existing bargaining unit into separate units of Act 312- eligible and non-eligible employees. As we noted in that decision, at 373, unit clarification is appropriate for resolving ambiguities in unit placement caused by the creation of new positions or by recent substantial changes in the job duties of existing classifications. It is generally not appropriate for upsetting an agreement of the parties or established practice concerning unit placement. *Genesee Co,* 1978 MERC Lab Op 552, 556; *Wayne Co Probate Ct,* 1988 MERC Lab Op 726. See also *Grosse Pointe Pub Library,* 1999 MERC Lab Op 151; *Lansing Sch Dist,* 20 MPER 3 (2007). As we noted in *Ottawa,* we have held that unit clarification is appropriate to remove supervisors from nonsupervisory units, even where the supervisors have been included in the unit by agreement or by longstanding practice. *City of St Clair Shores,* 1978 MERC Lab Op 445; *Detroit Bd of Ed,* 1978 MERC Lab Op 1140. However, the inclusion of supervisors in nonsupervisory bargaining units is explicitly prohibited by § 13 of PERA, incorporating by reference § 9(e) of the Labor Mediation Act, MCL 423.423.9e. While we have expressed our preference for separate units of Act 312-eligible and non-eligible employees, neither PERA nor Act 312 includes any prohibition on so-called "mixed" units.

We reaffirmed our holding in *Ottawa* in *Alpena Co & Alpena Co Sheriff,* 1997 MERC Lab Op 651, in which we again dismissed the employers' unit clarification petition seeking to split a mixed unit into separate units of Act 312-eligible and non-eligible employees. As we stated in *Alpena Co:*

We do not agree with the contention of the County that the present unified

> collective bargaining unit is no longer appropriate because the ability of part of the unit to participate in interest arbitration creates such a diversity of interest that the two groups of employees no longer function as one unit. The fact that one part of a unit finds a contract offer acceptable is certainly not unusual and does not affect the underlying appropriateness of the unit. See our discussion of broad units that contain Act 312-eligible employees, and the necessity of arbitrators balancing the rights of all employees in compulsory arbitration proceedings, whether included in the unit or not, in *City of Charlevoix*, 1970 MERC Lab Op 404, 409-411. The fact that the non-312 eligible employees outnumber the deputies eligible for interest arbitration does not affect our ruling herein that the Employer cannot clarify the existing unit into two units. The 312-eligible employees can always petition at an appropriate time to sever from the existing unit if they become dissatisfied. See *Montcalm County*, 1997 MERC Lab Op 157, at 170-171. The further argument of the Employer that the separate ratification of a tentative agreement by the non-312 eligible employees means that there is no longer any community of interest between the two groups of employees, since they "have divided themselves into two separate camps as surely as if a Commission-supervised election for severance had occurred," is also without merit. We have always considered the ratification of contracts as an internal matter to be regulated by the individual parties, and we conclude that it has no effect on our definition of the appropriate unit. See *City of Lansing*, 1987 MERC Lab Op 701, 707, 708.

In only one case have we ever granted an employer's petition to split an existing bargaining unit into separate units of Act 312-eligible and non-eligible employees. In *Oakland Co & Oakland Co Sheriff*, 20 MPER 63 (2007), aff'd *Oakland Co v Oakland Co Deputy Sheriff's Assn*, 282 Mich App 266 (2008), we granted the employers' unit clarification petition seeking to split an existing unit of sheriff's deputies and corrections officers into two separate units on a petition filed by the employer to clarify the unit. We noted that there was no statutory basis for holding that an employer could never seek to split a mixed bargaining unit, where circumstances made this appropriate. However, we emphasized that *Oakland Co* involved a highly unusual set of circumstances. These included that: (1) the parties had been without a contract, or any immediate prospect of achieving one, for more than three years when the employer filed the unit clarification petition; (2) the parties' protracted inability to reach a contract had left them "frozen in place" and had given rise to the filing of more than fourteen unfair labor practice charges since the contract expired; and (3) the parties were unable to agree even as to which unit classifications were Act 312-eligible and which were not. This last circumstance resulted in confusion over which groups of employees were covered by which dispute resolution mechanism – Act 312 arbitration or fact finding – and further prevented resolution of the parties' contract dispute by those means. Our decision in *Oakland Co* included a ruling on which positions in dispute were Act 312-eligible. However, we concluded that an order splitting the unit was appropriate because the continued existence of the mixed unit in that case had disrupted the collective bargaining process to such an extent that the

process had essentially broken down, thus depriving employees of their right to collective bargaining.

The facts in this case do not resemble those in *Oakland Co*, and Petitioners do not contend that the collective bargaining process has broken down because the bargaining unit includes both Act 312-eligible deputies and non-eligible employees. Rather, Petitioners maintain that the interests of Act 312-eligible and non-eligible employees are rapidly diverging in light of the distinctions drawn by the Legislature in Act 349 and in the recent amendments to § 15b. They point out that two-thirds of the Union's bargaining unit is no longer covered by a union security agreement. Therefore, at any point in time, the Union could potentially lose two-thirds of its financial support. They foresee internal strife within the unit, and the potential for coercive conduct, in the future if non-eligible employees withdraw their financial support from the Union and become "free riders." Petitioners admit that they are aware of no significant discord between the deputies and non-eligible group at this time. However, they foresee conflict between the groups if the Act 312 eligible deputies continue to pursue their interests at the expense of the interests of the non-eligible group. They assert that the deputies, a minority of the unit, have already demonstrated their willingness in 2013 to proceed to Act 312 arbitration at the expense of the interests of the remainder of the unit, i.e., delaying a wage increase for the non-eligible group by filing for Act 312 arbitration. Petitioners point out that while § 15b provides unions with strong incentives to reach expeditious contract settlements, the 2014 amendments to that section remove these incentives for unions representing Act 312-eligible employees. That is, since the deputies in the unit can demand retroactive wage increases or obtain retroactive increases from an Act 312 arbitrator, and can receive step increases based on experience during the hiatus between contracts, they have much less incentive than the non-eligible employees to reach a quick contract settlement. Keeping Act 312-eligible and non-eligible employees in the same bargaining units, Petitioners argue, is "fraught with monetary peril" for the non-eligible group.

In addition to asserting that internal strife within the unit will negatively impact the bargaining relationships between the Union and Petitioners, Petitioners argue that keeping Act 312-eligible and non-eligible employees in the same unit, under the current law, gives employers many opportunities to drive a wedge through the unit. For example, employers could insist on proceeding to Act 312 arbitration in all cases, thereby causing monetary loss to the non-eligible group.

We emphasize that Petitioners' predictions of internal strife within the unit are, at this point, mere speculation. We have always recognized that, as indicated in the quote from *Alpena Co & Alpena Co Sheriff*, 1997 MERC Lab Op 651 above, the interests of all members of a bargaining unit may not be identical. The fact that one group within a bargaining unit finds a particular contract offer unacceptable does not automatically mean that the employees within the unit lack a community of interest. In this case, both the Act 312-eligible deputies and the non-eligible employees might find benefit – in the form of increased job security or promotional opportunities - in remaining within the same bargaining unit. However, this, like Petitioners' arguments, is mere speculation. We have

long recognized that the availability of Act 312 arbitration is a significant enough factor in labor relations that units consisting only of Act 312-eligible employees are preferable to mixed units. We agree with Petitioners that the recent amendments to PERA may perhaps make separate units even more preferable for both Act 312-eligible and non-eligible employees. However, whether separate units would be preferable in this case is not the question before us. Nor are we faced with the question of whether, upon the filing of a representation petition, either the Act 312-eligible deputies or the non-eligible employees should be permitted to vote to sever from the existing unit. The only question here is whether, in the absence of extraordinary circumstances such as were present in *Oakland Co,* we should create an exception for Act 312 mixed units to the rule that unit clarification is not appropriate for upsetting an agreement of the parties or established practice concerning unit placement.

Creating this new exception would clearly impact bargaining units other than the one in this case. It may be, as Petitioners predict, that effective collective bargaining in mixed units of Act 312-eligible and non-eligible employees will become impossible in light of the recent changes to PERA. However, Petitioners have not established either that effective collective bargaining has become impossible in this mixed unit or that this is the inevitable outcome of the statutory changes. At this time, and considering these facts, we conclude that Petitioners' request to split the Union's bargaining unit should be denied and its petition for unit clarification dismissed as inappropriate.

ORDER

For reasons set forth above, the petition for unit clarification is denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: May 19, 2015