STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, MICHIGAN COUNCIL 25, LOCAL 1456,
Incumbent-Labor Organization,

Case No. 20-K-1702-RC

-and-

TECHNICAL, PROFESSIONAL AND OFFICE WORKERS ASSOCIATION OF MICHIGAN,
Petitioner-Labor Organization,

-and-

CITY OF FARMINGTON HILLS,
Public Employer.
_____/

APPEARANCES:

AFSCME, Michigan Council 25, Local 1456, by Kenneth J. Bailey, for Incumbent-Labor Organization

TPOAM, by Ed Jacques, for Petitioner-Labor Organization

City of Farmington Hills, by John Randle, Sr., for Public Employer

DECISION AND ORDER ON PETITION FOR ELECTION

Pursuant to the provisions of § 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, a petition for a representation election was filed on November 4, 2020, by the Technical, Professional and Office Workers Association of Michigan (TPOAM). In the petition, the TPOAM seeks to represent a bargaining unit which is currently represented by the American Federation of State, County & Municipal Employees, Michigan Council 25, Local 1456 (AFSCME). The case was assigned for hearing to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings & Rules (MOAHR).[1]

[1] MOAHR Hearing Docket No. 20-027190-MERC

On January 15, 2021, the parties agreed to waive an evidentiary hearing and have this matter decided on stipulated facts and exhibits. Based upon a joint stipulation of facts filed by the labor organizations on January 22, 2021, and on their briefs submitted on or before February 11, 2021, the Commission finds as follows:

Facts:

1. In July of 2017, AFSCME's membership ratified a tentative agreement (TA) that was subsequently ratified by the Employer's City Council on July 24, 2017.

2. The resulting collective bargaining agreement (CBA) was to be effective from July 1, 2017, until June 30, 2022, but provided wage scales only for the first three years of the CBA; the wage scales for the final two years were to be determined later by negotiations.

3. On April 8, 2020, AFSCME notified the Employer of its desire to negotiate wages for the final two years of the CBA.

4. By July 28, 2020, the parties reached a TA in which they agreed, upon ratification of the bargaining unit and City Council, to amend the July 1, 2017 – June 30, 2022, CBA by extending it for an additional year, through June 30, 2023, and for the bargaining unit to receive raises of 2% in each year (i.e., 2% in 20-21; 2% in 2021-2022; 2% in 2022-2023).

5. Ratification by AFSCME occurred on August 5, 2020.

6. Ratification by City Council occurred on August 10, 2020.

7. The petition which gave rise to this dispute was filed by TPOAM on November 4, 2020.

Positions of the Parties:

Petitioner TPOAM asserts that the recent collective bargaining agreement entered into by the City of Farmington Hills (Employer) and Incumbent AFSCME on July 28, 2020 and ratified by the Employer on August 10, 2020 is merely an extension of the initial agreement which was set to expire on June 30, 2022. As such, the recent agreement cannot bar an election because it constituted a premature contract extension for purposes of § 14(1) of PERA.

The Incumbent AFSCME argues that the newly ratified collective bargaining agreement of August 10, 2020 appropriately acts as a "contract bar" and precludes this agency from conducting an election in this matter. According to the Incumbent, the Legislature's use of the word "premature" before "extension" in § 14(1) of the Act gives rise to the inference

that not all extensions of an existing contract will remove that agreement from the protection of the contract bar. AFSCME notes that the purpose of the premature extension doctrine is to ensure that an employer and incumbent union do not extend a contract prior to its expiration date so as to unfairly inhibit the ability of employees to change or remove their bargaining representative. The Incumbent asserts that directing an election in this matter would not further that purpose. Unit employees have had two opportunities to exercise their free choice of representative--during the open window period prior to and after the 3-year anniversary of the effective date of the initial agreement. For these reasons, AFSCME contends that the mutually ratified agreement as of August 10, 2020 produced a new contract that did not constitute a premature extension for purposes of PERA. Consequently, the petition filed by TPOAM should be dismissed.

The Employer has taken no position with respect to this dispute and did not file a brief in this matter.

Discussion and Conclusions of Law:

Section 14(1) of PERA, MCL 423.214(1), states:

> . . . An election shall not be directed in any bargaining unit or subdivision of any bargaining unit if there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration. A collective bargaining agreement does not bar an election upon the petition of persons not parties to the collective bargaining agreement if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

Rule 141(3) of the General Rules and Regulations of the Employment Relations Commission, R 423.141(3), allows petitions for representation election to be filed within the appropriate window period prior to the expiration of the contract. For petitions covering public employees who are not employees of a public school district or public educational institution, the open window period for the filing of a petition, pursuant to Rule 141(3)(b), is "not sooner than 150 days and not later than 90 days before the expiration date of the agreement." Although now incorporated into our rules, our policy of providing an open window period in which a petition can be filed during the term of a collective bargaining agreement dates back to the earliest days of the Act. See *Comstock Park Pub Sch*, 1980 MERC Lab Op 523; *Jackson Co Bd of Supervisors*, 1968 MERC Lab Op 473. The purpose of the window period is to "balance the at times conflicting public interests in stability of bargaining relationships on the one hand and employee freedom of choice on the other hand." *Berrien County Sheriff*, 1999 MERC Lab Op 177, citing *Port Huron Area School Dist*, 1966 MERC Lab Op 144, 149, and *City of Highland Park*, 1966 MERC Lab Op 173, 175.

This case concerns the applicability of the premature extension doctrine. The doctrine predates the enactment of PERA but was codified in § 14(1) of the Act. The premature extension doctrine holds that if the parties, during the term of the existing contract, execute an amendment or a new contract containing a later termination date, the contract is deemed prematurely extended. Such a contract cannot bar a petition for representation election. *Utica*

Cmty Sch, 1981 MERC Lab Op 884 (1981); *Detroit Library Commission*, 1970 MERC Lab Op 304; *Kent County Rd Commission*, 1969 MERC Lab Op 34; *Kent County Rd Commission*, 1978 MERC Lab Op 449. For purposes of the premature extension doctrine, it is immaterial whether the premature extension is embodied in an entirely new agreement, rather than in an amendment, supplement or extension of the existing agreement. *Utica Cmty Sch*, citing *Subnitz Greene Corp (Reynolds Spring Co Div)*, 116 NLRB 965 (1956) and *Auburn Rubber Co*, 140 NLRB 919 (1963). The question presented here is whether the collective bargaining agreement of August 10, 2020, which is currently in effect between the Incumbent Union and the City of Farmington Hills, constitutes a bar to the representation petition recently filed by the TPOAM.

When a collective bargaining agreement is three years or less in length, the application of § 141(1) of PERA and Rule 141(3)(b) is clear. A person or entity not party to the agreement, whether a rival union or a decertification petitioner, can file a petition for representation election either after the contract expires or between 90 and 150 days before the contract's stated expiration date. *17th Judicial Circuit Court*, 29 MPER 43 (2015). For contracts of more than three years' duration, the Commission has determined that the "expiration date" of the contract for purposes of computing the open window period is the third anniversary of the date upon which the agreement became binding. *Id*.; *County of Washtenaw*, 19 MPER 14 (2006). In other words, a contract constitutes a bar to rival election petitions until the agreed upon termination date of the agreement, or for three years, whichever comes first. *City of Wyandotte (Police Dep't)*, 1999 MERC Lab Op 289.

In the instant case, the Employer and AFSCME were parties to a collective bargaining agreement which covered the period July 1, 2017 through June 30, 2022. Because the initial agreement was for a period of five years, its effectiveness for "contact bar" purposes consistent with § 14(1) of PERA and Rule 141(3)(b) ended on July 24, 2020, or three years from the date that agreement was ratified by the City Council in 2017. A renegotiated agreement between these parties was reached on July 28, 2020 and ratified by the Incumbent Union and City Council on August 5, 2020, and August 10, 2020, respectively. Whether characterized as a wage reopener, an extension or an entirely new collective bargaining agreement, there can be no dispute that the current agreement was entered into after the initial contract had "expired" for contract bar purposes. Under such circumstances, we find that the contract ratified by the parties in August of 2020 to replace the initial agreement did not constitute a premature extension for purposes of § 14(1) of PERA. Therefore, the TPOAM's petition for representation election was untimely filed.

This conclusion fulfills our mandate in contract bar cases to balance the stability of bargaining relationships and employee freedom of choice. This is not an instance in which a contract extension foreclosed the right of employees to seek a change of representatives, which is the harm sought to be prevented by the premature extension doctrine. The TPOAM, or any other labor organization or group of employees, had multiple opportunities to file a petition for representation election. A rival petition could have been timely filed during the 60-day open window period beginning on February 25, 2020 through April 25, 2020, or at any time after July 24, 2020 when the 3 year "contract bar" protection period had ended. Yet the TPOAM did not file its representation petition until November 4, 2020, significantly later

than the open window period and well after the new agreement went into effect. Adoption of the TPOAM's argument under these circumstances would prevent the Incumbent Union and the Employer from extending their prior agreement or entering into a new contract for two additional years following the limited contract bar period of their initial agreement, thereby unduly impairing the stability of the bargaining relationship between the Employer and AFSCME.

In so holding, we note that our determination here is consistent with federal law. The National Labor Relations Board (NLRB) has held that a contract extension or an agreement on a new contract will be considered a "premature extension" only if a petition for election is filed during the open window period as calculated from the effective expiration date for purposes of the Board's contract bar policy, which, like § 14(1) of PERA, treats contracts of unreasonable duration as if they were limited to a three-year period. For example, in *Union Carbide Corp*, 190 NLRB 191 (1971), the incumbent union and the employer were parties to a contract dating from July 1, 1967, to October 15, 1970. Prior to the expiration of that agreement, the parties executed a modification of the existing agreement governing the period September 29, 1969, through October 15, 1972. The Board held that the new agreement barred a petition filed by a rival union on August 6, 1970. Although the petition was filed within the open window period preceding the expiration date of the 1967 agreement, the Board held that the new contract was a bar because the petition was filed after the third anniversary of the prior contract had passed. See also *H. L. Klion, Inc*, 148 NLRB 656 (1964); *Republic Aviation*, 122 NLRB 998 (1959).

As noted, our premature extension doctrine has its basis in the PERA. Section 14(1) prohibits us from directing an election if there is a valid collective bargaining agreement in effect that was not prematurely extended and of fixed duration. In contrast, the NLRB's contract bar rules are not the result of a statutory provision but instead are "self-imposed and discretionary in application." *Avco Mfg Corp, New Idea Div*, 106 NLRB 1104, 1105 (1953). For that reason, we have not universally applied the Board's contract bar rules in PERA cases. See e.g., *City of Wyandotte (Police Dept)*, 1999 MERC Lab Op 289 (1999). In the instant case, however, we find that the reasoning set forth by the Board in *Union Carbide Corp* best facilitates our statutory mandate to balance the stability of bargaining relationships and employee freedom of choice.

For the reasons set forth above, we conclude that dismissal of the TPOAM's representation petition is warranted.

ORDER DISMISSING PETITION

Based upon the findings and conclusions set forth above, the representation petition filed by the Technical, Professional and Office Workers Association of Michigan in Case No. 20-K-1702-RC is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

Robert S. LaBrant, Commission Member

William F. Young, Commission Member

Issued: June 8, 2021