STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LANSING,
Public Employer,

Case No. UC97 F-28

-and-

TEAMSTERS STATE, COUNTY AND MUNICIPAL WORKERS, LOCAL 214,
Petitioner-Labor Organization.
_____/

APPEARANCES:

For the Employer: Cohl, Stoker, & Toskey, P.C., by John R. McGlinchey, Esq.

For the Petitioner: Monaghan, LoPrete, McDonald, Yakima & Grenke, by Kenneth M. Gonko, Esq.

DECISION AND ORDER

This case was heard at Lansing, Michigan on July 31, 1998, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, MSA 17.455(13), and based on the record, including briefs filed by the parties on or before November 16, 1998, the Commission finds as follows:

The Petition and Positions of the Parties:

The petition was filed on June 16, 1997, by Teamsters Local 214. Petitioner seeks to add the position of deputy city attorney to a bargaining unit described in its certification as follows:

> All non-supervisory employees in the following positions: Public Service Department: Engineer 33, Engineer 34, Engineer 36; Law Department: Associate City Attorney 34, Assistant City Attorney 36, Senior Legal Secretary 26, Legal Secretary 25, Senior Clerk 23; Police Department: Legal Advisor 36, Administrative Secretary 28; Finance Department: Executive Secretary 30.

When the parties agreed to the unit description above, the deputy city attorney position had not yet been filled. Petitioner asserts that it agreed to exclude the position based on a job description

provided by the Employer. It also maintains that the Employer told Petitioner at the time that the individual filling a second excluded position, senior assistant city attorney, would be moved into the deputy city attorney position, and that the senior position would be abolished. Finally, Petitioner asserts that the parties agreed that Petitioner would have the right to file a unit clarification petition if the deputy city attorney did not perform the duties in the job description. In November 1996, the Employer filled the deputy city attorney position with a new hire. In January 1997, it reclassified the senior assistant position and gave it the title deputy city attorney. According to Petitioner, neither deputy city attorney currently performs the confidential labor relations duties contained in the job description, and neither should be excluded from the unit.

The Employer argues that the instant petition is barred by an existing contract entered into by the parties in May 1997. The Employer also maintains that the deputy city attorney hired in November 1996 clearly performs the labor relations duties set forth in its job description. The Employer admits that the second deputy city attorney position does not do labor relations work on a regular basis. However, according to the Employer, the second deputy city attorney performs the same duties he performed when Petitioner agreed to exclude him from the unit under the title senior assistant attorney. The Employer asserts that unit clarification is inappropriate in this case because the parties have unambiguously agreed to exclude both deputy city attorneys from the unit.

Facts:

Petitioner filed a petition in Case No. R98 I-163 seeking to represent nonsupervisory employees of the City of Lansing on September 7, 1993. The parties engaged in extended discussions which eventually resulted in an agreement to the unit language set forth above. Although they did not put exclusionary language in their unit description, the parties agreed in writing to specific positions to be excluded from the unit. In the law department, these were the city attorney, chief assistant city attorney, senior city attorney, one of the two legal secretaries, and deputy city attorney. The latter was a new position which had not yet been filled. On September 1, 1994, the Employer sent Petitioner job descriptions for these four positions. The descriptions of the duties of the chief assistant city attorney, senior city attorney, and deputy city attorney were identical:

> (Duties include, but are not limited to: responsible for drafting collective bargaining provisions; offers opinions as to the legality of provisions; reviews collective bargaining agreements; counsels on the handling of grievances or arbitrations; responsible for defending the City with regards to unfair labor practice charges; defends 301 suits regarding unionized employees; represents the City in court hearings regarding the arbitrability of grievances; represents the City in lawsuits brought by unions; responsible for drafting memoranda or written opinions regarding collective bargaining proposals; drafts resolutions ratifying collective bargaining agreements; participates in preference hearings for union employees; assists in the drafting of the budget for the Law Department; participates in drafting and implementing, with substantial discretion, the policies and procedures of the Law Department; drafts legal briefs and memoranda regarding collective bargaining and/or arbitration and grievance

proceedings.)

The Employer told Petitioner orally that it intended to move the senior city attorney to the deputy city attorney position and to abolish the senior job. The parties, however, did not make this a part of their written agreement.

On October 24, 1994, the Employer sent Petitioner a letter which included the following statements:

> The Deputy City Attorney will be a new position that will be created under a reorganization of the Department . . .
>
> The City agrees that the position will not be a filled position at the time of the vote. The City requests that you examine the description we sent to you . . . to determine whether it will be an exempt position or not. In other words, we request that you agree at this time that it will be an exempt position. If, once filled, the position does not adhere to the description set forth herein, we acknowledge your right to ask for a unit clarification on the grounds that it is not an executive or confidential position in accordance with the law.

The parties subsequently entered into a consent election agreement, and Petitioner was certified as the bargaining representative for the unit set out above on January 17, 1995.

First Deputy City Attorney Position:

The deputy city attorney position remained vacant until late 1996. In November 1996 the Employer hired an attorney from outside of the department to fill the position. The deputy city attorney was assigned labor and personnel matters as his primary areas of responsibility. These included collective bargaining, PERA, the Fair Labor Standards Act (FLSA) and state wage and hour laws, the American with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA). Prior to November 1996, most of these matters had been handled exclusively by outside counsel. Worker's compensation, unemployment compensation, and benefit matters were not within the deputy city attorney's primary areas of responsibility.

This deputy city attorney works closely with the City's labor relations director, and is the attorney in the law department who generally handles matters related to collective bargaining. This deputy city attorney has rendered legal opinions on labor relations questions, including questions about the application of PERA. He has, at the labor relations director's request, drafted proposed contract language, including language for the contract covering Petitioner's bargaining unit. He also reviews the language of all tentative collective bargaining agreements before they are presented to the City Council for ratification. This deputy city attorney is not a member, but regularly attends meetings of, the City's labor relations committee. This committee meets weekly to discuss labor and employment issues, including topics to be addressed in collective bargaining. The labor relations

director has consulted with the deputy city attorney regarding grievance issues, and the deputy city attorney once represented the City in a grievance arbitration when the labor relations director was too busy. He has also represented the City in unfair labor practice cases before this Commission.

The deputy city attorney was recently part of a working group overseeing the consolidation of the City's emergency dispatch services into a single department, a move adamantly opposed by the union representing the Employer's fire fighters. The other members of the working group were the labor relations director, the fire chief, the police chief, and the City's outside counsel. The deputy city attorney performed legal research for the group, including rendering a legal opinion on the legality of the proposed consolidation, and identifying PERA issues presented by the proposed action. The deputy city attorney also assisted outside counsel in defending against a circuit court action seeking to block the reorganization, and in handling the reorganization issue in an Act 312 arbitration involving the City's fire fighters. For example, the deputy city attorney drafted and submitted a brief to the arbitrator on the issue of whether the reorganization was a mandatory subject of bargaining over which the arbitrator had jurisdiction.

This deputy city attorney assisted the personnel department in drafting the City's ADA policies. He has drafted legal memoranda on FLSA and ADA questions in response to requests from the City's personnel director or other City department heads. Although the FLSA and ADA are considered to be part of the deputy city attorney's primary areas of responsibility, other attorneys in the office also work on these matters. The record indicates, however, that this deputy city attorney and the city attorney are the only attorneys who work on matters directly related to collective bargaining or grievance handling. This deputy city attorney also handles matters unrelated to labor relations or personnel problems. He estimated that he spends between 80-85% of his time on labor relations and personnel issues.

Second Deputy City Attorney Position:

As noted above, in 1994 the parties agreed in writing to exclude the city attorney, chief assistant city attorney, and senior assistant city attorney from the bargaining unit. Sometime in late 1996, the city attorney suggested that the senior assistant city attorney ask for a classification review of his position. As a result of this review, in January of 1997, the position was reclassified, given a higher salary and, at the request of the city attorney, retitled "deputy city attorney."[1] The primary responsibilities of this deputy city attorney are real estate and environmental litigation. He also supervises and coordinates criminal and district court work performed by assistant city attorneys. The record indicates that the duties of this position did not change with the title change. The record also indicates that this deputy city attorney does not regularly perform any work relating to labor relations or personnel issues.

[1] The position "chief assistant city attorney" was also retitled in 1996. After the incumbent retired, the title was changed at the city attorney's request to "chief deputy city attorney."

1997 Contract Negotiations:

In December of 1996, the parties began negotiating a new contract to replace their agreement expiring on January 31, 1997. Petitioner's initial contract proposals included a request to "review" all the positions in the law department that had been excluded as confidential. According to the labor relations director, Petitioner's chief negotiator said at the bargaining table that Petitioner had no problem with the newly hired deputy city attorney, but that Petitioner was questioning the continued exclusion of the recently retitled position. Petitioner's chief negotiator could not recall telling the Employer that it did not have a problem with the newly hired deputy city attorney. According to Petitioner's chief negotiator, the labor relations director's response to Petitioner's proposal was that if the Petitioner felt that the duties contained in the job description were not being performed by the deputy city attorney, then the Petitioner should file a unit clarification petition and not bring the subject up in negotiations. Petitioner's chief negotiator also testified that she was not aware at that time that the senior assistant city attorney's position had been retitled. In May of 1997, the parties entered into a new contract with the recognition language unchanged from their previous agreement.

Discussion and Conclusions of Law:

The Employer first argues that the instant petition is barred by the parties' existing contract. The City contends that the Petitioner tacitly agreed to the continued exclusion of the two deputy city attorneys by entering into a new collective bargaining agreement containing the same recognition language as the parties' previous agreement. The contract bar rule, as applied to representation petitions, has its basis in the Act itself. Section 14 of PERA prohibits us from directing an election in any bargaining unit or subdivision thereof during the first three years of a valid collective bargaining agreement of fixed duration. In *Genesee County*, 1978 MERC Lab Op 552,556-557, we noted that the National Labor Relations Board (NLRB) normally does not entertain petitions for unit clarification during the term of a contract to alter a unit which is clearly defined in that contract. We held that the same considerations that supported the contract bar rule, i.e., the necessity of maintaining stable bargaining units and bargaining relationships, warranted adopting the NLRB's policy.[2] We also noted in *Genesee* that unit clarification was not appropriate where the parties had acquiesced to the exclusion of a position, or in any situation where the parties had either an explicit agreement or an established practice concerning the unit placement of the position. This principle applies even when there is no valid contract in effect. We have, however, considered other factors, including whether the recognition language was ambiguous and how long the Union waited before making its demand for recognition, in determining whether a new contract should serve as a bar to a unit clarification petition.

For example, in *Huron Valley Schools,* 1984 MERC Lab Op 201, the parties' recognition clause referred to "full-time vocational education employees." The employer had never employed

[2] We have not applied this rule when the unit is alleged to contain both supervisors and nonsupervisors in violation of Section 13 of PERA. *Charlevoix Public Schools,* 1978 MERC Lab Op 893,895.

part-timers in this classification. The employer posted a new part-time position while contract negotiations were taking place. The union did not raise the issue at the bargaining table, and the parties reached an agreement with no change in their recognition language. Two months after the posting the position was filled, and one week later the union filed a petition for unit clarification. We held that the union had not implicitly agreed to exclude the position by failing to raise the issue before concluding the contract and found no contract bar because the union had filed its petition shortly after the position was filled. See also *Pontiac School District*, 1997 MERC Lab Op 173 (unit clarification petition filed during negotiations, parties entered into new contract with old recognition language while the petition was pending, contract did not serve as a bar since recognition clause was ambiguous). *Cf. Centreville Public Schools*, 1993 MERC Lab Op 799 (contract was a bar to unit clarification petition where a new position was created before contract negotiations began, and union did not make a demand to bargain over position until contract with old language had been ratified, more than 16 months later).

Here, Petitioner proposed at the bargaining table to "review" the excluded attorney positions in the law department. According to Petitioner's chief negotiator, the Employer told Petitioner to file a unit clarification petition rather than bringing the issue to the bargaining table. Whether or not her testimony is credited, the facts show that the Employer agreed in 1994 to permit the Petitioner to challenge the exclusion of the deputy city attorney position by means of a unit clarification petition if, after the position was filled, Petitioner believed that the position was not performing the confidential labor relations duties set out in the position's job description. The instant petition, filed less than seven months after the deputy city attorney began work in November 1996, is that petition. We conclude, however, that Petitioner's request to include this position in its unit should be denied. The record establishes that this deputy city attorney performs most of the duties set out in the job description, and all of the duties related to collective bargaining. Moreover, he is the only attorney in the department, aside from the city attorney, who handles labor relations matters or who regularly has access to confidential labor relations information. Accordingly, we find that this deputy city attorney is properly excluded from the unit as a confidential employee.

The second deputy city attorney position has never done labor relations work on a regular basis. Nevertheless, this position was excluded from the unit by agreement of the parties under its former title, senior assistant city attorney. Petitioner asserts that the Employer said that the senior assistant would be given the deputy position, and that his position would be abolished. Petitioner, nevertheless, agreed to exclude both the deputy and the senior assistant position. This agreement was not modified when the Petitioner entered into a new contract in May 1997, one month before filing this petition. We find that the parties have an established agreement to exclude this position from the unit, and that the position's change in title did not affect this agreement. For this reason, we find that Petitioner's request to include this second deputy city attorney position in its unit should also be denied.

We note that the city attorney here stated on the record that, based on his experience, all attorneys in a department such as his should have the title deputy city attorney. This is why he requested that the senior assistant attorney and chief assistant attorney positions be retitled. The city

attorney also stated forthrightly that he adamantly opposed his attorneys belonging to a collective bargaining unit, particularly one which included positions outside the law department, because he felt it compromised the confidentiality of the department. Petitioner argues that if its unit is not clarified to include the position of deputy city attorney, the city attorney will gradually remove all the attorneys in the department from its unit under the guise of a title change. We wish to make it clear that we have found an agreement by the parties in this case to exclude four attorney positions in the law department: city attorney, chief deputy city attorney, and two deputy city attorney positions. However, the titles of these positions, as long as they retain their current duties, are irrelevant. Petitioner has not agreed or acquiesced to the exclusion of all positions with the title deputy city attorney.

In accordance with the discussion and findings of fact and law above, we hereby issue the following order:

ORDER

Petitioner's request to clarify its nonsupervisory bargaining unit to include two positions currently titled deputy city attorney is hereby denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated: _____