STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BERRIEN COUNTY SHERIFF AND BERRIEN COUNTY,
Public Coemployers,

-and- Case No. R98 I-114

MICHIGAN FRATERNAL ORDER OF POLICE LABOR COUNCIL,
Labor Organization-Petitioner,

-and-

POLICE OFFICERS LABOR COUNCIL,
Incumbent Labor Organization.
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APPEARANCES:

Hankins & Flanigan, P.C., by Dan E. Hankins, Esq. (Jayne M. Flanigan, Esq., on the brief), for the Petitioner

John A. Lyons, Esq., for the Incumbent Labor Organization

DECISION AND DIRECTION OF ELECTION

Pursuant to the provisions of Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, and 423.213, MSA 17.455(12) and (13), and a notice of hearing dated September 22, 1998, an information-type hearing in this matter was held at Lansing, Michigan on November 10, 1998, before James P. Kurtz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript, exhibits, and the briefs filed by the two labor organizations on or before February 2, 1999, this Commission finds as follows:

Petition and Background Matters:

This petition for a representation election was filed by the Michigan Fraternal Order of Police Labor Council (FOP) on September 17, 1998, seeking certification as the bargaining representative of a unit of supervisory personnel of the Berrien County Sheriff Department, the Employer herein. The petition claims that the classifications of chief deputy, captain, lieutenant, and sergeant should be included in any supervisory bargaining unit. All of these positions are presently included for

purposes of collective bargaining in one unit with the nonsupervisory deputies represented by the Police Officers Labor Council (POLC). The existing unit of all sworn personnel, approximately 136 in number, excludes the sheriff, undersheriff, animal control officers, office and clerical employees, food service employees, court bailiffs, part-time deputies (working less than 1,000 hours per calendar year), special deputies, summer marine deputies, and reserve officers. The total number of employees in the department is approximately 160 to 170. The latest collective bargaining agreement between the Employer and the POLC expired on December 31, 1998, covering a period of three years beginning on January 1, 1996.

Prior to the hearing, the Employer confirmed its previously stated position in a letter to both Unions, dated November 2, 1998, that, "The Berrien County Sheriff and the County of Berrien will not be participating in the upcoming hearing regarding the representation petition and will not be taking a position with respect to the petition one way or the other."[1] The incumbent bargaining representative, POLC, contends that the petition for an election was untimely filed after the filing of a petition for compulsory arbitration under Act 312; that the chief deputy should be excluded as an executive employee; and that the sergeants are not supervisory employees, but are working leaders who should remain in the POLC nonsupervisory bargaining unit. These three issues are treated separately below.

Timeliness of Election Petition:

The petition in this case was filed on September 17, 1998, during the 150-90 day open period for the filing of petitions for an election by third parties under Section 14 of PERA, where there is in effect a valid collective bargaining agreement between an employer and an incumbent labor organization. This contract bar rule was enunciated in a litigated case in *Jackson County*, 1968 MERC Lab Op 473, 479, in which a representation petition was dismissed based upon the following statement of policy of this Commission (then Labor Mediation Board), approved February 8, 1968:

> Petitions for elections filed by rival labor organizations or decertification petitions under the provisions of the Public Employment Relations Act, must be filed with the Labor Mediation Board (now Employment Relations Commission) no earlier than 150 days and no later than 90 days prior to the termination of the collective bargaining agreement.

After giving notice in July of 1998 to commence negotiations on a new contract to replace the one expiring on December 31, 1998, the POLC and the Employer held their first meeting on August 18, 1998. After this meeting, the POLC learned that the position of the County would be to maintain the status quo, and that there would be no pension improvement offered in its promised counterproposals. The POLC then decided to immediately file for compulsory arbitration under 1969 P.A. 312, which it did on August 25, 1998, Mediation Case No. L98 G-7027, listing seven issues in dispute. This petition for compulsory arbitration was filed prior to the POLC requesting the

[1]The Sheriff, however, was called by the Petitioner FOP as a witness in this matter.

assistance of a mediator. The second meeting of the parties took place on September 15, 1998, and a mediator was present at their third meeting held on October 15, 1998. Thereafter, the processing of the Act 312 petition commenced. The POLC representative acknowledged that at the time of the filing of the Act 312 petition, he was aware of the fact that the supervisory deputies had been meeting with the FOP since February 1998.

The POLC contends that the FOP representation petition filed on September 17, 1998, is barred by the prior filing of the Act 312 petition on August 25, 1998, even though the representation petition was filed within the appropriate 150-90 day open period. The Incumbent POLC contends that allowing the FOP representation petition to proceed does not operate to preserve the status quo mandated in Section 13 of Act 312, which states:

> During the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act. (MCL 423.243, MSA 17.455(43).)

The policy of this Commission with regard to a petition for Act 312 arbitration barring the filing of representation petitions by third parties was adopted on April 25, 1978, and was ruled upon in *Oakland County (Sheriff Dep't)*, 1980 MERC Lab Op 1123, 1131, note 4. This policy was reaffirmed by the Commission on June 16, 1983, with the addition of the last sentence, and was restated in our decision in *City of Three Rivers*, 1985 MERC Lab Op 108, at 112:

> [T]he Commission will entertain representation petitions during the established filing period of 150-90[2] days prior to the expiration date of a collective bargaining agreement even though Act 312 arbitration has been initiated or is pending; but, if the collective bargaining agreement has expired and an Act 312 arbitration proceeding is pending, the filing of representation petitions will be barred by the arbitration proceedings. *For purposes of this policy, an Act 312 petition shall be considered as pending from the date said petition is filed with the Commission.* (Italics added in the 1983 reaffirmation of the policy.)

In *Three Rivers*, a mediator had been assigned to the case more than three months prior to the expiration of the contracts when the Commission received a copy of the usual statutory notice prior to negotiations. The petitions for arbitration were filed about five weeks prior to the expiration of the contracts and prior to the completion of mediation. The representation petitions were filed a

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[2]The one page statement of the 1983 policy, issued by the Bureau of Employment Relations and attached to the POLC brief, has the erroneous figure of "190" instead of "90 days," but it is clear that the open or "window period" for filing of election petitions in public employment has been 150 to 90 days prior to the expiration of a collective agreement. See also *Mich. Ass'n of Public Employees (MAPE) v MERC*, 153 Mich App 536, 542, 125 LRRM 3123, 3125 (1986), where the election petition "window period" was restated and applied by the Court of Appeals.

month after the expiration of the collective bargaining agreements. Section 3 of Act 312 provides that where a contract dispute has not been resolved in the course of mediation, a petition for compulsory arbitration may be filed "within 30 days of the submission of the dispute to mediation, or within such further additional periods to which the parties may agree, ..." MCL 423.233, MSA 17.455(33). The Commission held that the petitions for Act 312 arbitration were not properly filed because "the requisite mediation had not taken place." Therefore, the Commission upheld its previous dismissal of the Act 312 petitions and directed elections in the representation cases.[3]

The Act 312 arbitration bar to a representation petition, set forth in *Oakland Sheriff* and *Three Rivers,* does not by its terms apply to any petition for election filed during the 60-day open period, so the FOP petition for an election was timely filed in this case. The Commission has always sought in contract bar cases "to balance the sometimes conflicting public interests in stability of bargaining relationships on the one hand and employee freedom of choice on the other hand." *Port Huron Area School Dist.,* 1966 MERC Lab Op 144, 149, 63 LRRM 1109; see also *City of Highland Park,*1966 MERC Lab Op 173, 175, 63 LRRM 1097, 1098. The balancing of these public interests has been done by the Commission through adjudication, rather than by rulemaking. See *AFSCME v Wayne County*, 152 Mich App 87, 97-100, 125 LRRM 2588, 2591-2593 (1986), *aff'g* 1985 MERC Lab Op 244, 246-247, and 1984 MERC Lab Op 1142; *Linden Comm. Schools*, 1990 MERC Lab Op 763, 766-767. We have always provided employees with an opportunity at the end of a contract term to file for an election to eliminate or select a new bargaining representative, thereby fulfilling the legislative intent expressed in the election provisions of Sections 12 and 14 of PERA. Among those provisions is the requirement that a contract cannot be a bar for more than three years. See *Sterling Twp,* 1966 MERC Lab Op 169, 171; and 9, 13, 61 LRRM 1229, 1230.

The status quo provision of Section 13 of Act 312 is not affected by honoring the open period prior to a contract's expiration, since the parties cannot, irrespective of Section 13 of Act 312, change wages, hours, or other working conditions during the pendency of an election petition that raises a question concerning representation. *1620 Corp., d/b/a/ Howard Johnson's*, 1972 MERC Lab Op 817, 819; and 731, 734-737; *cf. City of Jackson*, 1979 MERC Lab Op 1146, 1150-1154; and 1977 MERC Lab Op 402, 405-406. This issue was discussed in *Three Rivers, supra* at 112, where we stated:

> . . . The conditions of employment established in a collective bargaining agreement continue until either they have been bargained to impasse or altered by new

[3]This procedure is no longer followed by the Commission, but instead Act 312 petitions filed prior to the completion of mediation are held in abeyance pending completion of the mediation process. See *MAPE v MERC, supra*, 153 Mich App at 548, 125 LRRM at 3157, where the Court upheld the dismissal of a representation election petition by the Commission director after mediation had been undertaken. The Court noted that the election petition had been filed over eight months after the expiration of the contract, and that it was not filed during the 60-day open period, or during the six months time period after the expiration of the contract before the incumbent labor organization filed its Act 312 petition for compulsory arbitration.

> contractual agreements. . . . The Employer may not unilaterally alter conditions of employment after the expiration of a contract. (Citations omitted.)

See also *Local 1467, Firefighters v City of Portage*, 134 Mich App 466, 472-474 (1984), *rev'g* 1981 MERC Lab Op 952. In conclusion, the petition for election filed by the FOP during the 60-day open period prior to the expiration of the collective agreement between the Employer and the POLC was timely and was not barred by the prior Act 312 petition filed by the POLC.

Inclusion of Chief Deputy in Bargaining Unit:

The Sheriff Department has a chief deputy, who is the third-ranking officer in the department after the sheriff and undersheriff. The 160 to 170 employees in the department include clerical and civilian employees. As the name implies, the chief deputy is a high-level supervisor who exercises on behalf of the sheriff broad supervisory powers. In Berrien County the chief deputy is in charge of all law enforcement areas of the department, including road patrol, detectives, marine officers, bomb squad, and tactical unit. The chief deputy position is presently included in the overall unit of deputized or sworn employees, approximately 130 in number, represented by the POLC. The POLC, however, argues that the chief deputy should be excluded from any supervisory unit on the ground that he is an executive employee.

This Commission has recently discussed the status of the chief deputy position in a sheriff department and whether it may be excluded from a supervisory unit as an executive employee. In *Lake County Sheriff*, 1999 MERC Lab Op __ (Issued 3-31-99), we held that the executive exclusion would not be extended to a third level position in a department of a public employer. Therefore, we included the chief deputy in the supervisory unit in that case. The department in Berrien contains about 130 sworn personnel, compared with about 40 in Lake County, but we do not find that this difference in size is material to our decision or that it requires any change in our analysis. Thus, the factual discussion and analysis in *Lake County* apply to the chief deputy position in the instant matter. Accordingly, we conclude that our *Lake County* ruling is applicable to the chief deputy position at issue herein, and we will include the chief deputy in the supervisory bargaining unit found appropriate in this case. See also *Livingston County Sheriff*, 1989 MERC Lab Op 852-853; *Sterling Heights, Police Dep't*, 1984 MERC Lab Op 253, 256-257.

Status of Sergeants as Supervisors:

The Petitioner FOP contends that the approximately 20 sergeants in the department are supervisory employees who should be included in a supervisory unit along with the chief deputy, the three captains, and the 14 lieutenants. The Incumbent POLC takes the position that the sergeants act as lead employees and/or as substitutes for the lieutenants and, therefore, should remain in its nonsupervisory bargaining unit. In a paramilitary operation, such as a county sheriff department, it is often difficult to draw the line between those ranks exercising effective supervisory authority, and those ranks which do not exercise such authority, since each rank exercises authority over a subservient rank. See *Oakland County Sheriff*, 1980 MERC Lab Op 1123, 1132-1133; *Eaton*

County Sheriff, 1971 MERC Lab Op 1105, 1111. Under the facts in this case, we agree with the Incumbent POLC that the sergeants are lead employees who act as substitute supervisors in the absence of a higher-ranking officer, and that they should remain a part of the nonsupervisory bargaining unit. *City of Woodhaven*, 1989 MERC Lab Op 701, 703; see also *Lapeer County*, 1997 MERC Lab Op 149, 155.

Out of the 130 or so sworn officers in the Sheriff Department, the parties admit that the 20 officers from the sheriff down through the classification of lieutenant are supervisory employees. There are 20 sergeants, and the remaining 90 employees in the POLC unit are either deputies, correction officers, communications specialists, or specialized classifications, such as jail nurse. After the sheriff, the undersheriff is in charge of all the support services of the department, such as recruiting, training, and prisoner transfer. As noted above, the chief deputy is responsible for all law enforcement functions. The three captains are in charge of the jail, communications, and the detective bureau, and the remaining divisions or units of the department, such as narcotics, are under the overall supervision of one of the 14 lieutenants or higher level supervisor. Each of the three shifts of the road patrol and the jail are also under the supervision of a lieutenant.

A sergeant is assigned to each shift of the road patrol and jail, and when not substituting for an absent or off duty lieutenant, they perform duties similar to the other deputies or correction officers with whom they work. In communications, a sergeant acts as lead dispatcher on each shift. A utility sergeant is assigned to each shift and is used wherever needed. In addition to the captain, the detective bureau is made up of a detective lieutenant and three to five detective sergeants. In the absence of a captain or lieutenant, a sergeant, or in rare cases the senior deputy, is in charge of the shift or unit. Sergeants may give verbal reprimands or discipline, but in other than emergency situations they make recommendations to their superior officers regarding discipline and matters such as schedule and shift changes. Transfers of sergeants between different units have occurred, but are not frequent. Incident and traffic reports are sometimes reviewed by sergeants and may be sent back to the writer if not satisfactory. Each rank has a role in the evaluation of employees of lesser rank.

We find, as stated above, that the sergeants are lead employees, and that their delegated functions and responsibilities are insufficient to establish supervisory status. *Kalkaska County Sheriff*, 1994 MERC Lab Op 693, 697-699, and cases cited therein. The precedent relied upon by the FOP for a finding of supervisory status are distinguishable on their facts. The authority delegated to a supervisory employee must be actual and real, and more than the mere routine and sporadic responsibility for such matters as scheduling, assigning work and overseeing a small shift of employees, reviewing reports, substituting for lieutenants, and the like. *Lapeer County*, *supra*, at 154-155; *Genesee County Sheriff*, 1975 MERC Lab Op 152, 154-155. As noted in the above precedent, the fact that sergeants substitute for the head of their unit or shift is insufficient to find supervisory status. We also note that a finding of supervisory status on the part of the sergeants would result in an abnormally high ratio of supervisory employees to nonsupervisors, 40 for 90 unit employees, or one supervisor for every two or so employees. Accordingly, we will leave the sergeants in the nonsupervisory unit in this case.

Bargaining Unit and Election Order:

Based upon the above, we conclude that a question of representation exists herein under Section 12 of PERA, and that the following employees constitute a unit appropriate for the purposes of collective bargaining under Section 13 of PERA:

> All supervisory employees employed by Berrien County and its Sheriff Department, including the chief deputy, captains, and lieutenants; but excluding the sheriff, undersheriff, sergeants and other employees included in the nonsupervisory bargaining unit presently represented by the Police Officers Labor Council (POLC), office and technical employees, and all other employees.

Pursuant to the attached direction of election the aforesaid employees will vote whether they wish to be represented for purposes of collective bargaining by the Michigan Fraternal Order of Police Labor Council (FOP), or by the Police Officers Labor Council (POLC), or by neither labor organization. If a majority of the supervisory employees reject representation by the labor organizations, they will be choosing to remain unrepresented.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commissioner

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C. Barry Ott, Commissioner

DATED: _____