STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF WYANDOTTE, POLICE DEPARTMENT,
Public Employer,

-and- Case No. R98 I-113

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,
Petitioner-Labor Organization,

-and-

POLICE OFFICERS LABOR COUNCIL, WYANDOTTE
LODGE 111 COMMAND OFFICERS BARGAINING UNIT,
Incumbent Labor Organization.
_____/

APPEARANCES:

Steven H. Schwartz, Esq., for the Public Employer

Martha M. Champine, Esq., Assistant General Counsel, and William Birdseye, Business Agent, for the Labor Organization-Petitioner

John A. Lyons, P.C., by Timothy J. Dlugos, Esq., for the Incumbent Labor Organization

DECISION AND ORDER DISMISSING PETITION

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 14, 1998, an information-type hearing in this matter was held at Detroit, Michigan on November 25, 1998, before James P. Kurtz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript, exhibits, and briefs filed by the parties on or before February 1, 1999, this Commission finds as follows:

Petition and Background Matters:

This petition for a representation election was filed by the Command Officers Association of Michigan (COAM) on September 9, 1998, seeking certification as the bargaining representative of a unit of supervisory police officers of the Employer, City of Wyandotte police department. This

bargaining unit includes lieutenants and sergeants who have been represented for purposes of collective bargaining by the Police Officers Labor Council (POLC), specifically Wyandotte Lodge 111 Command Officers Bargaining Unit. There is no dispute as to the scope of the unit or the eligibility of any officer to vote. The prior collective bargaining agreement between the City and the POLC expired on January 31, 1996, and has been replaced by a four-year agreement dictated by a compulsory arbitration award issued under 1969 PA 312, MCL 423.231; MSA 17.455(31), expiring January 31, 2000.

The sole issue presented in this case is the timeliness of the filing of the petition for an election under Section 14 of PERA; that is, what date, among the several advanced below by the parties, does the compulsory arbitration contract become effective for purposes of computing the contract bar period. In pertinent part, the last two sentences of Section 14 read as follows:

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

Contract and Filing of Election Petition:

The COAM petition was filed on September 9, 1998, during what the Petitioner calculated as the 60 day open period for the filing of petitions for an election by third parties under Section 14 of PERA. This window period was computed as the time from 150 to 90 days prior to the expiration of the third year of the four-year contract beginning with its retroactive or effective date of February 1, 1996. See *Wyoming Police Dep't*, 1985 MERC Lab Op 84, 89-90 (petition timely filed after three years of a longer contract period had elapsed).[1] For purposes of Section 14, the COAM contends that the February 1, 1996, date must be considered as the "execution" date of the new contract for contract bar purposes because wages were retroactive to that date. The Employer and the Incumbent, however, argue that the petition is not timely, and advance their own dates for the calculation of when the new contract begins to run for purposes of a bar to an election under Section 14 of PERA.

After the expiration of the prior contract on January 31, 1996, the Employer and the Incumbent POLC were unable to reach a new contract through collective bargaining and mediation.

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[1]Recently, in *Berrien County Sheriff*, 1999 MERC Lab Op ___ (Issued May 17, 1999), we discussed whether an election petition filed during the 150-90 day open period for the filing of rival union petitions prior to the expiration of a contract was barred by the pendency of a petition for Act 312 arbitration. We held in *Berrien* that the pendency of an Act 312 proceeding is not a bar to such a petition, since the right of employees under Section 14 to eliminate or change their bargaining representative takes precedence over pending Act 312 proceedings.

Therefore, the POLC filed a petition for Act 312 compulsory arbitration on August 30, 1996. The case was assigned MERC Case No. D-95 G-1078. The Act 312 arbitration hearing was concluded on April 16, 1997, and the final decision of the arbitration panel was issued on October 23, 1997, in the form of a series of separate rulings on the various issues taken to compulsory arbitration. The panel adopted one of the last offers of the two parties.[2] The arbitrated contract was for a four-year term beginning with the expiration of the prior contract on January 31, 1996, and the award granted a reopener in the fourth year limited to pension issues only. The award provided that everything was retroactive to the date of the award, except wages, which were retroactive to February 1, 1996.

After issuance of the arbitration award, the Employer and the POLC began the task of assembling the actual contract, reducing the arbitrated issues into contract language, and integrating these issues with the remainder of the contract that was agreed to prior to completing compulsory arbitration. Between October 23, 1997, and January 19, 1998, the two parties exchanged a number of drafts of the new agreement, assembled the final contract, and worked out the details of its implementation. After submission to counsel, the Employer and POLC representatives signed the final agreement on January 19, 1998, which, by the explicit terms of the contract, became its "effective" date. After this date, the wage and benefit improvements were implemented, including all retroactive provisions.

Positions of the Parties:

The Employer argues that the contract should be considered a bar from the date of its signing on January 19, 1998, through its expiration on January 31, 2000. In the alternative, if the execution of the contract is considered merely a ministerial act, then the Employer contends that the bar should date from the issuance of the compulsory arbitration award on October 23, 1997. No matter which date is used for the initiation of the contract bar, the City contends that, as a matter of policy, it should receive the full benefit of the four-year contract awarded by the Act 312 panel, whether or not a period of more than three years is involved. This argument is moot under the facts in this case, since both the arbitration award and the signing of the contract took place less than three years from the termination date of the contract. We note, however, that any bar over the statutory three years would require an amendment to Section 14 of PERA. The Incumbent also contends that the contract is a bar from the date of its signing and implementation on January 19, 1998, or, in the alternative, from the date of the panel award on October 23, 1997.

Petitioner COAM argues that the issue relative to the date upon which the contract bar period begins to run when the collective bargaining agreement is the product of an Act 312 arbitration award is unique and one of first impression for this Commission. Petitioner asserts that since the parties to the prior contract have already benefitted from the Act 312 bar, they should not be permitted to impose the bar of a new contract to the detriment of the employees' ability to exercise their statutory

[2]In its brief, the COAM mistakenly uses May 17, 1997, as the date of the issuance of the Act 312 arbitration award, rather than October 23, 1997. The earlier date is the date of the Employer's last offer of settlement which, along with the POLC's last offer, was attached to the compulsory arbitration award.

right under PERA to change their bargaining representative. We understand Petitioner's position, but its petition for election was filed during the term of an agreement, and Section 14 does not distinguish between a contract resulting from collective bargaining and a contract resulting from the mandate of compulsory arbitration. Therefore, we must confront the statutory Section 14 contract bar issue presented herein no matter what took place prior to the contract coming into existence.

The validity of the Act 312 bar is not directly at issue in this case, so any further discussion of that alleged bar will have to await an appropriate fact situation. We note, for now, that the rationale for the existence of an Act 312 bar is, in part, premised upon the presumed extension of a collective bargaining agreement, and the validity and usefulness of such a bar may be questionable where there exists the possibility of extending the total bar period beyond the statutory limit of three years. Nevertheless, Petitioner's concern over joining an Act 312 bar to a contract bar, thereby causing the period of the bar to exceed the statutory maximum of three years, will not be considered further in this case.

Discussion of Petitioner's Argument:

The COAM's argument that the beginning of the contract bar period must be the same date as the effective date of the current contract is premised on rulings of the National Labor Relations Board (NLRB), and on a Commission decision in *City of Warren*, 1986 MERC Lab Op 101, 103-104. The NLRB holds that the controlling date for purposes of determining the contract term and the timeliness of petitions for elections is the effective date of the contract, usually a retroactive date, rather than the execution date. *United Wallpaper, Inc, Benjamin Franklin Div*, 124 NLRB 54, 44 LRRM 1290 (1959), where the Board chose the retroactive effective date of the contract for bar purposes, rather than the execution date. See also *General Cable Corp*, 139 NLRB 1123, 51 LRRM 1444 (1962), where in an extensive summary of contract bar law, the NLRB lengthened its contract bar period from two to three years.

The NLRB contract bar rule, however, is not the result of a statutory provision, but it is "self-imposed and discretionary in application" and "designed to stabilize for reasonable periods of time established collective bargaining relationships." *Avco Mfg Corp, New Idea Div*, 106 NLRB 1104, 1105, 32 LRRM 1618 (1953). While this Commission's contract bar doctrine has a similar rationale and purpose, the legislature in Section 14 of PERA has explicitly mandated not only how the term of a contract will be computed (agreement's execution), but also the appropriate length of the term (three years), thereby removing these determinations from Commission discretion. See *Sterling Twp*, 1966 MERC Lab Op 9, the first published contract bar decision of the Commission, then known as the Labor Mediation Board, and historically our third published decision. With regard to the inability to apply universally the NLRB's contract bar rules in PERA cases, *Sterling Twp* held that "the standards of legal sufficiency [of a contract] of the National Labor Relations Board are not entirely applicable to the present proceedings." *Id*. at 11.

In *Warren*, *supra*, an incumbent labor organization represented a general unit of nonsupervisory employees, excluding police and fire employees. The contract for this unit expired

on June 30, 1981, but was extended on a day-to-day basis. A new four-year contract was negotiated in 1984, retroactive to July 1, 1982. The draft of the contract provided that it "shall become effective as of its date of ratification, March 7, 1984, . . ." the date of ratification by the Union. The contract was then ratified by the City Council at meetings held on May 9, and June 19, 1984, after which it was implemented, including the payment of wage increases retroactive to July 1, 1983, the second year of the contract. The final version of the *Warren* contract had never been prepared and signed by the parties.

A petition to represent the communications employees in the *Warren* unit was filed on February 28, 1985, during the 150-90 day open period prior to July 1, 1985, three years from the retroactive date of the new contract. Both the city and the incumbent claimed that the petition was barred by the contract. The Commission agreed and reaffirmed the rule that where a contract has been ratified and implemented by both parties, the execution of a separate written document is a "mere formality," or a "purely ministerial act," and that the contract becomes a bar when fully implemented. In support of its finding that there was a valid contract the Commission relied on *Dickinson Co Memorial Hosp*, 1978 MERC Lab Op 1250, 1254, *Highland Park General Hosp*, 1967 MERC Lab Op 390, 394, and Section 15 of PERA, which permits a contract to be incorporated in an ordinance or resolution of the governing body of a public employer, as well as in a written document.[3] Thus, the lack of a signed document had no significance in the case.

The problem raised by *Warren*, and relied upon by the COAM in the instant case, relates to the decision's confusion over the use of the terms "implementation" and "effective date" of a contract. In *Warren*, the contract *by its own terms* named March 7, 1984, the date of the ratification by the Union, as its "effective date." Nevertheless, the Commission went on to find "that the effective date of the contract here is the date upon which the wage increases became effective July 1, 1983," and it held that the contract was a bar "for the full length of its term or until its expiration on June 30, 1986."[4] The *Warren* decision did not explain how the "execution"date of a contract, pursuant to Section 14 of PERA, could be dated back to its retroactive date, where the contract was neither ratified nor implemented until on and after June 19, 1984, or why the explicit agreement on the effective date by the parties to the contract was ignored. In any case, since the contract in *Warren* would have barred the petition with the use of the implementation date, we find the statement that the bar began to run from the date of the retroactive wage increase to be mere dicta. For the reasons

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[3]The Commission in *Dickinson* also distinguished that case from the rule set forth in the *City of Grand Rapids*, 1968 MERC Lab Op 194, 199, and *Kent County*, 1971 MERC Lab Op 909, 912, which gives contracting parties 30 days after reaching a signed tentative agreement to ratify the new contract, which will then bar any petition filed after the tentative agreement.

[4]This conclusion seems to ignore the fact that the contract was actually a four-year agreement with a wage freeze in the first year, July 1, 1982, through June 30, 1983. The decision also does not resolve what could be done about any petition for election filed between the alleged effective date of the contract, July 1, 1983, and the date upon which the parties reached their tentative agreement, on or about March 7, 1984.

discussed below, we decline to follow it.

Conclusions Relative to Contract Bar:

The beginning date of the contract bar period under Section 14 of PERA is the date of "execution" of a memorandum or document evidencing the collective agreement of the parties, and then its ratification by both parties, if required; or if no signed document exists, the ratification or passage of a resolution, and the implementation of the tentative agreement. Whichever of the two means is employed for finalizing an agreement, the resulting collective bargaining agreement thereafter becomes a bar to rival election petitions until the agreed upon termination date of the contract, or for three years, whichever comes first. Under Commission precedent, until the parties have agreed to the terms and the termination date of a new contract and have reduced it to writing, at least in the form of a signed or initialed memorandum, whether negotiated or imposed by a third-party arbitrator, the agreement remains incomplete and in an inchoate state, unable to be either ratified, executed, or implemented and, therefore, unable to serve as a bar to any petition for election. See example *Jackson County Int Sch Dist*, 1995 MERC Lab Op 547, 549-550; *City of Highland Park*, 1993 MERC Lab Op 340, 343; *Lake Superior State College*, 1984 MERC Lab Op 301, 304-305 (ratification a condition subsequent, not precedent, where there exists a valid signed agreement); *Warren Police Dep't*, 1974 MERC Lab Op 850, 854; *Armada School Dist*, 1973 MERC Lab Op 221, 225; *River Rouge Bd of Ed*, 1968 MERC Lab Op 724, 727-730 (resolving a number of objections to the validity of the signed document and its ratification by the district board).

In this case, the terms of the agreement outlined by the Act 312 arbitrator were assembled and the appropriate contract language agreed upon during the months following the issuance of the award on October 23, 1997. The agreement in final written form was prepared by January 19, 1998, the date that both parties agreed the contract was to be "effective," the date they "executed" or signed the final document, and the date that the new contract was implemented. Therefore, we find that, for purposes of Section 14 of PERA, the "execution" of a contract that will bar third party election petitions took place on January 19, 1998. Accordingly, the contract serves as a bar until its original date of termination on January 31, 2000. Prior to January 19, 1998, the elements necessary for a contract bar, a signed and implemented agreement, or in the case of public employment, an implemented ordinance or resolution within the meaning of Section 15 of PERA, simply were not in existence. As noted in *United Wallpaper, supra*, and other contract bar rulings, these elements are required so that employees and outside unions may have notice of the dates of a collective bargaining agreement in order to predict the appropriate open period for the filing of rival representation petitions.

The statute provides that the "execution" date of a new contract is the beginning of the bar period. This language rules out any of the other proposed dates in this case. Had the legislature wanted to use the "retroactive" and/or "effective" dates, when they are different from the "execution" date, as the beginning date for contract bar purposes, it would have explicitly indicated as such. The terms "retroactive," "effective," and "execution" are terms well-understood in labor relations law, as evidenced by the NLRB's long-standing treatment of the terms. Moreover, there is an additional

reason for adhering to the generally accepted meaning of the term "execution." Prior to execution, there is nothing to give parties to representation cases any guideline for the filing and processing of third-party representation petitions. In this case, the effective and execution dates were, by the terms of the contract, the same, but had they been different, then the execution date would have to control under the clear statutory language.

Finally, some comment must be made relative to the alternative argument that the date of the arbitrator's award was the date of "execution." Aside from the fact that this assertion does not conform to the literal wording of the statute, there was no complete written contract when the award issued, as this Commission has always required. See example *Armada*, *supra*, and *Sterling Twp*, *supra*. The compulsory arbitration award typically sets forth the rulings on the issues presented to arbitration, one party winning and the other party losing based on their last offers, but a complete contract still has to be drafted, assembled, executed by both parties, and/or implemented. Until the actual agreement, which is made up of the items voluntarily agreed to in collective bargaining, plus the issues taken to arbitration and ordered by the arbitration panel, is executed by both parties, as required by Section 14, there is no contract in existence upon which to find a bar.

The use of the execution date for contract bar purposes not only fulfills the statutory mandate, but also, as we noted recently in *Berrien County Sheriff*, 1999 MERC Lab Op ____, fulfills our mandate 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," citing *Port Huron Area School Dist*, 1966 MERC Lab Op 144, 149, and *City of Highland Park*, 1966 MERC Lab Op 173, 175. In conclusion, the petition for election filed by the COAM on September 19, 1998, is barred by the contract executed by the Employer and the POLC on January 19, 1998. Since this contract had less than three years of its term left from its date of execution, the contract will, under Section 14 of PERA, act as a bar to any petition for election filed during its stated term ending January 31, 2000, with the exception of the open period of 150 to 90 days prior to its expiration date. Accordingly, we will dismiss the COAM petition.

ORDER DISMISSING PETITION

Based upon the findings and conclusions set forth above, the petition for a representation election filed herein is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commissioner

C. Barry Ott, Commissioner

DATED: _____