STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CLINTON COMMUNITY SCHOOLS,
Respondent-Public Employer,

Case No. C97 L-274

-and-

CLINTON CUSTODIAL-MAINTENANCE EMPLOYEES ASSOCIATION, MEA-NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Thrun, Maatsch & Nordberg, P.C., by Joe D. Mosier, Esq., for Respondent

White, Przybylowicz, Schneider & Baird, P.C., by Douglas V. Wilcox, Esq., for Charging Party

DECISION AND ORDER

On December 11, 1998, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

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

Date: _____

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White, Przybylowicz, Schneider & Baird, P.C., by Douglas V. Wilcox, Atty, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This matter was heard at Lansing, Michigan on February 13, 1998, before James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission, pursuant to a complaint and notice of hearing dated January 7, 1998, issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCLA 423.216, MSA 17.455(16). Based upon the record and post-hearing briefs filed on May 11, 1998, the undersigned makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA:

Charge and Background Matters:

This unfair labor practice charge was filed on December 22, 1997, by the above-named labor organization, the Union or MEA, which represents a bargaining unit of approximately eight full-time and regular part-time custodial and maintenance employees of the School District. The charge recited the fact that the MEA had replaced Local 547, International Union of Operating Engineers (IUOE), as bargaining representative of the above unit after winning a mail ballot election counted on November 14, 1997 in Case No. R97 I-138. The charge alleged that the Employer had on September 26, 1997, prematurely and in violation of PERA, declared impasse on two issues negotiated with Local 547; namely, inclement weather days, and wages for new probationary employees.

The Employer filed an answer to the charge on December 30, 1997, admitting most of the factual allegations but denying any unfair labor practices. The Employer affirmatively alleged that it was unaware of the filing of the MEA petition in Case No. R97 I-138 when the impasse was declared, and that it properly declared impasse on the two issues. The essential facts in this matter are not in dispute. Both parties argued in their pleadings and briefs the applicability to the instant case of the decisions in *Quinn v Police Officers Labor Council*, 456 Mich 478, 157 LRRM 2541 (1998), *rev'g* 216 Mich App 237, 153 LRRM 2635 (1996), and *aff'g* 1994 MERC Lab Op 828, relative to the standing of the MEA to bring this charge. The Supreme Court decision in *Quinn* issued shortly before the hearing in this case, holding that the labor organization that had represented the employees when a grievance arose is responsible for the processing of that grievance, even though it had been subsequently replaced by another bargaining agent. In view of the decision below that the Employer could lawfully act when it did, the standing of the MEA need not be resolved, and the *Quinn* decision will have no direct effect on this decision.

Factual Findings:

The last collective bargaining agreement between the Employer and Local 547 expired on June 30, 1997. Bargaining on a new contract began with a meeting held on April 25, 1997, at which the parties exchanged their written proposals. Local 547 sought changes to six provisions of the old contract, mostly economic in nature, such as wages, vacations, holidays, and longevity. The Employer sought a number of changes in contract language, in addition to certain economic modifications. The Employer emphasized at this meeting that there were two areas where it clearly needed changes. One was the elimination of the two inclement weather days permitted under the old contract, whereby a unit employee working those days was given the same amount of time off with pay. The second was a lower wage rate for new unit employees completing their probationary period after July 1, 1997. These areas were discussed at this meeting, including their importance to the Employer. In response to the concerns of the Union, the Employer agreed to grandfather employees who were promoted so that they would not receive a cut in pay; agreed to an increased rate of pay for custodians under the new tiered wage system; and agreed to a change in the rate of pay for probationary employees.

The Local 547 representative faxed to the Employer its counterproposals on June 5, indicating about 13 areas where a tentative agreement had been reached by the parties. The chief negotiators for the two parties, the Local 547 business representative and the Board's superintendent, had a number of telephone conversations during this time regarding various issues and some agreements were reached. The second bargaining session between the two negotiating teams was held on June 19, 1997, and additional agreements on various issues were achieved, including agreement by the Union to the two-tiered wage system. The Employer stuck to its position on inclement weather days, insisting that it could not see paying custodians two additional days not to work. A tentative three-year contract was reached at this meeting, providing for 2% increases for unit employees, and a "me too" clause relative to the teachers' negotiations.

Local 547 drafted up the contract settlement document, dated June 30, 1997, and presented it to the membership for ratification. The contract was rejected by the employees, mainly because of the elimination of the inclement weather days and the wage rate for new employees. The Local 547 representative notified the superintendent of the contract rejection on July 7, and the two negotiators remained in telephone contact during July and August until the next meeting of the bargaining teams on August 27, 1997. At this third meeting the Employer made it clear that the Board's position remained firm on the issues of inclement weather days and the new employee wage rate, and no change was made in these provisions. After discussing the issues and positions of the parties, Local 547 agreed to again take the proposed contract back to the employees, in order to try to persuade them to accept the Employer position.

The second ratification attempt was held on Saturday, September 20, and the Local 547 representative was asked to leave the room while the employees discussed the contract. The employees were still unhappy with the agreement because of the two issues, and they decided at that time to go with another labor organization. The Local 547 representative was called back into the room and told by the employees that they did not want her to represent them anymore, and that the MEA would do a better job. The Local 547 representative and the employee member of the bargaining team resigned as bargaining team representatives on the ground that there was no hope for a contract. The Local 547 representative sent a letter to the superintendent the same day, which was received on Monday or Tuesday, September 22 or 23, stating that the unit had "rejected their contract and informed me that they no longer wished to be represented by the Operating Engineers." The letter indicated that Local 547 would notify this Commission that as of October 1, 1997 it would no longer be the certified bargaining agent for the custodial-maintenance unit. This notice was sent to the Commission under date of September 29, with copies to the superintendent and to the chief steward of the unit, who also was the employee member on the Local 547 bargaining team.

The receipt by the Employer of the September 20 letter from Local 547 disclaiming further interest in representing the custodial unit convinced the superintendent that no agreement on the two issues could be reached in the near future, if at all. In view of the approach of winter relative to inclement weather days, and the fact that the serious illness of a unit employee could cause the need to hire a new custodial employee in the near future, the superintendent decided to use the authority granted to him by his Board to declare an impasse. On September 26, a letter from the superintendent was hand delivered to the chief steward for Local 547. This letter recited the history of negotiations between the School District and Local 547, including the two rejections by the bargaining unit of the tentative agreement, and set forth the provisions on inclement weather days and the wage schedule for new hires that the Board had insisted it needed in any new agreement. The letter stated further:

> . . . It is my understanding that the membership is unwilling to agree with the Board's position on these two issues. It is also my understanding that the membership is

seeking to decertify the IUOE as its sole and exclusive bargaining agent. Given the bargaining history, there is no reason whatever for me to believe that the parties will be able to reach agreement on these two issues in the foreseeable future. The positions of the parties are so entrenched that sufficient movement to reach agreement is not possible. Accordingly, I am declaring impasse on these two issues effective immediately. The District will soon be experiencing inclement weather and may also have need to hire a new bargaining unit employee. Therefore, the Board is of the considered opinion that it is necessary to implement these changes consistent with our last position at this time.

Please consider this official notice that I will be so recommending to the Board at its next meeting scheduled for October 20, 1997.

On September 22 this Commission received the petition for a certification election in the Local 547 bargaining unit, filed by the MEA and docketed as Case No. R97 I-138. This petition was mailed to the parties with the usual Commission cover letter on September 25, 1997. The Board received this copy of the MEA petition on September 29, three days after the impasse declaration. This was the first notice that the Employer had that any other labor organization was involved with its custodial-maintenance employees. On October 16, five unit employees sent a letter to the superintendent protesting the declaration of impasse, contending that the status quo must be maintained until the election process was concluded, and asking that the Board not act on the impasse recommendation on the two issues or on any other mandatory bargaining subject.

At its next regular meeting held on October 20, the Board of Education ratified and affirmed the declaration of impasse by the superintendent on the two disputed issues, effective September 27, 1997. The next day the superintendent sent a memorandum to the custodial staff in response to their October 16 letter, advising them of the official action taken by the Board the previous evening, and summarizing the facts and position of the Employer relative to the declared impasse. In regard to the filing of the MEA petition, the superintendent stated that, "The 'status quo' at the time the petition was received by the district was that impasse had been declared and the Board's last position on these two issues instituted effective immediately."

Thereafter, the Employer and the MEA entered into a consent agreement for a mail ballot election in the representation case, without the participation of the incumbent Local 547 based on its disclaimer of representation. The ballots were mailed on October 30, and the count of the ballots took place on November 14. The MEA won the election by a 4-1 vote and was certified by the Commission on November 24, 1997. Two of the unit custodians resigned during the month of November, and were replaced by the Employer in December. Also, in December, school was closed one day due to inclement weather. On December 17, the superintendent wrote to the MEA representative who had contacted him about negotiations a couple of days previously, and asked that the MEA send him a copy of its contract proposal so that he could share it with his Board prior to

their first meeting. On December 18, the MEA sent a memo to the superintendent demanding to bargain about the filling of the custodial positions, and indicating that it would contact him after January 5, 1998 to arrange a bargaining date. At the time of this hearing, the Employer had received no proposals from the MEA and no negotiations had taken place.

Discussion and Conclusions:

The parties have argued in their briefs essentially three issues for determination: First, whether there was an actual impasse in the negotiations between the Employer and Local 547 on the two issues in question. Secondly, whether the Employer had a right to declare impasse and implement its last best offer on September 26, since a representation election petition had been filed by the MEA, which allegedly required the Employer to maintain strict neutrality and the status quo until the representation issue was resolved. Thirdly, whether the MEA had standing to bring this proceeding, since the IUOE was the sole and exclusive bargaining representative at the time the impasse was declared. In view of my conclusion that there was an impasse on the two items at issue, and that the Employer properly declared and implemented them when it did, I will not discuss or decide the issue of standing in this matter.

The arguments of the MEA that the Employer and the IUOE were not at impasse on the date of its declaration by the Employer's superintendent on September 26, 1997, I find to be lacking in merit. The impasse was declared only after two tentative agreements had been turned down by the employees and the bargaining agent had agreed with the request of the employees to disclaim its representative status. Under these circumstances, it would be hard to conceive of a fact situation where a collective bargaining agreement is less likely to occur. Not only is it clear that the employees and the Employer were unable to agree on the two issues that caused the two rejections of the contract, but there was the added element that after the second rejection there was no bargaining agent with whom further bargaining could take place. Thus, as of September 26, no flexibility in the position of either party on the two relevant issues was evident, and the superintendent had just been informed by Local 547 of the second rejection of the contract and that it was withdrawing as bargaining representative of the unit. Under these circumstances, I find that the parties were at impasse. *Ida Public Schools*, 1996 MERC Lab Op 211, 214-215, 219 (impasse declared after four formal bargaining sessions); *Wayne County (Attorney Unit)*, 1995 MERC Lab Op 199, 202-204, 207 (four bargaining sessions before declaration of impasse.)

The MEA argues that due to the short period of negotiating time spent by the parties in reaching the tentative agreements no impasse could have been reached, relying on *Munson Medical Center*, 1971 MERC Lab Op 1092, 1100-1102. *Munson,* and a later case that also involved only three meetings and a finding of no impasse, *Flint Township*, 1974 MERC Lab Op 152, 155-157, stress that the totality of the actions and circumstances must be considered in determining whether impasse in fact has been reached. Both *Munson* and *Flint* involved fact situations where it was found that the employers prematurely and on a take-it-or-leave-it basis declared impasse, while the bargaining agents were seeking further negotiations, and the facts established that progress was still

being made in the negotiations. Such was not the case in regard to Local 547 and the Employer, where two tentative agreements had been rejected on the same two issues and the bargaining agent had withdrawn as the representative of the employees.

While the amount of time spent in bargaining is a factor to be considered when finding an impasse, it is only one consideration when assessing the totality of the negotiations. See *Wayne County (Attorney Unit), supra*; *Escanaba Area Schools,* 1990 MERC Lab Op 887, 892-894. The amount of time spent in bargaining and the number of meetings held do not necessarily have a direct bearing on the fruitfulness and productivity of collective bargaining negotiations. Parties who approach bargaining in an efficient and time-conscious manner should not be penalized because of the quickness and efficiency of their negotiations. The MEA further argues that there was no legitimate business necessity or urgency for the superintendent to declare impasse on September 26, since the Employer did not demonstrate that there was a financial burden by maintaining the status quo in regard to snow days and probationary wage rates. See *Allendale Public Schools,* 1997 MERC Lab Op 183, 189. This argument presupposes that the Employer was unable to act on the impasse on September 26, unless there was a true business necessity. I do not find this to be the case. Whether or not one accepts the Employer's reasons for declaring impasse on September 26, I find that the Employer was justified in such declaration in any event, given all the factual circumstances.

The remaining issue is whether the superintendent could lawfully declare impasse between the time the MEA petition for an election was filed and the date the School District received actual service and notice of the filing of the petition. There is no dispute that the petition was filed with the Commission on September 22; mailed to the parties on September 25; received by the Employer on September 29, three days after the declaration and implementation of the impasse by the superintendent; and the latter had the authority to declare and implement the impasse. The Commission holds, contrary to the National Labor Relations Board (NLRB), that an employer must maintain strict neutrality and refrain from further collective bargaining with the incumbent labor organization during the pendency of a representation petition. *Paw Paw Public Schools,* 1992 MERC Lab Op 375, 377-378. Such neutrality, for the purposes of this decision, will be considered to extend to an employer's declaration of an impasse once it is aware of the pendency of a rival election petition. In regard to such notice, the *Paw Paw* case holds, at 377, that ". . . when notified of the filing of the petition, an employer must stop bargaining with an incumbent union until the representation dispute is resolved."

In this case the superintendent did not receive notice of the MEA petition until three days after he had declared and implemented the impasse. Thus, the impasse in this matter falls under the *Paw Paw* rule, and did not violate the Employer's bargaining obligation under PERA. The fact that the superintendent was aware, as stated in his September 26 declaration of impasse, that

the unit was "seeking to decertify the IUOE" does not affect this conclusion.[1] The Employer must receive actual notice of the filing of a rival election petition before it is precluded from further action relative to collective bargaining. Any other finding would subject collective bargaining negotiations to the uncertainty of relying on rumor and hearsay, and would lead to the interruption or suspension of negotiations whenever a faction of the employees in the unit became dissatisfied or wished to interfere with negotiations.

The MEA also argues that the impasse was not actually ratified, affirmed, and implemented until the Board of Education formally voted to "ratify and affirm the Superintendent's declaration of impasse and institution of the Board's last position . . . effective September 26, 1997" at its next regular meeting on October 20, 1997. This argument presupposes that the superintendent was not an agent who could and did bind the Board by actions taken within the scope of his authority, whether or not such actions are ultimately ratified by the Board. I refuse to so find. There is no evidence that the superintendent's September 26 declaration and implementation of impasse were outside the scope of his authority as defined by the Board, and the Board would have had to answer for his actions, whether or not it decided to ratify them on October 20. Commission case law does not sustain the MEA's position, as exemplified by the *Wayne County* and *Escanaba* cases cited above. In *Wayne County* the impasse was declared by the County labor relations director, whereas in *Escanaba* the impasse declaration was left to a vote of the school board at a special meeting. In conclusion, the impasse in this case was effectively declared and binding on all parties as of the date of its implementation on September 26, 1997.

Since the actions of the Employer in this case do not establish any violation of its obligation to bargain in good faith, or any other violation of PERA, I recommend that the Commission enter the following order:

[1]It is noted that the term "decertify" or "decertification election" is often used wrongly to apply to those situations where represented employees seek to replace an incumbent bargaining representative with another labor organization, rather than limiting the term to actual decertification election petitions where the unit rejects representation and their employment becomes at will. In the instant case, the statement of the superintendent must be accepted as written, absent other evidence to the contrary.

ORDER DISMISSING CHARGE

Based upon the aforesaid findings and conclusions, the unfair labor practice charge in this case is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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James P. Kurtz
Administrative Law Judge

Dated: _____