

**STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
LABOR RELATIONS DIVISION**

In the Matter of:

MONROE COUNTY OPPORTUNITY PROGRAM,  
Employer,

Case No. R99 K-151

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL 547, AFL-CIO,  
Petitioner-Labor Organization.

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APPEARANCES:

Plunkett & Cooney, P.C., by Stanley C. Moore III, Esq. (Elizabeth A. Logan, Esq., on the Brief),  
for the Public Employer

Homer L. Sterner, Business Representative, for Petitioner

**DECISION AND ORDER DISMISSING  
PETITION FOR ELECTION**

Pursuant to the provisions of Sections 12 and 13 of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, MCL 423.212 and 423.213; MSA 17.455(12) and (13), and Section 27 of the Labor Mediation Act (hereafter "LMA"), 1939 PA 176, as amended by 1965 PA 282, MCL 423.27; MSA 17.454(29), a notice of hearing in this matter was issued on November 30, 1999. This information-type representation case was heard at Detroit, Michigan on February 1, 2000, before James P. Kurtz, Administrative Law Judge, acting as Hearing Officer for the Michigan Employment Relations Commission. Based upon the record, including the transcript of the hearing, exhibits, and briefs filed by the parties on May 11, 2000, this Commission, in the exercise of its administrative expertise, finds as follows:

Petition and Issues:

This petition for a representation election was filed on November 24, 1999, by the Operating Engineers, Local 547, AFL-CIO, seeking a residual-type bargaining unit composed of approximately eight employees of Monroe County Opportunity Program (hereafter "MCOP"). At issue herein are those employees not already included in a unit of full-time and regular part-time nonsupervisory employees represented by the United Automobile Workers (hereafter "UAW"), Local 157, which were certified as bargaining representative on June 14, 1999, in Case No. R99 B-25. The proposed unit

is composed of six department directors, and two clerical employees: an executive secretary or assistant to the executive director of the agency, and a payroll/personnel/benefit coordinator. The Union contends that all eight of the above employees are eligible to form a bargaining unit under PERA. Alternatively, in the event that we determine that the LMA applies to this proceeding, the Union argues that all of the claimed employees are nonsupervisory and, therefore, eligible to constitute a residual unit.

The Employer contends that it is not a public employer within the meaning of PERA, but that it is, and always has been, a private, nonprofit entity subject to the statutory provisions of the LMA. With regard to the proposed bargaining unit, the Employer contends that the six directors are supervisors as defined by this Commission and, thus, may not constitute a bargaining unit under the LMA. As for the two clerical employees, the Employer contends these positions should be excluded as confidential, and that even if only one of the two is excluded as a confidential, then the remaining employee must also be ineligible in order to avoid a one-person unit. Both parties agree that the executive director of MCOP is an executive employee.

#### The Employer Issue:

MCOP is a community action agency located at St. Mary's Center in Monroe, with a separate warehouse nearby for its food and home chore programs. It employs a total of about 50 employees. MCOP was created under the Federal Economic Opportunity Act of 1964 (hereafter "FEOA"), Public Law 88-452, 78 Stat. 508, to reduce the causes and effects of poverty for low-income, elderly, and disabled individuals. The Monroe County Board of Commissioners, exercising its option under the federal legislation, decided that the agency would be a private, nonprofit Michigan corporation, rather than a department of the County of Monroe. The Union contends that the Employer is governed by 1981 PA 230, known as the Michigan Economic and Social Opportunity Act of 1981 (hereafter "MESOA"), MCL 400.1101 *et seq.*; MSA 16.615(1) *et seq.*, and, by implication at least, is a public employer thereunder. This Michigan statute, according to its preamble, created a bureau of community services, and a commission on economic and social opportunity, "to reduce the causes, conditions, and effects of poverty and promote social and economic opportunities that foster self-sufficiency for low income persons." One of the functions of the bureau under Section 8 of MESOA is to designate community action agencies, which can be a unit of local government, a combination of two or more units of local government, or a "nonprofit private agency." MCL 400.1108; MSA 16.615(8). This same section of the Michigan statute recognized the continuing validity of any existing community action agency established under the 1964 federal legislation, such as MCOP.<sup>1</sup>

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<sup>1</sup> At the time of the hearing, there were 31 community action agencies in Michigan, most covering multiple counties, and most of them nonprofit private corporations, except for six county agencies located in Kent, Genesee, Kalamazoo, Macomb, Ottawa, and Washtenaw Counties, which are designated as public employers. Although we previously treated one of these community action agencies as a public employer under PERA, the agency's employer status was not put into issue by the parties in that case and there were no exceptions to the ALJ decision. See *Muskegon-Oceana Community Action Against Poverty, Inc.*, 1998 MERC Lab Op 601, 603. See also *Community Action Against Poverty, Inc.*, 1973 MERC Lab Op 198 (no issue raised concerning the appropriate statute for jurisdictional purposes).

MCOP was originally incorporated as a private nonprofit corporation in June of 1965 under the name, Economic Opportunity of Monroe County, Inc. In 1975, its name was amended to Monroe County Opportunity Program. The Employer is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. MCOP is governed by a fifteen-member appointed board of directors, chosen through a nominating committee of the board or by a petition to the board. Five of the board members are elected public officials, such as state representatives, and County and City of Monroe officials, who represent the public sector; five represent the private sector and are chosen from community organizations, local utilities, businesses, and industry; and five represent consumers, such as senior citizens, low income persons, or agencies that represent consumers, such as the State Family Independence Agency or the American Red Cross. Only one public sector member of the board of MCOP is a member of the Monroe County Board of Commissioners.

The programs offered by MCOP are funded through federal, state, and local government grants, and by private sources such as gifts, United Way donations, and fund-raising events. MCOP operates independently of any other agency or government entity, submitting and approving grant applications prepared by its own directors, often in competition with other private nonprofit organizations; entering into its own contracts; leasing its own facilities, and purchasing its own equipment; preparing its own budget; maintaining its own bank accounts; hiring and compensating its own employees, including having its own benefit plans; and, in general, does not answer to any other employer, public or private. In sum, MCOP employees have no employment rights, such as transfer or the setting of compensation, relative to the County or to any other public employer, and MCOP is not subject to the direct supervision or control of its daily operations by any public entity. At the time of the hearing, MCOP, because of its expertise in the area, was assisting the County in implementing and managing a public housing authority, to be known as the Monroe County Housing Commission. Once this program is able to operate on its own, the Housing Commission will become a County department with direct ties to its Board of Commissioners, and it will operate as a completely separate legal entity from MCOP.

#### Conclusions on Employer Status:

The appropriateness of the unit sought in this case is dependent upon the Commission exercising its responsibility to determine whether MCOP is a public employer under PERA. See *Wayne County Federated Library System*, 1979 MERC Lab Op 494, 503, on remand from 402 Mich 871 (1978), modifying 1976 MERC Lab Op 413, 425-426; aff'd 78 Mich App 240 (1978). See also *War Memorial Hospital*, 1967 MERC Lab Op 398, 399 and 402-403 (nonprofit hospital affiliated with Chippewa County found to be a public employer under PERA, rather than an employer under the LMA, even though it is self-supporting). This initial determination is necessary, since most of the employees sought by Petitioner are claimed by the Employer to be supervisors who would be ineligible for collective bargaining under the LMA. *Midland Hospital*, 1970 MERC Lab Op 96, 103-104, and 696 (motion for reconsideration denied). Since PERA defines the term "public employee," whether PERA applies to MCOP depends on whether its employees are persons employed by "political subdivisions of this state" . . . "or in any other branch of the public service," within the

meaning of Section 1(e) of PERA, MCL 423.201(e); MSA 17.455(1)(e).<sup>2</sup>

MCOP is a social service or social welfare agency established in 1965 under enabling federal legislation for the purpose of implementing antipoverty programs through the use of federal funds and/or block grants. From its inception, MCOP was established by the County of Monroe as a private nonprofit Michigan corporation, rather than being created by the Michigan legislature as a “political subdivision” or “other branch of the public service.” Such nonprofit social welfare corporations have been found to be private, as distinguished from governmental, agencies, and subject to the LMA, rather than PERA. See e.g. *Flint Neighborhood Improvement & Preservation Project, Inc.*, 1991 MERC Lab Op 434, 436; *Community Head Start Inc. of Catholic Social Services of Wayne County*, 1977 MERC Lab Op 886, 895; *Neighborhood Service Organization*, 1977 MERC Lab Op 155, 160. These cases stress that even though most of the funding for an agency derives from governmental bodies, utilizing public tax revenues, this does not make the agency a public employer under PERA, since most charitable and nonprofit institutions derive at least some, if not most, of their funding from governmental sources.

MESOA, the 1981 Michigan statute upon which the Union relies, explicitly recognized and permitted the nonprofit status of MCOP to continue, as established under the 1964 federal legislation. All aspects of the employment relationship of MCOP employees are granted by and under the control of MCOP, similar to any private nonprofit or charitable social agency. As an employer, MCOP does not answer to, nor is it in any way tied to, any public entity in regard to employment matters. Since MCOP has not been established by the Michigan legislature as part of the public service, and since it is not a branch of any political subdivision of this State, we find under the case law cited above that MCOP is a private employer, and that its employees are private employees whose labor relations are governed by the provisions of the LMA, rather than that of PERA. Cf. *Adams v Vandemark*, 855 F2d 312 (CA 6, 1988), cert den 488 US 8042; 109 S Ct 868; 102 L Ed 2d 992 (1989) (discharge of employees by community action agency did not constitute state action).

#### Unit Issues – Supervisory Status:

With the exception of the executive director, the eight unrepresented employees who make up the proposed bargaining unit are the only regular employees of MCOP not included in the UAW’s nonsupervisory bargaining unit. If the six directors, including the interim controller or accountant, are supervisory employees, then under the ruling above that MCOP is a private employer subject to

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<sup>2</sup> Contrary to the contention of the Employer, we do not find that the addition of subsection (i) to Section 1(e) of PERA by 1994 PA 112, applicable to the issue raised in this case. Under subsection (i) the employees of private entities providing “services under a time-limited contract with the state or a political subdivision of the state” are not public employees. This provision of Act 112 relates to contract employees of a public employer, and it does not resolve the issue of which statute is applicable to the Employer in this case.

the LMA, these employees will be ineligible for collective bargaining, since supervisory units are not permitted under Section 9e of the LMA. See *Midland Hosp, supra*; *Hackley Hosp*, 1970 MERC Lab Op 42, 47-48 (no exceptions). See also *Community Head Start Inc, supra* at 897. Cf. *Wilshire, Inc.*, 1972 MERC Lab Op 524, 527-529.

The six alleged supervisors report directly to the executive director of MCOP and are in charge of various programs or the administration of MCOP. The interim controller/finance director or accountant is the highest paid employee of the Employer other than the executive director. All of the directors are paid substantially more than the employees with whom they work. The controller is the director of the accounting department and is responsible for both the fiscal and personnel areas of the Employer, including the accounting required for the more than 30 programs administered by MCOP. Two clerical employees report to the controller, an accounts payable/receivables clerk and a payroll/personnel/benefits coordinator.

The housing department director is responsible for various housing programs or grants, such as the weatherization program, and community development block grants. MCOP is the central housing authority for the County, until such time as the County establishes its own separate public housing authority. Two employees, a coordinator and a housing assistant, report to the housing director, and a third position in the department was vacant at the time of the hearing. This director and/or the controller substitute for the executive director in her absence.

The home care director is responsible for the department of the same name. This director oversees approximately 25 homemakers or personal care workers, including a staff assistant and a billing clerk, who provide respite services and assist the elderly in their homes.

The director of the transportation department is in charge of the specialized transportation programs of MCOP, which employs seven drivers. This department administers a number of programs dealing with the transportation needs of clients, such as taking the elderly shopping, or to doctor and hospital appointments.

The resource advocacy director oversees several outreach workers and an outreach assistant. This program assists senior citizens in their homes to receive services from various social programs or agencies, such as emergency fuel assistance, and deals with homelessness.

The sixth, and last, alleged supervisor is the home chore director who is in charge of a number of programs referred to as home chore, commodity supplemental food, and emergency food assistance. She directs an administrative assistant, two crew leaders, two chore workers, and a number of volunteers. Home chore itself refers to heavy work around the home, such as snow shoveling. The home chore director is the only supervisor, according to the Employer, stationed at its separate warehouse location, where the food programs operate, and which otherwise would have no direct supervision on site.

All of the above directors assign and schedule work for the employees they oversee, grant leave and time off, evaluate the employees in their charge, maintain time reports and authorize the

payroll. They also interview applicants for employment and recommend hire to the executive director, who at the time of the hearing had never disregarded such a recommendation. They attend supervisory meetings, and participate in formulating personnel policies for the Employer. These responsibilities and the documented exercise thereof by the six directors are the types of authority that have always been found by this Commission to be supervisory in nature. See e.g. *City of Fenton*, 1999 MERC Lab Op 189, 194; *Whitmore Lake P S*, 1999 MERC Lab Op 117, 120-121; *Huron County Med Care Fac*, 1998 MERC Lab Op 137, 145-146. Cf. *Butman Twp*, 2000 MERC Lab Op \_\_ (Case No. UC98 J-39, issued 1-18-00), where a working superintendent was found to be a leader, not a supervisor, because of his limited independent judgment and his routine exercise of discretion on personnel matters.

The contention of the Union that only the executive director of MCOP possesses supervisory power would mean that the entire agency, with more than 30 programs and in excess of 50 employees, is supervised by only one employee. This is highly unlikely, if not a practical impossibility, and would lead to an abnormally high ratio of employees to supervisors. See *Berrien County Sheriff*, 1999 MERC Lab Op 177, 186-188 (involving the contrary ratio of a large number of supervisors to employees). The record in this matter establishes that the duties and responsibilities of the six directors are more than “routine or clerical,” contrary to the contention of the Union, and that they clearly exercise independent judgment in personnel matters. These directors have real authority and discretion in managing their areas of responsibility, and in directing the employees with whom they work, including direct participation in the hiring of said employees. *Johannesburg-Lewiston Area Schools*, 2000 MERC Lab Op \_\_\_\_ (Case No. UC98 J-42, issued 8-29-00), reconsideration pending. Under these circumstances we find the six directors to be supervisory employees and, therefore, excluded from collective bargaining under the LMA.

#### Remaining Unrepresented Clericals:

Out of the eight person unit sought by the Union herein, there are two clerical employees who are not included in the UAW bargaining unit, and who the Employer contends are ineligible for representation because they are confidential employees. The first is the secretary/receptionist for the executive director, also referred to as the executive assistant/receptionist. This position acts as the personal secretary to the executive director and handles any confidential communications, including preparations and documents related to collective bargaining negotiations. This secretary has performed wage studies for the Employer and is assigned the task of taking the minutes of board meetings.

The second unrepresented clerical employee is the payroll/personnel/benefit coordinator, who works for the controller. Among the duties of the coordinator position is the task of maintaining all personnel files, which entails access to all wage information. This position is also responsible for drug screening potential employees and maintaining the confidentiality of the results. Also, this employee has been involved in the gathering of information for collective bargaining negotiations and assisting the executive secretary in preparing proposals.

This Commission has always permitted public employers to exclude as a confidential employee

one nonsupervisory employee from inclusion in collective bargaining units, so that the Employer may have available an employee that can directly assist in the preparation and handling of bargaining proposals during negotiations. *City of Bay City*, 1966 MERC Lab Op 271, 278-279. This exclusion applies even where there have been no confidential labor relations duties in the past. *Dickinson Co Rd Comm'n*, 1973 MERC Lab Op 745, 746. Cf. *Local 498, IBEW*, 1986 MERC Lab Op 169, 171. These confidential duties are usually delegated to an experienced clerical employee who works closely with the head of the employer's negotiating team. Mere access to confidential material or assisting the designated confidential, however, is insufficient for exclusion, since such access is widespread and usually involves public data, and the exclusion is strictly limited in our litigated cases to effectuate the legislative intent of guaranteeing collective bargaining rights for all public employees. *Benton Harbor Bd of Ed*, 1967 MERC Lab Op 743, 746. See also *Lansing Comm College*, 2000 MERC Lab Op \_\_ (Case Nos. UC 99 D-13 & UC98 D-21, issued 4-26-00); *Lake County Sheriff*, 1999 MERC Lab Op 107, 113 (limitation on granting exclusions from a bargaining unit applies to executives as well as confidentials).

In the instant case, the executive assistant/receptionist performs the confidential labor relations work for the Employer, and we will grant her exclusion as a confidential employee. We see no justification in this record to extend that exclusion to the payroll coordinator position, especially where the regular duties of her position are not confidential in a labor relations sense. *Antrim Kalkaska Com Mental Health*, 1998 MERC Lab Op 11, 15; *Lapeer Co & 40<sup>th</sup> Cir Ct*, 1998 MERC Lab Op 611, 619-621. The small size of the Employer and the limited amount of labor relations confidential work that would be involved does not justify an additional confidential exclusion. This leaves the coordinator position as the only employee eligible for inclusion in a residual unit at MCOP. Given the current policy of this Commission not to certify one-person bargaining units, as set forth in *Bricklayers, Local 31*, 1992 MERC Lab Op 677, 679-680, the remaining employee eligible for representation may not become a residual unit, so this petition must also be dismissed. *Village of Lawrence*, 1997 MERC Lab Op 319, 326; *Hazel Park Library Bd*, 1996 MERC Lab Op 287, 293; *Grand Traverse County*, 1996 MERC Lab Op 13,15; *Bloomfield Twp*, 1994 MERC Lab Op 568, 570.<sup>3</sup>

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<sup>3</sup> We can make no ruling in this case whether the payroll coordinator position may or should be included in the UAW bargaining unit.

**ORDER DISMISSING PETITION**

For the reasons set forth above, and in accordance with our findings and conclusions, the Union's petition for an election to represent a residual bargaining unit of employees of Monroe County Opportunity Program is hereby denied, and the petition filed herein is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

DATED: \_\_\_\_\_