STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISON

In the Matter of:

CITY OF ROYAL OAK (POLICE DEPARTMENT),
Public Employer

-and- Case No. R02 B-030

ROYAL OAK POLICE OFFICERS ASSOCIATION,
Petitioner
_____/

APPEARANCES:

Bruce Bagdady, Esq., Keller Thoma, P.C., for the Employer

L. Rodger Webb, Esq., L. Rodger Webb, P.C., for the Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to the provisions of Section 12 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended, MCL 423.212, MSA 17.455 (12), this matter came on for hearing at Detroit, Michigan on May 14, 2002, before an Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including briefs filed on or before June 28, 2002, the Commission finds as follows:

The Petition:

In the petition filed on February 27, 2002, the Royal Oak Police Officers Association seeks to add by accretion election all full and regular part-time parking enforcement officers to its current bargaining unit of police department employees. The Employer opposes the petition based on the fact that there is an agreement not to represent these positions which is spelled out in the contract.

Facts:

The Royal Oak Police Officers Association represents a bargaining unit which consists of all police department employees below the rank of detective and sergeant. The latest contract between the parties covered the period from July 1996 through June of 1999. The duration section of this agreement reads as follows:

> 53.l This Agreement shall be effective 12:01 A.M. on July 1, 1996 and expire at 11:59 P.M. on June 30, 1999. All provisions of this contract shall continue to operate unless notice of termination or desire to modify or change this Agreement is given in writing by either party at least sixty (60) days prior to the expiration date hereof.
>
> 53.2 The parties, in recognition of the fact that vital services are involved, agree that this contract shall remain in full force and effect until a new contract is negotiated.

During negotiations for a successor contract, the Union sought to remove a section of the contract which deals with parking enforcement officers, Section 41A. This section reads as follows:

> 41.A.1 The City may hire part-time parking enforcement officers with the following guarantees:
>
> (a) The City will guarantee ten (10) full time Police Service Aide positions and one (1) full time parking enforcement position. Upon retirement of the present Parking Meter Enforcement Officer, the City will guarantee eleven (11) full time Police Service Aide positions.
>
> (b) Part time employees will not be eligible to work Police Service Aide duties other than parking enforcement. *Part time parking enforcement officers shall not be part of the bargaining unit nor covered by this agreement,* it being understood that the City shall have the right to determine compensation and working conditions for such personnel. [Emphasis added.]
>
> (c) This agreement does not preclude the Employer from utilizing full time PSAs for parking enforcement.

This section had not been part of the previous 1992-1995 agreement, but was negotiated in the 1996-1999 agreement in return for salary and benefit improvements by the City.

At the time of the hearing in this matter, no new contract had been reached and the parties were engaged in compulsory arbitration, pursuant to a petition for Act 312 arbitration filed in September of 2000 by the City. In the course of Act 312 arbitration, the Union initially proposed converting all part-time parking enforcement positions to full-time. In submission of its last best offer to the Act 312 arbitrator, the Union proposed eliminating Section 41A:

> Parking Enforcement (per ROPOA's statement at Hearing it withdraws its earlier-submitted proposal, and takes the position that the section should be eliminated, for the reason that the agreement underpinning it, that part-time parking enforcement officers shall not be part of the unit, is a permissive subject respecting which the ROPOA declines to bargain; the Union will brief this issue)

Discussion and Conclusions:

The Employer asserts that it is well settled that where a contract explicitly provides that the Union will not seek representation of particular positions, such a provision is enforceable and bars a representation or unit clarification petition. Since the contract is still in effect pursuant to Section 53.2, the Employer argues that the Union is barred from seeking to represent the part-time parking enforcement officers. The Employer also maintains that Section 41A was negotiated in exchange for wage and benefit improvements by the Employer and the Union should be held to its bargain.

The Petitioner takes the position that there is no contract bar, since the parties' 1996-1999 contract expired by its terms on June 30, 1999. The contract was extended under Section 53 for the purpose of permitting the parties to negotiate a new collective bargaining agreement. In addition, according to the Petitioner, the language relied upon by the Employer does not expressly state that the Union waived its right to seek representation of these employees, but even if it could be so construed, does not bar a representation petition filed over two years after expiration of the contract.

In *City of Detroit*, 1999 MERC Lab Op 81, 87-88, we reiterated the rule that absent an explicit agreement by a union not to seek representation of certain categories of employees, a contract which excludes these employees will not serve as a bar to an election petition seeking to add these positions to the bargaining unit. *City of Tecumseh*, 1984 MERC Lab Op 1175, 1179; *Eaton Rapids Pub Sch*, 1988 MERC Lab Op 511 (*affd* Court of Appeals 12/16/89 , Docket No. 109475, unpublished); *Beecher Sch Dist*, 1990 MERC Lab Op 347; *Briggs-Indiana Corp*, 63 NLRB 1270, 17 LRRM 46 (1945). We have emphasized that there must be an *express* promise not to seek to represent the employees, and have refused to imply a promise from the exclusionary language, or from an alleged understanding of the parties during contract negotiations. In *City of Saginaw (Fire Dept)*, 1992 MERC Lab Op 601, we stated:

> The record establishes that the parties understood the 1988 contract provisions to mean that the union would not seek to represent the civilian dispatchers, at least for the life of the contract. Such understanding, however, and the implications to be drawn from the contractual provisions do not constitute an "express contractual promise" within the meaning of the above cases, and absent such promise we refuse to imply one. Aside from the doubtful validity of a labor organization permanently waiving its right to represent certain employees as part of its bargaining unit, the Union in this case made no such express and explicit commitment never to seek representation of the civilian ESDs.

See also *Cessna Aircraft Co*, 123 NLRB 855, 44 LRRM 1001 (1959). We find that the language of Section 41A which states that "parking enforcement officers shall not be part of the bargaining unit nor covered by this agreement" does not equate to a specific promise not to seek

representation of these employees.[1] Rather, we interpret this clause to mean that these employees are excluded from the existing bargaining unit, and will not be covered by the previously negotiated terms and conditions of employment set forth in the contract. [2]

Even if the language could be construed to be an express promise, as argued by the Employer, we find that it would not bar the petition under the circumstances of this case. The contract expired on June 30, 1999, but by agreement of the parties remained in effect while bargaining for a successor agreement continued. We have long held that a day-to-day contract extension after expiration date, for the purpose of permitting terms and conditions of employment to continue while bargaining takes place, will not bar an election because such a contract is not an agreement of fixed duration within the meaning of Section 14 of PERA. *City of Riverview*, 1970 MERC Lab Op 62; *Birmingham Bd of Ed*, 1972 MERC Lab Op 235; *Kearsley Comm Sch*, 1973 MERC Lab Op 39. The extension would, therefore, not bar a representation petition under ordinary circumstances. The Employer here argues, however, that under the contract extension, the Union is restricted by the language of Section 41A. Since the extension provides that the contract will continue until a new agreement is reached, under this theory, the Union would waive its right to represent these employees indefinitely, and not for a reasonable time as contemplated under the rule established in *Briggs-Indiana, supra.* We cannot endorse such an unlimited waiver of representation rights, since it would unduly restrict the right of employees under Section 9 of PERA to bargain collectively through representatives of their own free choice, and operate to deny unrepresented employees the right to representation in an appropriate bargaining unit. *City of Saginaw, supra; See also Lansing Sch Dist*, 1978 MERC Lab Op 1013,1017.

Accordingly, we find that an election among the full and part-time parking enforcement officers is not barred by the extended collective bargaining agreement and that these employees may appropriately be included in the bargaining unit of police department employees currently represented by the Royal Oak Police Officers Association, if they so choose.

ORDER AND DIRECTION OF ELECTION

Based on the above facts and conclusions of law, we find that a question concerning representation exists under Section 12 of PERA in regard to the employees described below, and we shall direct an election by secret ballot pursuant to the attached Direction of Election among the following employees:

All full and regular part-time parking enforcement officers.

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[1] Compare the following language found to be an express promise in *Lexington Health Care Group*, 328 NLRB 894, 161 LRRM 1225 (1999): "…the union agrees not to undertake organizing activities at existing facilities or in unorganized facilities for a period of 12 months (until October 1, 1996)."

[2]This is in keeping with the conclusion reached by the Michigan Court of Appeals in *Howell Ed Sec Assn v HowellPub Sch*, 130 Mich App 546 (1983), *revg* 1982 MERC Lab Op 943, in which the Court found that the terms of the existing collective bargaining agreement did not automatically apply to a newly accreted group of employees.

Employees who are eligible shall vote whether or not they wish to be represented for purposes of collective bargaining by the Royal Oak Police Officers Association. If a majority of votes are cast for the Royal Oak Police Officers Association, the employees will have expressed their desire to be added to the bargaining unit currently represented by that organization and the Notice of Election will so indicate.

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: _____