STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY AIRPORT AUTHORITY,
Public Employer-Respondent,

-and-

WAYNE COUNTY LAW ENFORCMENT SUPERVISORY,
LOCAL 3317, AFSCME,
Labor Organization-Charging Party in Case No. C05 H-187,

-and-

SEIU, LOCAL 503
Labor Organization-Charging Party in Case No. C05 H-196.
_____/

APPEARANCES:

The Danielson Group, P.C., by Kenneth M. Gonko, Esq., for the Public Employer

Akhtar, Webb & Ebel, by Jamil Akhtar, Esq., for the Labor Organizations

DECISION AND ORDER

On May 12, 2006, Administrative Law Judge (ALJ) Roy L. Rouhlac issued his Decision and Recommended Order in the above matter finding that Respondent, Wayne County Airport Authority (WCAA), violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ found that Respondent breached its duty to bargain in good faith by proposing to eliminate Act 312 arbitration for bargaining unit members of the Wayne County Law Enforcement Supervisory Local, 3317, AFSCME and SEIU, Local 503 (Charging Parties) who were transferred to the WCAA from the Wayne County Sheriff's Department.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. After requesting and receiving two extensions of time in which to file, Respondent filed exceptions to the ALJ's decision on October 3, 2006. On October 12, 2006, Charging Parties filed a brief in response to Respondent's exceptions. Along with their exceptions, Charging Parties filed a motion to reopen the

record. Respondent responded to this motion on October 23, 2006.

In their Motion to Reopen the Record, Charging Parties seek to reopen the record to present the collective bargaining agreement between Respondent and the International Association of Fire Fighters Local 741, which allegedly contains a provision that "shows a contrary position on the part of Respondent" from the position Respondent asserts in this case. Pursuant to Commission Rule 166, R 423.166, a motion to reopen the record will only be granted upon a showing of all of the following:

> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
>
> (b) The additional evidence itself, and not merely its materiality, is newly discovered.
>
> *(c) The additional evidence, if adduced and credited, would require a different result. (*Emphasis added.*)*

Because the evidence that Charging Parties seek to be presented in this case, if adduced and credited, would not require a different result, we decline to reopen the record.

In its exceptions, Respondent alleges that the ALJ erred by finding that Charging Parties' members retained the right to binding arbitration under Act 312 of 1969. Respondent contends that it merely proposed to eliminate a permissive contractual provision that provided its employees with access to Act 312 arbitration and, therefore, did not violate its duty to bargain. It also asserts that the ALJ erred by failing to recognize that the Commission has exclusive jurisdiction to determine Act 312 eligibility. Respondent requested oral argument on these issues. After reviewing the exceptions and briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, Respondent's request for oral argument is denied. We have reviewed the Respondent's exceptions and, for the following reasons, find that the exceptions, in part, have merit.

Factual Summary:

Prior to the enactment of Act 90 of the Public Acts of 2002, the Detroit Metropolitan Wayne County and Willow Run Airports were operated by Wayne County. When Act 90 created the WCAA as a separate and distinct public employer to operate these airports, it also gave employees who transferred from Wayne County to the WCAA protection for certain rights and benefits. Section 119(2) of Act 90 provides that transferring employees who had a right, by contract or statute, to submit unresolved disputes to binding arbitration pursuant to Act 312 of the Public Acts of 1969, as amended, MCL 423.231 to 423.247, shall continue to have that right.

Charging Parties represent bargaining units comprised of former Wayne County

employees who transferred from the Wayne County Sheriff Department to the WCAA. Their collective bargaining agreements with Wayne County and Locals 502 and 3317 contained the following provision:

> It is hereby agreed between the parties that all of the employees in the Bargaining Unit are subject to the hazards of police work and perform duties of a critical service nature. It is further agreed that, since the continued and uninterrupted performance of these duties is necessary for the preservation and promotion of the Public Safety, Order and Welfare, all of the employees in this Bargaining Unit are subject to, and entitled to invoke the provisions of 1969 PA 312 for the resolution of disputes.

During bargaining for the parties' first collective bargaining agreements, Respondent proposed to eliminate the above contract provision. Charging Parties claimed that the proposals were illegal and demanded that the WCAA withdraw them. The WCAA refused to withdraw its proposals but offered to continue bargaining on other open issues and return to its proposals later. Charging Parties responded by filing unfair labor practice charges and notifying the WCAA that negotiations would not proceed until this Commission ruled on its Charges. Charging Parties have acknowledged that Respondent has not challenged the petition for Act 312 arbitration or the appointment of an arbitrator.

Discussion and Conclusions of Law:

The National Labor Relations Board has held that interest arbitration is a permissive subject of bargaining, *Sheet Metal Workers Local 38*, 231 NLRB 699, 702 (1977) and that bargaining to impasse on retaining an interest arbitration clause is an unfair labor practice, *Amalgamated Transit Union Local 28*, 339 NLRB 760 (2003). Our jurisdiction to determine what is a mandatory subject of bargaining is well established. We also have jurisdiction to decide issues of Act 312 eligibility. *Metropolitan Council 23 v Oakland Co*, 89 Mich App 564 (1979), rev'd on other grounds, 409 Mich 299 (1980). Here, the ALJ concluded that Respondent violated its duty to bargain by proposing to eliminate Act 312 arbitration for Charging Parties' bargaining units. We disagree. By its proposals, Respondent merely sought to eliminate language addressing Act 312 from the parties' collective bargaining agreements.

Permissive subjects of bargaining can be changed unilaterally without bargaining. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44 (1974); *West Ottawa Ed Ass'n v West Ottawa Pub Schs Bd of Ed*, 126 Mich App 306 (1983). Here, Respondent proposed to delete a contract provision, the absence of which would have no impact upon statutory eligibility under Act 312. We hold that Act 312 eligibility, like interest arbitration, is a non-mandatory subject of bargaining. We also hold that it is not an unfair labor practice to propose, as did Respondent, that language addressing Act 312 eligibility be removed from a collective bargaining agreement.

Exception has also been taken to the ALJ's holding that because Wayne County employees transferring to the WCAA had a right by contract and by statute to submit disputes to arbitration under Act 312, they continued to have that right under Section 119(2) of Act 90 which provides:

> The rights and benefits protected by this subsection may be altered by a future collective bargaining agreement except that any employee who as of the effective date of this chapter has the right, by contract or statute, to submit any unresolved disputes to the procedures set forth in 1969 PA 312, MCL 423.231 to 423.247, shall continue to have that right.

Based on the record before us, we are not willing to say that this language preserves the right of all members of both bargaining units to invoke Act 312 unalterably and forever. To the extent that the right was conferred by contract, it expires when the contract expires; and on the record before us, we cannot determine which bargaining unit classifications retain Act 312 eligibility as a statutory right. That issue is not properly framed by the unfair labor practice charges before us and should not have been addressed by the ALJ. As we determined in *City of Detroit*, 1990 MERC Lab Op 561, the Act 312 arbitration panel can make findings as to Act 312 eligibility and either party can seek judicial review of such findings if it believes that the arbitration panel has exceeded its jurisdiction. See also *City of Detroi*t, 1990 MERC Lab Op 859.

ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

The Danielson Group, P.C., by Kenneth M. Gonko, Esq., for the Public Employer

Akhtar, Webb & Ebel, by Jamil Akhtar, Esq., for the Labor Organizations

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on December 21, 2005 and February 2, 20006 by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216. Based on the record and the parties' post-hearing filed by March 28, 2006 and reply briefs filed by April 24, 2006, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charges:

Charging Parties, the Sergeants and Lieutenants Local 3317[1] and SEIU Local 502, are the exclusive bargaining representatives of non-supervisory police officers, corporals, detectives and dispatchers, and supervisory police officers employed by Respondent Wayne County Airport Authority, respectively. Local 3317 and Local 502 filed unfair

[1]The charge was filed by the Sergeants and Lieutenants, Local 3317. However, the Wayne County Law Enforcement Supervisory Local 3317, AFSCME, which is named as the Charging Party in the caption, and Wayne County are the parties to the collective bargaining agreement at issue in this case.

labor practice charges on August 24, 2005 and September 1, 2005, respectively, alleging that Respondent engaged in an illegal subject of bargaining in violation of Sections 10, 15 and 16 of PERA and Section 119(2) of Act 90 of the Public Act of 2002, MCL 259.108 *et seq.,* by proposing during bargaining to eliminate Charging Parties' members ability to engage in binding arbitration pursuant to Act 312 of the Public Acts of 1969, as amended MCL 423.231 to 423.247. Respondent filed answers to the charges on September 21, 2005. Respondent denied that it violated PERA and asserted that Section 119(2) of Act 90 is not controlling in this matter and that its bargaining unit members are not eligible for Act 312 arbitration.

Procedural and Bargaining History and Facts:

This charge is one of several filed by Local 3317 and/or SEIU Local 502 against the WCAA and/or Wayne County involving issues surrounding the Legislature's March 2002 enactment of Act 90, which created, among other things, WCAA as a separate and distinct public employer to operate the Detroit Metropolitan Wayne County and Willow Run Airports, granted certain rights and benefits to employees who elected to transfer from the employment of Wayne County to the WCAA, and imposed obligations on the WCAA to protect the rights and benefits that the transferring employees had during their employment with Wayne County. Before March 2002, bargaining unit members worked in the Wayne County Sheriff's Department Airport Police Division with work assignments at the airports.

Section 119(2) of Act 90 provides that the protected rights and benefits of employees who transferred from Wayne County to the WCAA could be altered by a future collective bargaining agreement except that if the transferring employees had a right, by contract or statute, to submit unresolved disputes to binding arbitrations pursuant to Act 312 of the Public Acts of 1969, as amended, MCL 423.231 to 423.247, shall continue to have that right. Act 312 eligibility is limited to employees who are subject to the hazards of police work and fire fighting, and who are employed in a critical-service department whose function is to promote public safety, order and welfare so that a work stoppage would threaten community safety. *Metropolitan Council No. 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299 (1980). The contracts between Wayne County and Locals 502 and 3317 contain the following provision:

> It is hereby agreed between the parties that all of the employees in the Bargaining Unit are subject to the hazards of police work and perform duties of a critical service nature. It is further agreed that, since the continued and uninterrupted performance of these duties is necessary for the preservation and promotion of the Public Safety, Order and Welfare, all of the employees in this Bargaining Unit are subject to, and entitled to invoke the provisions of 1969 PA 312 for the resolution of disputes.

In 2004, during bargaining for the parties' first collective bargaining agreements, the Locals 502 and 3317 filed petitions for Act 312 arbitration. In June, 2005, WCAA proposed to eliminate the above provision from future contracts. Both Unions, alleging that the proposals were illegal subjects of bargaining, demanded that WCAA withdraw

the proposals and if they were not, they would file unfair labor practice charges, seek declaratory rulings from the Commission that would grant them permanent rights to Act 312 arbitration and would not continue bargaining until declaratory rulings were obtained. WCAA refused Charging Parties' request but offered to continue bargaining on other open issues and return to its proposals later.

Conclusions of Law:

Respondent claims that it did not engage in illegal subjects of bargaining because recourse to binding, interest arbitration is, at best, a permissive subject of bargaining. According to Respondent, if the ability to resort to interest arbitration is based in contract, it was within its right to propose to eliminate the contractual provision. Respondent further asserts that the Commission has exclusive jurisdiction to decide Act 312 eligibility questions and that the Legislature lacks authority to undermine, by "special interest" legislation, the Commission' exclusive jurisdiction and related administrative and judicial precedent concerning Act 312 eligibility. Respondent also claims that the Unions' members are not eligible for Act 312 arbitration because they are not employed in a critical-service department whose function is to promote public safety, order and welfare so that a work stoppage in that department would threaten community safety.

I find no merit to any of Respondent's arguments. Before the Legislature enacted Act 90, members of Charging Parties' bargaining unit were Act 312-eligible not only because of provisions in the parties' agreements, but also by statute. It is undisputed that the employees were subject to the hazards of police work. Further, although some were assigned to the Department's Airport Division and worked at the airports, they were all employed by the Wayne County Sheriffs Department, a critical-service department whose function is to promote public safety, order and welfare so that a work stoppage would threaten community safety. *Metropolitan Council No. 2, supra.*

The Legislature, in clear and unambiguous language, mandated in Section 119(2) that if transferring employees had a right, by contract and statute, to submit unresolved disputes to binding arbitration, they shall continue to have that right. I find that because employees who transferred from Wayne County to WCAA had a right, by contract and by statute, to submit unresolved disputes to binding arbitration, they continue to have that right. The Legislature's inclusion of Section 119(2) in Act 90 is evidence of its intent to preserve a benefit that bargaining unit members might have lost by transferring to the WCAA.

The Commission, which has exclusive jurisdiction to determine Act 312-eligibility, is a creature of the Legislature. It is well settled that quasi-judicial administrative agencies, such as the Commission, lack authority to challenge the Legislature's authority to enact legislation or to rule on its constitutionality. I find, therefore, that Respondent is in the wrong forum to challenge the Legislature's authority to include Section 119(2) in Act 90.

Based on the above findings of fact and conclusions of law, I conclude that Respondent violated it duty to bargain in good faith by proposing to eliminate Act 312 arbitration for members of Charging Parties' bargaining unit who transferred to the WCAA in accordance with provision of Act 90. I have carefully considered all other arguments advanced by the parties and conclude that they do not warrant a change in the result. I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

Respondent Wayne County Airport Authority, its officers and agents, are hereby ordered to:

1. Cease and desist from proposing to eliminate Act 312 arbitration for members of Charging Parties' bargaining unit who transferred to the WCAA in accordance with provision of Act 90 of the Public Acts of 2002, MCL 259.108 *et seq.*

2. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted for 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated:

NOTICE TO EMPLOYEES

After a public hearing, the Michigan Employment Relations Commission found that the Wayne County Airport Authority committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Based upon the Commission's order, we hereby notify our employees that:

WE WILL NOT propose to eliminate Act 312 arbitration for members of Charging Parties' bargaining unit who transferred to the WCAA in accordance with provision of Act 90 of the Public Acts of 2002, MCL 259.108 *et seq.*

All of our employees are free to engage in lawful, concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid or protection as provided by Section 9 of the Public Employment Relations Act.

WAYNE COUNTY AIRPORT AUTHORITY

BY: _____

TITLE: _____

Dated: _____

Direct questions about this notice to the Michigan Employment Relations Commission,

3026 W. Grand Blvd, Ste. 2-750, Box 02988, Detroit, MI 48202. Phone (313) 456-3510.