STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GARDEN CITY PUBLIC SCHOOLS,
Public Employer,

Case No. R06 I-110

-and-

MICHIGAN EDUCATION ASSOCIATION,
Incumbent Labor Organization,

-and-

TEAMSTERS STATE, COUNTY, AND MUNICIPAL EMPLOYEES LOCAL 214,
Petitioner-Labor Organization.
_____/

APPEARANCES:

Miller, Canfield, Paddock & Stone, P.L.C., by Beverly Hall Burns, Esq., for the Public Employer

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for the Petitioner

Law Offices of Lee & Clark, by Michael K. Lee, Esq., for the Incumbent Union

DECISION AND DIRECTION OF ELECTION

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, this case was heard on December 1, 2006, before Doyle O'Connor, Administrative Law Judge for the Michigan Employment Relations Commission. Pursuant to Sections 13 and 14 of PERA, and based upon the entire record, including the transcript of hearing, oral closing argument, and briefs filed by the parties on or before December 27, 2006, the Commission finds as follows:

The Petition:

In the petition, filed on September 22, 2006, and amended with consent of all parties at the hearing on December 1, 2006, Teamsters Local 214 (Teamsters) seeks to replace the

Michigan Education Association (MEA) as the exclusive representative of an existing bargaining unit of nonsupervisory non-instructional support personnel employed by the Garden City Public Schools (Employer or Garden City). The unit is described as consisting of "bus drivers, bus aides, mechanics and groundskeepers, custodians, skilled trades, and cafeteria workers, and excluding supervisors, administrators, and all other employees."

Position of the Parties and Findings of Fact:

Background

The MEA and the Employer are parties to a collective bargaining agreement that expired on June 30, 2006. The petition filed by the Teamsters encompasses the entire unit presently represented by the MEA.

All parties agree that the Commission should conduct an election. In dispute is whether individuals who had been employed in several specific classifications in the custodial and food service fields, but who are not actively employed at present, should be allowed to vote in that election. At the time of the hearing, there were approximately forty active employees. Approximately thirty-one individuals had been laid off, and of those, nine had retired, thereby giving up any recall rights, leaving twenty-two individuals on layoff status. The MEA asserts that these twenty-two laid off individuals who retain recall rights should vote, with the Teamsters objecting, and the Employer remaining neutral on the question. All parties agree that the individuals in dispute are non-instructional support personnel and that the Employer has subcontracted the entirety of their former work to an outside provider on a long-term basis. It is undisputed that the individuals in question may retain the right to recall to available vacancies for a period of years, depending on their individual seniority.

The Teamsters filed a pre-trial motion seeking an order that an election be conducted without holding a hearing. They asserted that there are no material facts in dispute, as all parties agree that the work in question had been subcontracted on a multi-year basis, and there was no duty to bargain by a public school employer over such subcontracting work of non-instructional support personnel. The Teamsters asserted that there could not be any conceivable factual basis for finding that the former employees had a reasonable expectation of recall to active employment in the foreseeable future. The MEA, in response, demanded a hearing on the basis that the Commission rules required one. The response by the MEA did not identify any material factual dispute; rather it asserted that the MEA did not know what the facts were as no hearing had yet been held. The Employer took no position on the Teamsters' motion. The issues raised by the motion were taken under advisement.

Contractual Layoff and Recall Provisions

The expired contract provides for layoff, and recall from layoff, by seniority within broad classification groupings. The custodian series of classifications under the MEA contract includes both positions that are in the skilled trades and 'general custodian' positions that perform traditional janitorial work. The cafeteria workers group includes cook manager, cook, and cook

helper positions. Recall within both of the broader groups requires an available vacancy, sufficient seniority, and the requisite qualifications for the particular position, with the Superintendent making the final determination on qualifications. Seniority for recall is retained for the number of years that the individual was a bargaining unit member, which, for some affected individuals, exceeds twenty-five years. Individuals currently on layoff status as a result of the subcontracting are receiving no income from the Employer, but they were provided health care insurance through December 2006.

The Employer has had prior experience with routine layoffs which resulted in some later recalls to employment; however, there has never previously been a layoff resulting from a decision to subcontract an entire work function.

The Custodian Classification

In June of 2006, the Employer exercised its statutory power to subcontract all of its janitorial work. A contract was entered into between the Employer and Grand Rapids Building Services, Inc. (GRBS), which runs for three years from July 1, 2006. The GRBS contract may be automatically renewed for an additional three years, and may alternatively be terminated by the Employer with 150 days notice, provided that if the termination is within the first year of the contract, a penalty of just under two hundred thousand dollars would be owed to GRBS.

As a result of the July 1, 2006 GRBS contract, all of the twenty-eight janitorial custodians in the unit were laid off. Since then, nine of the janitors have taken retirement, thereby surrendering their contractual recall rights, leaving nineteen janitors on layoff status. No janitors have been recalled to employment.

The decision to subcontract out the janitorial work was recommended by the administrative staff of the schools, with Superintendent Richard Witkowski having final authority over that recommendation. The elected school board made the ultimate decision to subcontract. Witkowski testified that the Employer is satisfied with the performance of GRBS.

The contract with GRBS provides for a process by which the Employer will notify GRBS of any perceived deficiencies in their performance. The Employer has made no such claim of deficiency. There has been no discussion among the administrative leadership of the Schools to consider the termination of the GRBS contract.

The Employer has no recalls scheduled and no present intent to recall any custodians from layoff. Witkowski testified that there is nothing to indicate that even the most senior of the laid off custodians would be recalled in the foreseeable future. The only possibility for recall would be if an existing employee in a skilled trades position retired, or otherwise left employment, and an individual on layoff from a janitorial position happened to have the requisite skills for that position. The MEA's unit president, Bob LeFevre, acknowledged that he was not certain that any of the janitors on lay off were qualified to take over a skilled trades position if one did open up as a result of the retirement of an incumbent.

A series of eight e-mails was introduced at the hearing detailing concerns raised by various school employees regarding the quality of janitorial services provided by GRBS. The e-mails were from the first two months of the school year and ranged from complaints to compliments about problems perceived and then resolved. Witkowski was aware of some, but not all, of the concerns and they did not alter his firm assertion that the school board was satisfied with the performance by GRBS.

The Cafeteria Worker Classifications

By at least July 1, 2004, Garden City had subcontracted a significant portion of its food service program to a private vendor, ARAMARK. Effective July 1, 2006, the remainder of the cafeteria work was contracted out to ARAMARK. The food service workers who were still working were laid off effective June 28, 2006 and retain recall rights. No food service workers have been recalled to employment and no food service employees currently work for the Schools. The current contract between ARAMARK and Garden City runs for one year and is renewable for an additional two years.

Garden City is satisfied with the work performed by ARAMARK. No problems with ARAMARK's performance have been identified, and consequently, no notice of deficiency has been given to ARAMARK. There are no recalls scheduled and no present plans or intention to recall food service employees. The Employer did not foresee any recall of individuals laid off as a result of the food service subcontracting.

Discussion and Conclusions of Law:

The paramount function of a representation election is to provide an opportunity for affected employees to select, or reject, a union to serve as their exclusive representative. Here, an election must be ordered as the petition raises a question concerning representation regarding an undisputedly proper bargaining unit. The MEA proposes that two groups of laid off former employees should vote, as the election may have an impact on their future conditions of employment. The Teamsters object, asserting that it would be improper to allow individuals with, at most, a speculative interest in the outcome of the election to vote on, and perhaps determine, the selection of an exclusive bargaining agent for active employees. The numbers involved are significant, with a unit of approximately forty active employees and with the MEA proposing that an additional twenty-two former employees (nineteen custodians and three food service workers) be allowed to vote.

Public employees are defined by the Act as being those individuals who actually hold "a position by appointment or employment in. . . .the government of 1 or more subdivisions of this state." MCL 423.201(1)(e). The disputed individuals are not presently employed. The test for the eligibility of laid-off former employees to vote in a representation election is whether or not there is a reasonable expectation of recall, which can be objectively ascertained by examination of the employer's past experience with recalls, the circumstances surrounding the layoffs, what the employees were told about the likelihood of recall, and the future plans of the Employer. *Goodwill Industries of Muskegon*, 1987 MERC Lab Op 278; *NLRB v Seawin, Inc*, 248 F3d 551

(CA 6, 2001). Where recall to employment appears unlikely, the individual is ineligible to vote. *Goodwill*. Where a layoff is not a mere seasonal layoff, but is a result of underlying business considerations, and the employer does not anticipate recalling the individual in the foreseeable future, the individual is not eligible to vote. *Soo Imports*, 1968 MERC Lab Op 217. The mere possibility of recall in the event of future changes in business circumstances is not sufficient to grant eligibility; rather there must be some concrete basis for concluding that the individual will be recalled to employment within a reasonable time frame. *Chesterfield Twp*, 1976 MERC Lab Op 904. It is improper to allow individuals without a reasonable expectation of returning to work to vote, as to do so could allow an election to be determined by individuals with no real stake in the outcome. *Wenger Construction*, 1974 MERC Lab Op 243.[1]

The primary relevant factor here is the circumstances surrounding the layoffs.[2] Garden City Schools has eliminated, for all practical purposes, its direct involvement in providing janitorial or cafeteria services. Pursuant to its statutory authority, it has subcontracted out these non-instructional support services. It no longer has the duty to bargain with the incumbent Union over that decision to subcontract. MCL 423.215(3)(f). These were not seasonal layoffs, nor were they the result of a temporary budgetary shortfall. There is no objective basis to support a conclusion that the Employer will reverse its decision to eliminate these two entire sections of its workforce, and there is no likelihood that the decision to subcontract work will be reversed at any time in the foreseeable future.

The second significant factor is the intention of the Employer. It has signed multi-year contracts with significant penalties for early termination. Based on the stated intentions of its superintendent, and upon the objective absence of institutional complaints about services provided by the janitorial and food service contractors, there is not even an arguable possibility, much less a reasonable expectation, of the recall of these individuals in the foreseeable future. The handful of e-mailed staff criticisms about the subcontractor's performance during the first two months of the school year was unpersuasive, as several of the e-mail exchanges established that the contractor had promptly and adequately addressed the staff complaints. The superintendent was aware of, and unswayed by, the several staff complaints about services.

There are no janitorial positions in existence to which the nineteen laid-off custodians could be recalled. As noted, the mere contractual entitlement to recall to potentially available positions does not give rise to a reasonable expectation that custodial positions will become available. Former janitorial custodians could theoretically be recalled to more skilled positions. However, there are currently no vacancies and none are anticipated. If a vacancy occurred, for example through retirement of a currently employed carpenter, a custodian would be eligible for recall from layoff, but only if the custodian possessed the necessary carpentry skills. Even MEA unit president LeFevre could not claim that any of the laid off custodians actually possess those prerequisite skills. The mere speculation that a skilled trades employee *might* at some point retire, and that one of the laid off custodians *might* have the needed skills to be recalled to the

[1] The MEA inappropriately relies on, and misstates, the holdings in, *Black Angus*, 1974 MERC Lab Op 29, and *Arenac Co and Sheriff*, 1989 MERC Lab Op 117. Both cases involved employees who had in fact been recalled to employment prior to the election.

[2] The Employer's prior experience with layoffs is unilluminating, as it had no prior expericnce with layoffs that occurred as a result of contracting out an entire business function.

position, cannot create a reasonable expectation of recall of any employees and certainly not of any particular employee.

All cafeteria positions have been eliminated. It was not done on a whim. The Employer first subcontracted a part of its food service to ARAMARK. After several years of service satisfactory to the Employer, it subcontracted the remainder of the cafeteria work to ARAMARK. There are no alternative classifications to which cafeteria workers could be recalled, as their entire seniority group has been eliminated. There was no testimony that there had been any complaints at all about ARAMARK's performance. There is not even a possibility based on speculation, much less a reasonable expectation, of the recall of the three individuals to the cafeteria classifications.

In conclusion, we find no plausible, or even a reasonable, basis for concluding that any of the affected individuals in either of the classification groups at issue will be recalled to active employment in the foreseeable future. We conclude, therefore, that none of the laid off individuals here are eligible to vote in the election we direct below.

ORDER

We conclude that a question concerning representation exists within the meaning of Section 12 of PERA. Accordingly, we hereby direct an election in the following unit, which we find appropriate for collective bargaining purposes within the meaning of Section 13 of PERA:

> All bus drivers, bus aides, mechanics and groundskeepers, custodians, skilled trades, and cafeteria workers, and excluding supervisors, administrators, and all other employees.

Pursuant to the attached Direction of Election, the individuals actively employed in the above classifications as of the date of this Order will vote on whether they wish to be represented for purposes of collective bargaining by the MEA, by Teamsters Local 214, or by neither union.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____