STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OAKLAND COUNTY and
OAKLAND COUNTY SHERIFF,
Public Employers – Unit Clarification Petitioners,

Case No. UC06 J-031

-and-

OAKLAND COUNTY DEPUTY SHERIFFS ASSOCIATION,
Labor Organization.
_____/

APPEARANCES:

Butzel Long by Malcolm Brown, Esq., and Craig Schwartz, Esq., for the Public Employers

Webb, Englehardt & Fernandes PLLC by L. Rodger Webb, Esq., for the Labor Organization

DECISION AND ORDER ON MOTION TO DISMISS PETITION FOR ACT 312 ARBITRATION AND PETITION FOR UNIT CLARIFICATION

Pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and 423.213, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ), acting on behalf of the Michigan Employment Relations Commission. This matter was initiated by the Employer's motion to dismiss, in part, the earlier petition for Act 312 arbitration filed by the Labor Organization, and by the Employer's petition for clarification of the bargaining unit. Based upon the entire record, including the transcript of the oral argument of April 26, 2007, and the multiple briefs filed by the parties, the Commission finds as follows:

The Parties and the Nature of the Dispute

The parties to this matter are Oakland County and its Sheriff (collectively referred to as the Employer) and the Oakland County Deputy Sheriffs Association (the Union), which represents a bargaining unit of uniformed employees of the Sheriffs Department. The parties have been without a collective bargaining agreement since 2003. On or about August 31, 2006, a petition was filed by the Union under Act 312, 1969 PA 312, as amended by 1976 PA

203, and 1977 PA 303, MCL 423.231-247, which provides for interest arbitration to resolve disputes regarding the terms of new collective bargaining agreements covering certain employees of police or fire departments. On September 12, 2006, the Employer brought a motion to dismiss the Union's petition in part, asserting that the conditions of employment for the majority of the employees included in the Union's petition were not covered by the Act 312 provision for interest arbitration.

The Employer's motion relied on the fact that the existing bargaining unit was a mixed unit of Act 312 covered and non-covered classifications certified in the 1970s, prior to the Commission's 1984 finding that such mixed units would no longer be certified. The Employer acknowledged that the approximately 340 employees in its Patrol Services Division are engaged as policemen, within the terms of the statute, and are therefore covered by Act 312. However, it asserted that over 400 employees in its Corrections Division (including circuit court and district court staff), plus five or six forensic laboratory specialists and six circuit court investigators in the Investigative and Forensics Division, are not included within the scope of Act 312. The Employer requested partial dismissal of the Act 312 petition as to the non-covered employees, or in the alternative, clarification of the bargaining unit.

The Union responded to the Employer's motion and brief with a two-page letter dated October 4, 2006, which opposed the relief sought, asserting that unspecified factual issues precluded the granting of the Employer's motion and required an evidentiary hearing. The Union's letter likewise opposed severing the bargaining unit into two units based on Act 312 coverage.

The Procedural History

The Employer's petition was referred for review by an administrative law judge. The Act 312 petition was nonetheless assigned to an arbitrator and Act 312 arbitration proceedings have been scheduled before that arbitrator.

On December 22, 2006, a formal notice was sent, after consultation with counsel, setting this matter for hearing on February 5, 6, 8, and 9, 2007. The Union brought a motion to adjourn those hearing dates and a conference was held with counsel on January 4, 2007, at which the Union asserted that it needed additional time to prepare to present multiple witnesses and "voluminous" evidence in support of the undisclosed factual issues requiring an evidentiary hearing. The Union's request was granted, and the hearing was moved from February 2007 to April 2007.

A formal pre-trial conference was held on February 6, 2007, pursuant to Rule 172(2) of the Employment Relations Commission's General Rules, 2002 AACS, R423.172(2), in an attempt to clarify the issues in dispute and to regulate the course of the hearing. The Union again asserted that "voluminous" evidence would be offered and that an extensive hearing schedule would be required. Although the Union did not identify any factual issues with particularity, at its request, seven days of hearing were scheduled.

In a further effort to ascertain what factual disputes required so many days of hearing, a pre-trial order was issued on February 12, 2007, requiring both parties to brief certain issues, focusing particularly on the application of the law to the anticipated proofs and the question of what material disputes of fact existed as to each of the several specific classes of employees in dispute. The order also required the disclosure of anticipated expert witnesses and the exchange of certain exhibits, and set the date for a final pre-trial conference.

The order's briefing deadline of March 7, 2007 was extended by request of the parties to March 12, 2007. The Employer timely filed a brief which complied with the order. The Union timely filed a brief limited to addressing the status of deputies directly employed in jail work and did not address claims as to the Act 312 coverage of the disputed categories of forensic laboratory specialist, circuit court investigator, corrective services staff assigned to the circuit court and district court, and complex patrol. The Union did not identify what it believed to be the proper legal standard to apply to corrections work and provided no response to that portion of the order that expressly directed it to identify "what material disputes of fact, if any, they believe need to be resolved regarding each of the contested employee groups."

On March 15, 2007, the Employer filed a motion to compel compliance with the pre-trial order, asserting that the Union's non-complying brief interfered with the Employer's ability to properly and timely prepare for the hearing. On March 16, 2007, the Employer filed a motion seeking additional time to identify its expert witnesses, which it asserted was needed as a consequence of the Union's failure to comply with the pre-trial order. The Union did not file responses to either of those motions.

The final pre-trial conference was held, on the record, on March 19, 2007. At that conference, the Union again did not identify any material dispute of fact warranting a hearing in this matter. It relied, instead, on the assertion that, as to sheriff's deputies assigned to corrections work, the courts and the Commission, for nearly thirty years, had applied the wrong legal standard in analyzing eligibility for Act 312 proceedings, and that the sole proper standard was whether corrections deputies were "subject to the hazards of police work."

Following that final pre-trial conference, and based on the Union's failure to identify any material dispute of fact warranting an evidentiary hearing, a supplemental pre-trial order was issued that granted the Employer's motion to compel compliance by the Union with the earlier pre-trial order and directed the Union to file a supplemental brief addressing specific issues of fact and law, supported by specific offers of proof and affidavits, no later than March 29, 2007. When the deadline of March 29, 2007 passed, the Union had not filed a supplemental brief and had not asked for an extension of time.

The ALJ, in an order of April 2, 2007, found that the Union had abandoned any legal or factual claim it might have had regarding the Act 312 status of the disputed categories of forensic laboratory specialist, circuit court investigator, correction services division staff assigned to the circuit court and district court, and complex patrol officers. The order found that the Union had offered no factual basis that would justify denying the Employer's motion to dismiss the Act 312 petition as to those challenged classifications. Consistent with the fact

that the Union had been cautioned, on the record in the pre-trial conference and in the subsequent order, that no evidentiary hearing would be necessary if it failed to establish the existence of a legitimate dispute of material fact, the April 2, 2007 order also limited the Union to advancing its position by way of oral argument on the Employer's motion to dismiss. The evidentiary hearing was cancelled, and oral argument was set for April 26, 2007.

On April 10, 2007, the Union filed a motion for reconsideration of the April 2, 2007 order. In an order issued April 18, 2007, the ALJ denied the motion finding that, even with its motion to reconsider and its supplemental pre-trial brief of April 10, 2007, the Union had not established the existence of a material dispute of fact. The April 18, 2007 order found that the Union had repeatedly asserted that there were no significant factual disputes, claiming that the case law has consistently misinterpreted the scope of Act 312. The ALJ reserved consideration of the Union's motion for reconsideration in part and only as to the corrections deputies assigned as complex patrol officers, finding that there may have existed questions of fact regarding the duties of the complex patrol officers despite the fact that the Union had failed to support its factual claims with proper affidavits.

The Union's request to adjourn the April 26, 2007 oral argument on the Employer's motion to dismiss was opposed by the Employer and was denied. Oral argument was conducted on April 26, 2007. Immediately following the oral argument, the parties took up the issue of the complex patrol officer category, on which the ALJ had reserved consideration of the Union's motion for reconsideration. The Employer then conceded that the complex patrol officers were properly construed to be police officers and subject to Act 312 constraints.[1]

Findings of Fact:

The bargaining unit consists primarily of employees classified as deputy I or deputy II. There are additionally the classifications of forensic laboratory specialist and the newly accreted classification of circuit court investigator. All deputies are currently covered by a single collective bargaining agreement and wage rates and benefits are essentially the same, regardless of whether they are assigned to the Patrol Services Division, Investigative and Forensics Division, or to the Corrections Division.

[1] The Union appeared at our June 2007 Commission meeting to request leave to file a post-oral argument brief. Although our rules do not provide for such filings, we instructed the Union to file its proposed brief by no later than July 16, and gave the Employer until July 23 to file a brief in response to the Union's motion for leave and, if it chose, a reply brief to the Union's proposed post-oral argument brief. The Union filed its brief on July 16, and on July 23, the Employer filed its reply brief, indicating that it did not oppose the Union's motion for leave to file post-hearing briefs. With the Union's motion unopposed, we find that the proposed additional briefing could aid our consideration of the matters before us, and for that reason, the respective post-oral argument briefs were accepted and considered.

Patrol Services Division

The three hundred plus road patrol deputies, whose status is not in dispute, are all required as a precondition for employment to have and to maintain certification as law enforcement officers by the State through the Michigan Commission on Law Enforcement Standards (MCOLES). Such certification is required by statute for any individual "responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state." MCL 28.601, *et seq.* Most, but not all, road patrol officers are ranked as a deputy II and many, but not all, began their careers as a deputy I in the Corrections Division. As a result of prior service in the jail, many, but not all, road patrol officers are certified as required for jail guards under the Local Corrections Officers Training Act (LCOTA), MCL 791.531. The training and certification by MCOLES is more extensive and time consuming than the training under LCOTA. Road patrol deputies are issued, trained in the use of, and authorized to carry a firearm while on and off duty. They exercise full law enforcement authority. Road patrol deputies work in the separate Patrol Services Division, headed by Major Damon Shields.

Corrections Division

Most of the nearly 400 corrections deputies are assigned to work in the main jail or one of several satellite facilities, which collectively contain approximately 2,000 prisoners. The Corrections Division, including court services, is headed by Major Charles Snarey and has a chain of command separate from the road patrol. The main jail/annex and work release facility are located in the Oakland County Service Complex in Pontiac, and are within several hundred yards of each other. The Trusty Camp, Boot Camp, and Frank Greenan Detention Facility, are adjacent to each other and located in Auburn Hills. The final satellite facility is the Southfield Jail Facility, which adjoins the Southfield Police Department in the Southfield Civic Center Complex. Corrections deputies may be classified as either deputy I or deputy II. In neither case are corrections deputies working as jail guards required by the Employer, or by statute, to be MCOLES certified police officers.

All corrections deputies must be certified under LCOTA, within a year after they are hired. Corrections deputies have firearms training but deputies assigned to the jails are not ordinarily authorized as part of their employment to carry firearms on or off duty. Corrections deputies may be promoted to deputy II and may seek and secure MCOLES certification to thereby become eligible for transfer to the road patrol service. Corrections deputies who have secured MCOLES certification do not work in road patrol, except in emergencies. Corrections deputies are issued official deputy sheriff uniforms, but the majority wear fatigues instead of the formal uniform. Corrections deputies could become involved in preventing escapes or in recapturing prisoners, and are subject to assaults by prisoners.

The corrections division also includes the three officers assigned to patrol the Oakland County Service Complex in an assignment known as Complex Patrol. These individuals are required by the Employer to be MCOLES certified. While initially in dispute, by the

conclusion of the proceedings the Employer withdrew its motion to dismiss as to the complex patrol assignment, conceding that the regular duties of that assignment were akin to those in the road patrol positions, which were not in dispute.

The final category, or subset, of Corrections Division deputies are those assigned to the courts. They fulfill several functions. Deputies assigned to court security control access to the building and function similar to airport screeners. Most deputies working in this capacity are part-time employees who are not part of the unit and, therefore, are not in dispute. The remaining deputies assigned to court service transport prisoners and maintain custody of them while they are in the court building. The circuit court is accessed by an underground tunnel from the main jail. Prisoners are handcuffed and shackled during transport. Deputies may also transport prisoners to and from hospitals, other medical facilities, and other state institutions. Deputies may be directed by the court to take custody of individuals in the courtroom.

Investigative and Forensics Division

The six forensic laboratory specialists spend eighty-five percent of their time in the lab, and the remainder at crime scenes. When a technician arrives, the crime scene has already been secured by police officers from the County road patrol or other jurisdictions. While theoretically a possibility, it would be rare for a forensic laboratory specialist to be directly involved in an arrest or pursuit. While they wear a deputy uniform, and may be armed, the laboratory specialists are not required as a condition of employment to be MCOLES certified. Major Shields also heads the investigative and forensics division to which the laboratory staff is assigned. The Employer asserted, without counter, that those individuals could be "easily replaced" in the event of a strike by existing non-unit personnel in the forensics laboratory or by the State Police forensics laboratory.

The six circuit court investigators are in the same investigative and forensics division as the lab staff. These are special grant funded positions. They are involved in the enforcement of civil warrants and performing other work for the friend of the court office, with ninety-five percent of their work related to parents who are delinquent in child support payments.

Strike Replacement Plans

The Employer plans, in the event of a work stoppage by corrections deputies, to assign command officers, road patrol deputies, and other department personnel to perform the duties of the jail guards to maintain security.[2] It could additionally call in reserve officers and part-time non-bargaining unit deputies, or call upon applicants for employment. Over four hundred applicants have already passed the written and physical test for MCOLES pre-licensing. The County could, if needed, call upon the State Police or National Guard. Newly hired, or temporary, replacements for striking jail guards could be employed with minimal

[2] The vast majority of command officers and road patrol deputies have prior experience in the jail and could immediately assume the duties of corrections officers.

training and only require LCOTA certification within a year after being hired. Prisoners and detainees could be transferred to other jails, with multiple county jails alleged to be presently willing and able to house Oakland County prisoners and to send buses to pick them up. The County could seek permission to release non-violent misdemeanor prisoners. The County correctional facilities have automated devices for monitoring and securing prisoners, who could be 'locked down' in their cells to allow for minimum staffing. There are non-essential corrections services which could be curtailed during a strike, including the closing of some facilities. The Employer asserts that road patrol services would not be diminished by the steps needed to manage a strike by corrections deputies. Against these factual assertions, the Union only offered the generalized assertion that the guards could not be replaced without "implicating the public safety, order and welfare."

Discussion and Conclusions of Law:

This Commission and the appellate courts have heard multiple cases involving the question of the scope of coverage of Act 312. Typically, the cases have been driven by an attempt to expand coverage to include groups of employees who perceive such coverage as conferring an advantage to them in the collective bargaining process. The Commission has jurisdiction to resolve such disputes over the extent of coverage of Act 312. *City of Grand Rapids*, 1981 MERC Lab Op 327; *AFSCME v Oakland Co (Prosecutor's Investigators)*, 89 Mich App 564 (1979). In a prior proceeding, this very dispute over whether or not Oakland County non-road patrol deputies were covered by Act 312 was untimely raised and, therefore, was not substantively resolved. *Oakland Co*, 1983 MERC Lab Op 181.

Act 312, MCL 423.231, *et seq.*, as a supplement to the provisions of PERA provides:

> Sec. 1. It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.
>
> Sec. 2. Public police and fire departments means any department of a city, county, village, or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof, emergency medical personnel employed by a police department or fire department, or an emergency telephone operator employed by a police or fire department.

Act 312 interest arbitration functions primarily as a limitation on a certain narrow class of public employers, police and fire departments, which prevents them from exercising the rights normally held by public employers. When a good faith bargaining impasse is reached, public employers generally may unilaterally impose changes in conditions of employment. Act 312 prohibits covered police and fire departments from exercising that same power. As held by the Supreme Court, in reviewing the first significant challenge to Act 312,

compulsory interest arbitration acts to stay the hand of police and fire department employers, prohibiting them from unilaterally implementing changes in conditions of employment, and thereby, to minimize the likelihood of an unlawful response by employees:

> Unless there is some constraint on public employers, they may ignore legitimate negotiation demands of the employees and illegal strikes may result.
>
> The challenged act represents a legislative attempt to prevent the dire consequences of strikes or work stoppages by certain public employees—policemen and firemen.

Dearborn Firefighters Union v City of Dearborn, 394 Mich 229, 247 (1975). The concurring opinion by Justice Williams phrases the Act's purpose as avoiding strikes under those circumstances where "the public welfare *cannot endure* the impact of a work stoppage while awaiting the resolution of problems through ordinary negotiations." *Dearborn Firefighters Union*, at 293, (emphasis added). Justice Coleman, in her concurring opinion, similarly recognized the urgent goal of the legislation as avoidance of the sort of provocations which as a practical matter often sparked dangerous strikes despite their illegality, noting:

> In the private sector "impasse" often results in a strike. The employees refuse to accept the unilateral conditions imposed by the employer and withhold their services as a bargaining weapon. In the public sector strikes are prohibited but nevertheless do occur. If the public employees do strike, the public employer may resort to the courts in order to return the labor situation to status quo. By the time that court relief is obtained, however, the public may well have been left for a long period without the services and protection of the striking employees.
>
> When policemen engage in a strike, the community becomes immediately endangered by the withdrawal of their services. . . .
>
> The Legislature, with knowledge of the vital character of police and fire services and with reference to the specific recommendations of the Governor's Advisory Committee on Public Employee Relations (February 1967) moved to foreclose strikes to police officers and fire fighters by enacting 1969 Public Act 312.

Dearborn Firefighters Union, at 278-279.

In the instant case, the Union argues that the scope of coverage of Act 312 should be "liberally construed," based on the final clause of Section 1 of Act 312, MCL 423.231. The Union confuses the obligation to give "liberal construction" to the scope of remedies under the Act with an obligation to give a "liberal construction" to the scope of jurisdiction of that Act. The Union offers no compelling rationale, nor supportive case law, for the proposal that the facially narrow exception to the norm in public employee labor relations embodied by Act 312 should be expansively read. In keeping with the original precise focus of Act 312, every

appellate decision to date has given a narrow construction to the scope of jurisdiction of Act 312.

Dearborn Firefighters Union found that in Act 312, the Legislature intended to address only the risk of strikes by police and fire fighters which have the potential of causing immediate and dire consequences. Two years later, the Court of Appeals, in *Lincoln Park Detention Officers v City of Lincoln Park*, 76 Mich App 358 (1977), gave a similar narrow construction of the scope of Act 312's jurisdiction, finding that it did not cover all employees of a police department. The Court excluded employers of local jail guards from the Act's control, finding that:

> Compulsory arbitration statutes are generally limited to critical public employees. Work stoppages by certain public employees, *e.g*., police officers and fire fighters, can threaten the safety of the entire community and these statutes aim at preventing such work stoppages. Although it can be argued that a strike by non-critical police department employees could burden police officers with non-emergency duties, thereby adversely affecting the operation of the entire department and possibly causing indirect harm to the public due to weaker patrols or overworked officers, we do not think that the Act meant to be so all encompassing. Work stoppages by almost any group of public employees could theoretically cause an extra burden on the police department. For example, a strike by street and highway personnel could cause defective traffic lights to become unreported and force some police officers to shift to traffic directing duties thereby weakening other sections of the police force. . . We therefore . . . hold that section 2 . . . limited compulsory arbitration to employees of police and fire departments who were engaged as police officers or fire fighters or subject to the hazards thereof.

Lincoln Park Detention Officers, 358, 364-365, (citations omitted).

Within three years of the *Lincoln Park Detention Officers* decision, the Supreme Court had two similar cases before it involving the scope of coverage of Act 312. One involved investigators employed by Oakland County and the other involved jail guards employed at the Detroit House of Corrections.[3] The Court heard and decided the Oakland case and held the Detroit case in abeyance.

In *AFSCME v Oakland Co (Prosecutor's Investigators)*, 409 Mich 299 (1980), the Court adopted a construction of Act 312's jurisdiction much like that of the *Lincoln Park Detention Officers* jail guard case. At issue in *Oakland Co (Prosecutor's Investigators)*, were investigators who carried guns and badges on duty as part of their responsibilities, investigated crimes, effectuated arrests, and otherwise interacted with potentially dangerous individuals in a non-jail, non-controlled setting. Notably, all but two of the investigators were deputized as police officers by the County Sheriff. In finding that the conditions of

[3] *AFSCME v Oakland Co (Prosecutor's Investigators)*, 89 Mich App 564 (1979) and *Local 214 Teamsters v City of Detroit*, 91 Mich App 273 (1979).

employment of such employees were not controlled by Act 312, the Court held that Act 312 came into play only where the nature of work of the employees *and* the employing department's critical service function was such that a work stoppage would result in an imminent threat to public safety. The investigators were held not covered by Act 312 as their function was not the general enforcement of the criminal statutes of the State or the prevention of crime.

Following the decision in *Oakland Co (Prosecutor's Investigators)*, the Court of Appeals on remand found that conditions of employment of corrections officers in the Detroit House of Corrections were not governed by Act 312. See *Local 214 Teamsters v City of Detroit*, 103 Mich App 782 (1981). Coverage of jail guards was revisited in *Capitol City Lodge v Ingham Bd of Comm'rs*, 155 Mich App 116 (1986), where *Oakland Co (Prosecutor's Investigators)*, was again applied to find that county jail guards were not covered by Act 312, as a work stoppage by such employees would not pose an imminent threat to public safety, such imminent threat being a prerequisite to the Act's coverage. As in *Lincoln Park Detention Officers*, it was recognized that a strike by jail guards would place a burden on the sheriff's department, but that it would not directly jeopardize public safety, as the county could lock down the jail, staff it with road patrol deputies and supervisors, and hire new employees.

This Commission has consistently applied *Capital City Lodge*, as it is constrained to do, to reject every claim that conditions of employment for jail guards are covered by Act 312. See, *Mecosta Co*, 1989 MERC Lab Op 607; *Midland Co*, 1989 MERC Lab Op 923; *City of Detroit (Police Detention Facility)*, 1990 MERC Lab Op 598; *Washtenaw Co (Sheriffs Dep't)*, 1990 MERC Lab Op 768 (effectively overruling 1979 MERC Lab Op 671 which had found Act 312 coverage for Washtenaw jail guards); *Kent Co (Sheriffs Dep't)*, 1991 MERC Lab Op 549, 551-555; aff'd sub nom, *Kent Co Sheriff's Ass'n v Kent Co*, unpublished opinion of the Court of Appeals, (Docket No. 145186); lv den 446 Mich 878 (1994); *Macomb Co (Sheriffs Dep't)*, 1991 MERC Lab Op 542, 545-547*; Allegan Co*, 1991 MERC Lab Op 583, 585; *City of Detroit*, 1992 MERC Lab Op 76, aff'd 207 Mich App 606 (1994); *Saginaw Co*, 1992 MERC Lab Op 693; *Ottawa Co*, 1993 MERC Lab Op 661, 663-665 *Presque Isle Co*, 1993 MERC Lab Op 669; *Jackson Co*, 1994 MERC Lab Op 278, 280-282 (involving sworn deputies serving as corrections officers); *Montcalm Co and Sheriff*, 1997 MERC Lab Op 157; aff'd sub nom, *POAM v FOP*, 235 Mich App 580 (1999); *Tuscola Co (Sheriffs Dep't)*, 16 MPER 49 (2003). In particular, we reviewed and reaffirmed the prior decisions excluding jail guards from Act 312 coverage in our 1991 decisions in *Kent Co (Sheriffs Dep't)*, and its companion case, *Macomb Co (Sheriffs Dep't)*. Any possible doubt as to the propriety of our continued following of *Capitol City Lodge* was resolved when our *Kent Co*, decision was affirmed in 1994. Moreover, we must presume that the Legislature was aware of the 1977 *Lincoln Park Detention Officers* decision, and that it acted deliberately, when it later chose to amend Act 312 by Public Act 303 of 1977,[4] which extended coverage to emergency telephone operators employed by a police or fire department but did not extend coverage to corrections officers.

[4] Public Act 303 of 1977 was enacted with immediate effect January 3, 1978.

We most recently revisited this issue in *Tuscola Co (Sheriffs Dep't)*, in 2003, where we rejected claims for coverage regarding correctional deputies who were required by their employer to be MCOLES certified police officers. The testimony established that the Tuscola officers could be involved in making arrests, capturing escaped prisoners, and had even performed some duties of road patrol officers. While there was the possibility of such officers being called on to perform a police function occasionally, we held that fact was simply insufficient to find coverage under an Act designed only to protect the most critical services from illegal disruption. Coverage by Act 312 requires that law enforcement duties be a regular and continual requirement of employment. *Tuscola Co (Sheriffs Dep't)*, at 163.

The Union here argues that a jail guard strike in Oakland County would overburden road patrol deputies, and that such overburdening would then threaten public safety. We cannot ignore the unequivocal holdings in *Lincoln Park Detention Officers*; *Oakland Co (Prosecutor's Investigators)*; and *Capitol City Lodge.* The scope of authority and actual job duties of the Oakland County corrections deputies, even as asserted by the Union here, are indistinguishable from the jail guards addressed in our previous cases. While Oakland correctional deputies are on a career ladder that may, or may not, result in their eventual promotion to full police officer status, they are not police officers. They are only required to be licensed as guards. They run a jail, albeit larger than most. They do not have road patrol duties. They do not carry weapons, on or off duty, or engage in pursuits of criminal suspects. When working outside the jail and in the courts, they serve as transport officers, mobile jail guards indistinguishable from the transport officers in *Ottawa Co*.

The Union offered nothing to distinguish the handful of remaining disputed positions from comparable positions which we, and the courts, have previously excluded from Act 312. The Oakland County forensic laboratory specialists are no different from the crime scene technicians whom we found were not covered by Act 312 in *City of Grand Rapids*, 1979 MERC Lab Op 1058. The Union did not dispute the Employer's factual assertion that the crime scene technicians here could be "easily replaced" by other non-unit laboratory employees or by the State Police crime lab.

The friend of the court investigators possess less indicia of police officer status than the investigators found not covered by Act 312 in *Oakland Co (Prosecutors Investigators)*. The circuit court investigators are involved in civil enforcement, do not investigate crimes, and do not arrest felons. As with the forensic laboratory specialists, the Union did not dispute the Employer's assertion that these investigators could be easily replaced by law enforcement deputies in the event of an illegal work stoppage.

"Subject to the Hazards Thereof"

Act 312 expressly covers employers who have "*employees engaged as policemen, or in fire fighting or subject to the hazards thereof* [and certain additional categories of employees]." The Union's principal argument is that its corrections officer members should be deemed subject to the hazards of police work and that, as a consequence of such a factual finding, their conditions of employment should be held to be covered by Act 312. Prior cases

have presumed for purposes of argument, or ultimately, that the phrase 'subject to the hazards thereof' was intended to modify 'policemen.' See, e.g., *Lincoln Park Detention Officers*; *Oakland Co (Prosecutor's Investigators)*; *Capitol City Lodge*. We, therefore, find it necessary to consider that issue here to provide guidance to these parties, and future parties, regarding the scope of Act 312's coverage. Accordingly, the parties were directed to address whether the phrase "or subject to the hazards thereof" was intended by the Legislature to modify only the phrase "or in fire fighting" or was intended to likewise modify the term "policemen."

The section of the Act at issue, MCL 423.232(1), defines the employers covered by the Act as:

> Public police and fire departments means any department of a city, county, village or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof . . . .

When interpreting statutes, the goal is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665 (2004). If the plain and ordinary meaning of the language is clear, it must be enforced as written. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720 (2005). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *People v Spann*, 250 Mich App 527, 530 (2002). The phrase "employees engaged as policemen" is straightforward and we conclude that in 1969, as today, it is best understood as meaning only MCOLES certified police officers who enforce the general criminal laws of the State.

The wording and grammar supports the conclusion that the placement of the commas, in delineating the modifying language, was intentional on the part of the Legislature. Placing a comma after the word "policeman" together with the placement of another comma after the word "thereof," indicates that the phrase "or subject to the hazards thereof" was intended to modify only "fire fighting" and was not intended to modify "policemen." Had the Legislature desired to define the scope of coverage to be as expansive as sought herein by the Union, the proper phrasing would have been akin to "engaged in police *work* or in firefighting, or subject to the hazards thereof." This analysis of the sentence structure is further supported by the fact that when the Legislature subsequently expanded the scope of Act 312 to include certain emergency medical personnel and emergency telephone operators, those categories of employees were added to the sentence as appended clauses following, rather than preceding, the phrase "or in fire fighting or subject to the hazards thereof."

The history of the Legislative use of the precise phrase "in fire fighting or subject to the hazards thereof" supports a conclusion that the choice of wording, and the placement of commas, was not a mere unintended artifact of the legislative drafting process, but was instead a conscious and coherent choice of a then well understood term of art. That phrase appears to originate with MCL 123.841, *et seq*, which regulates the hours of work of fire fighters, and certain collective bargaining issues applying only to covered fire departments, and which is colloquially known among fire fighters as Act 125, for the Public Act number

assigned to it when first adopted in 1925. That statute currently provides, at MCL 123.841, that:

> It shall be unlawful . . . to require any person in the employ of the fire department who is engaged in fire fighting or subject to the hazards thereof to be on duty in such employment more than 24 hours, or to be off duty less than 24 consecutive hours out of any 48-hour period . . . .

(Emphasis added.) Act 125 again uses the same phrasing at MCL 123.482 in carving an exception from those hours of labor restrictions for:

> . . . any municipality, which by agreement with the collective bargaining agent representing affected employees, does not require its employees engaged in fire fighting or subject to the hazards thereof, to be on duty more than 40 hours in any consecutive 7-day period.

Because of its narrow drafting, Act 125 has been held to apply only to traditional fire departments, and not police departments, or merged public safety departments where employees perform both policing and fire fighting duties. *Kalamazoo Police Supervisors Ass'n v City of Kalamazoo*, 130 Mich App 513 (1983). Moreover, the *Kalamazoo* decision provides the precise historical origin of the phrase, as well as a compelling understanding of why it cannot be as broadly construed as proposed by the Union herein. As originally passed, Act 125 covered "any person in the employ of the fire department of such municipality." *Kalamazoo,* at 519. In 1942, the Michigan Attorney General opined that the phrase "any employee" had to be read literally to include in the Act's scope clerical employees, dispatchers, and others not directly engaged in fire fighting. The Legislature responded by amending Act 125 in 1947 to limit its scope to "*those engaged in fire fighting or subject to the hazards thereof*." These were, and remain, words of limitation designed to make clear that neither clericals nor police officers, or others, were to be covered by Act 125. *Kalamazoo,* at 520.

Act 125 was originally passed in 1925 and was amended with the relevant limiting language in 1947, some 22 years prior to the adoption of Act 312, and was a statute well known in the fire fighting community, and presumptively known to the Legislature. It is common knowledge that the principal architect of Act 312 was labor attorney Theodore Sachs, who was counsel for many years for the Detroit Fire Fighters and the Michigan Council of Fire Fighters. In drafting this section of Act 312, it is apparent that Sachs used limiting language with which he was very familiar and which applied only to fire fighters. Accordingly, we find that the historical derivation of the phrase supports a conclusion that the Legislature, at the time of the passage of Act 312, understood the phrase to be one of limitation, and one applicable only in the fire fighting field.[5] It is that contemporaneous

[5] This provision is not the only part of the scheme for public employee labor relations in which firefighters are treated differently. PERA was amended in 1976 to require that the Commission, when defining bargaining units, treat all employees subordinate to a fire commission as being non-supervisory and therefore eligible for inclusion in a single bargaining unit. MCL 423.213. Policemen are excluded from this special treatment.

legislative intent which is binding on our interpretation of the language. See *Detroit Edison Co v Dep't of Revenue*, 320 Mich 506; 31 NW2d 809 (1948).[6]

We hold that in Act 312, the modifying phrase "*or subject to the hazards thereof*" applies to the phrase "*engaged . . . in fire fighting*" and does not modify the phrase "*engaged as policemen*." Consequently, non-police officer employees of a police department, or county sheriff department as here, are not within the scope of coverage of Act 312.

Request for Clarification or Severing of the Unit

The Employer seeks to sever those who are covered by Act 312 from those who are not covered in this long established unit. In *City of Dearborn Heights*, 1984 MERC Lab Op 1079, we recognized that the availability of Act 312 interest arbitration was such a significant factor in labor relations that, for policy reasons, we would no longer certify mixed bargaining units of the sort under challenge in this proceeding.[7] That holding was premised on a finding that the creation of such mixed units did not foster stable or productive labor relations. We have since stated that coverage by Act 312 outweighed other factors ordinarily relied upon to establish community of interest when defining appropriate bargaining units, and that Act 312 coverage constituted an "extreme divergence of interests" sufficient to override our general policy of not disturbing existing units. *Ottawa Co*, 1992 MERC Lab Op 370. As stated in *City of Walker*, 1991 MERC Lab Op 60, "Our policy is to include all Act 312 eligible employees in bargaining units with other Act 312 eligible employees whenever possible."[8] Nonetheless, we have applied the *Dearborn Heights* rule prospectively and we have avoided ordering that all pre-existing mixed units be disturbed, again, with the goal of effectuating the purposes of the Act by fostering stability in labor relations.

The Act provides that an employer, or affected employees or their union or other representative, has equal power to initiate interest arbitration proceedings under Act 312. The Union's assertion that an employer may not properly seek to sever a mixed unit, presumes

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[6] In so holding, we do not ignore the fact that the decisions in *Oakland Co (Prosecutor's Investigators)*, *Capitol City Lodge*, and their progeny, including our own decisions in cases such as *Ottawa Co*, looked first to the factual test of whether employees in the challenged non-police officer categories were "subject to the hazards of police work." In each such case, the employee groups in question were found not subject to the "hazards of police work" and were, therefore, presumptively not covered by Act 312, or were found, or assumed for the purposes of review, subject to the "hazards," but were held still not governed by Act 312, as they were not "critical service" employees. We conclude that the "hazards" test was applied without reference to the original intent of the drafters of the legislation. Additionally, we note that the "hazards" test has never resulted in a non-police officer category being subject to Act 312, and has failed to provide adequate guidance, such that the issue continues to be raised. Regardless of how it was phrased, the determinative inquiry throughout has been whether or not the challenged employee category provided critical police or fire services such that public safety would be placed at imminent risk in the event of an illegal strike. See *Tuscola Co*, 16 MPER 49, p.163, where, in reliance on *Capitol City Lodge*, we held that the key determination is whether the employees are "critical service employees whose strike would threaten community safety."

[7] In a companion case, *City of Fenton*, 1984 MERC Lab Op 1086, we directed a severance election regarding a group of police dispatchers who had been included in an existing non-312 unit.

[8] We have repeatedly reaffirmed, as recently as *City of Riverview*, 20 MPER 6 (February 7, 2007), that a bargaining unit consisting of all Act 312 covered employees of the same department is a presumptively appropriate unit.

that Act 312 is an entitlement of which the covered employees were the sole beneficiaries. On the contrary, Act 312 functions primarily as an extraordinary restriction on the ordinary rights of certain public employers to unilaterally impose changes in conditions of employment when good faith negotiations have failed to result in agreement.

In *City of Cheboygan*, 1978 MERC Lab Op 251, an incumbent union petitioned to sever its existing mixed unit that included classifications covered by Act 312 and those that were not. Finding that we had previously routinely granted separate units to police officers because of their clearly separate interests[9] we granted the relief sought by the union in that case over the opposition of the employer, which argued against disrupting the pre-existing bargaining unit. Of particular note, in *Montcalm Co*, we addressed a dispute between competing unions. The incumbent sought to maintain an existing mixed unit of road patrol and corrections deputies, asserting that both groups shared coverage under Act 312, while the rival union sought to spin off the road patrol deputies, asserting that the corrections officers were not under Act 312. We concluded, and were affirmed in the conclusion, that splitting the existing unit was appropriate where only the road patrol deputies were covered by Act 312, as the Montcalm County corrections officers, like all others previously reviewed, could be replaced by road patrol officers, while the reverse was not true. See *POAM v FOP*, 235 Mich App 580 (1999).

Similarly, today we find no basis under PERA or under Act 312 to hold that a covered employer may never seek severance of a mixed bargaining unit, where the circumstances make severance appropriate. It is the employer that is principally burdened by Act 312, by having its ordinary prerogatives truncated. We have previously described the severing of an existing bargaining unit to remove police officers as supported by "over-riding policy considerations." *City of Kalamazoo*, 1983 MERC Lab Op 249. There is no logical basis for precluding an employer from seeking clarification of a unit's coverage by Act 312, where the statutory structure expressly allows that same employer to petition for arbitration under the Act in precisely the same fashion as a union may initiate proceedings.

We find that that prospective application of the *Dearborn Heights* rule has generally served parties well in the ensuing twenty-seven years. However, the singular facts of the present dispute persuade us that our practice regarding such pre-existing mixed units should not be inflexibly applied.[10] We must always have foremost in mind our obligation to "decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and to otherwise effectuate the purposes of this act, the unit appropriate for the purpose of collective bargaining" taking into account the need to define a unit which "will best secure to the employees their right of collective bargaining." MCL 423.213 and

[9] Our policy of providing separate bargaining units for police officers predates the passage of Act 312 and the creation of interest arbitration, which further altered the bargaining dynamics. See, *Wayne Co Sheriff's Dep't*, 1968 MERC Lab Op 287, where we excluded institutional guards, who exercised some police and firefighting duties, from a unit of police officers.

[10] In *Ottawa Co*, we dismissed a petition by an employer to sever a mixed unit which at the point of the petition was less than nine months old. In doing so we re-emphasized our preference for separate units, but suggested, in *dicta*, that severance should occur only based on a timely election petition by the Act 312 covered employees. The statute clearly allows either employees or an employer to file representation petitions. MCL 423.212.

423.9e. Here, we find that the existing mixed unit is not effectuating the purposes of the Act; to the contrary, the continued existence of this mixed unit has interfered in the normal and healthy give and take of bargaining anticipated under PERA and under Act 312.[11]

The parties' collective bargaining agreement expired in 2003. This has left the parties frozen in place, with no immediate mechanism for adjusting conditions of employment. By a significant margin, the majority of the existing bargaining unit are in job categories not covered by Act 312. The Act 312 arbitration petition seeks to have an arbitrator set conditions of employment for County road patrol officers and for over 400 employees who clearly function as jail guards. The bargaining process itself has been skewed by the inability of the parties to agree, or otherwise resolve, which groups of employees are covered by which dispute resolution mechanism. The intractable nature of the dispute between the parties was evidenced by the filing of an extraordinary number of unfair labor practice charges.[12]

Severing the existing unit results in one Act 312 covered unit of nearly 350 employees and a non-Act 312 unit of over 400 employees. Both resulting units are large by comparison with other public employee bargaining units and would clearly be of sufficient size to effectively engage in collective bargaining with the Employer over issues peculiar to their respective unit members. The two separate units may continue to be represented by the Union, which will act separately on behalf of each unit. The Employer will be able to bargain separate agreements with the two units without having issues that should properly be limited to one group impinging on negotiations involving the other. Therefore, we find it appropriate to direct the severing of the existing unit in order to foster more productive bargaining and to thereby effectuate the purposes of the Act.

Dismissal of Act 312 Petition on Motion

The Union concedes, at page 5 of its May 25 brief, that the Commission may properly, without a hearing, dismiss an Act 312 petition based on an employer's motion, but asserts that such dismissal without an evidentiary hearing should not occur in the present matter. In *Presque Isle Co*, 1993 MERC Lab Op 669, the Police Officers Association of Michigan (POAM) filed a petition seeking to have a dispute resolved through Act 312 arbitration involving individuals employed in a county sheriff's department as cooks, clerks, and correctional officers. The employer moved for dismissal of the petition and the ALJ, acting for the Commission, issued an order that the union show cause why the petition should not be dismissed. In the absence of a timely response by the petitioning union, and in the face of

[11] This finding, which may ultimately be limited to these unusual circumstances, is not intended to diminish our prior holding that a unit clarification petition is "not generally" appropriate to upset an existing collective bargaining relationship or to sever an existing unit. *Ottawa Co*, 1992 MERC Lab Op 370, 373-374. *Cf*, *Alpena Co*, 1997 MERC Lab Op 651, where, finding the employer's arguments "unpersuasive", we dismissed a motion to sever an existing mixed unit under circumstances where the parties were successful in negotiating a separate collective bargaining agreement for the non-Act 312 portion of the mixed unit.

[12] The parties, contemporaneous with the filing of the Act 312 petition, had at least fourteen separate unfair labor practice charges pending, which included over 38 separate counts or separately stated claims, most of which were filed by the Union against the Employer.

extensive and conclusive case law finding that cooks, clerks and correctional officers were not covered by Act 312, the Commission dismissed the Act 312 petition without any hearing.

In *Sault Ste Marie Area Pub Schs*, 1993 MERC Lab Op 895, the Commission faced a similar demand by a party to proceed to an evidentiary hearing in a traditional unit clarification case, where no material dispute of fact existed. The Commission concluded that it could properly decline to hold a hearing on a representation petition where a party seeks to litigate an issue where the law is well settled, relying on *MAPE v MERC*, 153 Mich App 536, 549 (1986), *lv den* 428 Mich 856 (1987); *Harrington House, Inc*, 1993 MERC Lab Op 211; *Independent Opportunities, Inc*, 1993 MERC Lab Op 222; and *Presque Isle Co*.

A similar issue affecting a representation petition was addressed by the Commission in *New House, Inc*, 1994 MERC Lab Op 32. There, the union asserted that the employer's position was contrary to well established case law. Based on the union's motion, the employer was ordered to "demonstrate by affidavit and/or documentary evidence that sufficient facts existed to distinguish" their claims from those made, and rejected, in prior cases. The Commission found that the employer in that instance had failed to adequately show cause why an evidentiary hearing was necessary, and granted the relief sought by the union.

We find it appropriate to dismiss the Act 312 arbitration petition in the present case, without an evidentiary hearing as to the Corrections Division employees, deputies assigned to the courts, the forensic laboratory specialists, and the circuit court investigator categories of employees. None of these employees are required by statute to be certified police officers, and the Union failed to file a timely response to an order directing it to establish by offer of proof or proper affidavit that a legitimate dispute of material fact exists which warrants the holding of an evidentiary hearing. Despite the Union's stated desire for an extensive evidentiary hearing, a mere promise to offer factual support at trial is insufficient to establish that a genuine issue of material fact exists. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 305 (2005). Moreover, the Union repeatedly asserted that it believed that there were no significant factual disputes, and it repeatedly articulated the explanation that its case was premised on an argument that the prior case law had consistently misinterpreted the scope of Act 312. With no facts in dispute, no evidentiary hearing is warranted as to those classifications. *Stage Manager Group v MERC*, unpublished opinion per curiam of the Court of Appeals, issued July 2, 2002 (Docket No. 229608); *Teamsters Local 214*, 16 MPER 74 (2003).

Furthermore, the Union's theory that the prior case law has been wrongly decided does not require an evidentiary hearing. As in *Presque Isle Co*, the Union here seeks to avoid dismissal of an Act 312 petition seeking interest arbitration of a dispute involving deputies working as jail guards. Just like the petitioner in *Presque Isle Co*, and the respondent employer in *New House, Inc*, the Union here was given ample opportunity to establish the need for an evidentiary hearing, but failed to do so. This matter, which involves a dispute

over the proper interpretation and application of existing law and not a dispute of fact, is properly decided upon oral argument on the Employer's motion to dismiss the petition.[13]

ORDER

The Employer's motion to dismiss on jurisdictional grounds the pending Act 312 arbitration petition is granted, in part. The portion of the Act 312 petition that sought interest arbitration to resolve disputes related to conditions of employment affecting the Employer's Corrections Division, as well as positions assigned as circuit court investigators or forensic laboratory specialists, is dismissed.

Further, the Employer's petition to clarify the bargaining unit is granted, for the reasons stated above. There shall be two separate units represented by the Oakland County Deputy Sheriffs Association. The first unit shall consist of all positions previously within the bargaining unit that are assigned to the Patrol Services Division (including the complex patrol assignments), or assigned to the Investigative and Forensic Services Division (excluding forensic laboratory specialists), and require MCOLES certification, or are assigned to positions as dispatchers. The second unit shall consist of all positions previously within the bargaining unit that are assigned to the Corrections Division or to circuit court investigator or forensic laboratory specialist positions.

Given the likely significant and appropriate impact of this decision upon the collective bargaining issues facing the parties, the petition for Act 312 arbitration is remanded to mediation as prematurely filed as to conditions of employment within the Employer's Patrol Services Division, Dispatch, and the Investigative and Forensic Services Division, a unit only today created by this Order. In the event that mediation does not secure voluntary resolution, the proceedings may be reinstated regarding the police officer and dispatcher unit at the request of either party, or upon the recommendation to the Commission by the mediator pursuant to R 423.504.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

[13] To the extent that other arguments were advanced by the parties which were not expressly addressed herein, we have considered them and found that they do not warrant a change in the outcome.