STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COUNTY,
Public Employer,

Case Nos. UC08 A-007,
UC06 J-032 & UC06 J-032-A

-and-

AFSCME COUNCIL 25, LOCAL 3052,
Labor Organization-Petitioner.
_____/

APPEARANCES:

Gallagher & Gallagher, P.L.C., by Paul T. Gallagher, Esq., for the Public Employer

Miller Cohen, P.L.C., by Richard G. Mack, Jr., Esq., for the Petitioner

DECISION AND ORDER ON PETITION FOR UNIT CLARIFICATION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 et seq, this case was assigned to Administrative Law Judge (ALJ) Doyle O'Connor, of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission.

The Petition and Positions of the Parties:

On October 13, 2006, a petition for unit clarification was filed by the American Federation of State, County and Municipal Employees, Michigan Council 25 and Local 3052 (the Union or AFSCME) seeking the inclusion of approximately twenty additional positions in an existing unit of supervisory employees of Washtenaw County (the Employer). On February 26, 2008, a related petition was filed seeking the inclusion of approximately forty-seven classifications, apparently comprising nearly seventy individual positions.

Rule 143 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.143 requires that every such unit clarification petition must, when initially filed, provide a statement of the reasons for clarification of the unit and include the approximate date that each position was either created or substantially changed. The petitions in this matter provided only a listing of a series of job classifications. Although the petitions in question did

not provide the information required by Commission Rules, the petitions were accepted. Extensive efforts at voluntary resolution were conducted by elections staff of the Bureau of Employment Relations prior to the consolidation of the matters and the transfer of the case in June 2008 to SOAHR for adjudication.

On June 30, 2008, counsel for the parties were directed by the assigned ALJ to provide additional detailed information by August 30, 2008. A formal hearing was set for October 27, 2008. On August 20, 2008, at Petitioner's request, the deadline to provide additional information was extended to September 15, 2008. At that time, the Union was expressly directed to provide the information required by Rule 143, including a list of the positions in dispute and the date each position was created. The Union did not file additional information by the extended deadline and did not request additional time in which to do so.

On August 22, 2008, the Employer provided a position statement in which it asserts that the unit clarification petitions should be dismissed as the petitions improperly sought to include in the unit positions that had long been excluded. The Employer contends, therefore, that the only proper mechanism for altering the unit would be a representation petition supported by a proper showing of interest. Additionally, the Employer provided detailed documentation from its records that purported to show that a substantial number of the positions in question were created years prior to the filing of the petitions. However, the Employer's documentation showed that a small number of positions had been retitled or reclassified within approximately a year of the petition. With respect to those positions, the Employer asserts that the incumbent employee in each position was retained and that the positions had each been excluded from the unit prior to and after the reclassification.

The Union did not respond to the Employer's August 22 contentions. For that reason, and because of the paucity of information provided by the Union, the ALJ issued an order on September 26, 2008, directing Petitioner to consider withdrawing its petitions as to any position in existence more than twelve months prior to the filing of the related petition or to show cause why the petitions should not be dismissed. Petitioner was ordered to specifically and factually address the following items with respect to each position listed in the two petitions:

1. Identify each position whose unit status the Union seeks to have clarified;
2. Provide separately, as to each position, the approximate date on which it was created, or, provide separately, as to each position, the approximate date on which it was substantially changed, together with a factually specific description of the nature of the change in each such position;
3. Provide separately, as to each position, a statement of the reason for the proposed inclusion of that position;
4. Provide separately, as to each position which was created or significantly changed more than twelve months prior to the filing of a petition, an explanation of why the petition should not be dismissed as to that position under the analysis set forth in *Jackson Pub Sch*, 1997 MERC Lab Op 290.

Petitioner filed a timely response to the Order to Show Cause. However, Petitioner's response failed to provide the minimum information required to initiate a unit clarification

petition. Other than putting forth the general contention that the positions at issue might be supervisory, Petitioner's response failed to provide specific explanations as to why each position should be included in its unit. The Union attached a chart to its response, Exhibit 3, which Petitioner states "reflects AFSCME's review of each employee's personnel file." However, neither that chart nor the text of Petitioner's response to the Order to Show Cause provide the approximate date each position was created or substantially changed. Instead, the Union offered to provide that information to the Commission as additional job descriptions were received from the Employer. The Union claimed it was unable to provide the required information about the positions listed in its petition because its Local Union president, elected in 2002, was only a part-time officer, and because the Employer had, until June 2006, failed to timely provide that Union officer with contractually required semi-annual lists of employee positions.

Petitioner's response also contends that the date the positions at issue were created or substantially changed is not determinative of whether the petitions are timely. Instead, Petitioner contends that the date determining the timeliness of the petitions is the date that Petitioner was reasonably expected to have known that the positions had been created or substantially changed. According to Petitioner, with respect to the positions listed in the initial petition, that date was sometime after Petitioner's Local Union president received her first semi-annual list of positions from the Employer in June 2006. Petitioner asserts that the list of positions on the second petition was developed after discussions with the Employer over the matters raised by the initial petition. The Union claims that, therefore, the petitions are timely and that an evidentiary hearing should be held.

On October 27, 2008, the Employer filed a motion to dismiss the unit clarification petitions. In that motion, the Employer disputes Petitioner's contention that the petitions should be considered timely. The Employer notes the Union's assertion that the most recently elected Local Union president, who took office in 2002, had not received the semi-annual lists of employees until 2006. The Employer points out that while several of the disputed positions were created many years before the current Local Union president was elected, the Union offers no explanation for its failure to act before she took office. Additionally, the Employer notes the Union's failure to explain why its president waited four years to raise the concern over the failure to receive semi-annual employee lists and contends that Petitioner has thereby waived any right to claim that it was unaware of the positions in question. Moreover, the Employer contends that information the Union claims it needs to meet the requirements of the Order to Show Cause are public records, which are available in multiple locations, including on-line. The Employer further asserts that it has provided the Union with all requested information. Finally, the Employer's motion seeks dismissal based on the Union's failure to provide information required by the Order to Show Cause.

The Union did not respond to the Employer's motion to dismiss the petitions.

Discussion and Conclusions of Law:

In designating a unit as appropriate for collective bargaining under Section 13 of PERA, a primary objective is to constitute the largest unit that, in the circumstances of the particular case, is most compatible with the effectuation of the purposes of the law and that includes within

a single unit all employees sharing a community of interest. *South Lyon Cmty Sch*, 19 MPER 33 (2006); *Hotel Olds v State Labor Mediation Bd*, 333 Mich 382 (1952).

The Commission Rules and its case law regarding unit clarification petitions are both well settled. As held in *Jackson Pub Sch*, 1997 MERC Lab OP 290, 299*:*

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to created a real doubt as to whether the individuals in such classification continue to fall within the category--excluded or included-- that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not by express consent.
>
> We have consistently held that where a position has been historically excluded from the unit by the acquiescence of the union, accretion to the unit by unit clarification is not appropriate. The excluded position becomes part of the residual unit and can be accreted to the bargaining unit only upon the filing of a proper petition for representation election. *City of St Clair Shores*, 1990 MERC Lab Op 99; *Lake Orion Community Schools*, 1988 MERC Lab Op 296. Positions in existence for as little as a year to 18 months before the filing of a unit clarification petition have been found to be historically excluded. See *Washtenaw Community College*, 1993 MERC Lab Op 781, 787-788.

Here, the petition was first filed in 2006 and expanded with a second petition filed in 2008. Neither petition provided the minimum information required by Commission Rules. The Order to Show Cause directed Petitioner to provide the information, with the Order expressly cautioning the Union that a failure to "timely and substantively respond" would result in dismissal of the petition without further proceedings. Even with that, Petitioner's response, in Exhibit 3, only identifies the date that two of forty-five positions were created; one on November 11, 2001 and the other on October 10, 2006. Exhibit 3 indicates the dates that several positions were reclassified, but does not explain whether the positions' duties were substantially changed at that time and, if changed, how they were changed. Petitioner indicates that at least one position was reclassified as long ago as 1996. Exhibit 3 lists the date of hire, promotion, or transfer for the incumbents of several positions, but with one exception, it does not indicate whether these positions were newly created, substantially changed, or unchanged pre-existing positions at that time. Of these, Petitioner lists one employee who was hired as far back as 1979, and several others who were placed in their current positions in the 1990's, 2000, or 2001, well before Petitioner's Local Union president took office. For several other positions, Petitioner has provided no information beyond the position's title. The one position for which Petitioner alleges facts that indicate unit clarification may be appropriate is listed on both petitions and

identified on Exhibit 3 as No. 23, WCHO division manager-9015-0003. According to Petitioner, after the individual employed in the bargaining unit position of health services supervisor left that position, the Employer hired the current employee in the non-bargaining unit position of WCHO division manager-9015-0003 on January 9, 2006 and assigned the position the same work that had been performed by the health services supervisor.

Petitioner argues that the petitions should be considered timely because it was unaware of the existence of the positions at issue before receipt of the June 2006 semi-annual employee lists. Petitioner relies on *City of Detroit (Fire Dep't)*, 20 MPER 79 (2007) and *Wayne Co Cmty Coll Dist*, 20 MPER 55 (2007) to support its contention that the petitions are timely, however, Petitioner's reliance is misplaced. The Commission found that the petitioners in the aforementioned cases had not acquiesced in the exclusion of the disputed positions from their bargaining units. In both cases, the exercise of reasonable diligence by the petitioners did not permit them to discover more quickly that their units should be clarified to include the disputed positions. With the possible exception of the WCHO division manager-9015-0003 position, unlike the circumstances in *City of Detroit (Fire Dep't)*, there is no indication in Petitioner's response to the Order to Show Cause that the disputed positions were removed from Petitioner's bargaining unit without Petitioner's knowledge and despite Petitioner's exercise of reasonable diligence. Unlike the circumstances in *Wayne Co Cmty Coll Dist*, the Union has not asserted that the positions' titles or job descriptions were so misleading that Petitioner could not reasonably be expected to have known that the positions shared a community of interest with the positions in its bargaining unit. Indeed, based on the facts alleged by Petitioner, it appears that the Union may have acquiesced in the exclusion of several of the disputed positions from its bargaining unit.

Petitioner has requested that this matter be set for an evidentiary hearing despite its failure to allege facts to indicate that this matter is appropriate for unit clarification. The Commission has the discretion to determine whether to hold an evidentiary hearing in matters concerning representation issues. *Sault Ste Marie Area Pub Sch v Michigan Ed Ass'n*, 213 Mich App 176, 182; 539 NW2d 565 (1995). See also *MAPE v MERC*, 153 Mich App 536, 549; 396 NW2d 473 (1986), lv den 428 Mich 856 (1987). Where, as in this case, the petition fails to meet the minimum pleading requirements set forth by Rule 143, the petition fails to allege that the positions in question were newly created or recently substantially changed, and the petitioner has been given the opportunity, but has failed, to cure the defects in the petition, an evidentiary hearing is not merited. An evidentiary hearing is only necessary with respect to the single position for which Petitioner provided the required information, the WCHO division manager - 9015-0003 position. Accordingly, an evidentiary hearing will be conducted by the ALJ with respect to that position.[1]

The Employer's motion to dismiss challenges the propriety of the Union's effort to expand its unit through the unit clarification process where, the Employer asserts, the positions in question had existed and been excluded from the unit for years and even, for decades. The Union chose not to respond to the motion to dismiss, leaving the Employer's assertions unchallenged.

[1] Further proceedings regarding the unit placement of the WCHO division manager-9015-0003 position are assigned Case No. UC06 J-032-A.

With the possible exception of the WCHO division manager-9015-0003 position, the Union has failed to assert sufficient facts to indicate that the matter is appropriate for unit clarification. Therefore, the petitions must be dismissed as defective with respect to all of the listed positions except the WCHO division manager-9015-0003 position. See *Presque Isle Co*, 1993 MERC Lab Op 669.

ORDER REGARDING UNIT CLARIFICATION

The petitions filed by AFSCME Council 25 and Local 3052 are dismissed as to all the listed positions except the WCHO division manager- 9015-0003 position. This matter is referred back to the ALJ for an evidentiary hearing on the clarification of Petitioner's bargaining unit with respect to the WCHO division manager- 9015-0003 position.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated:_____