STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY AND WAYNE COUNTY SHERIFF,
Public Employers,

Case No. R08 E-077

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Petitioner,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION,
Incumbent Labor Organization,

-and-

WAYNE COUNTY DEPUTY SHERIFFS ASSOCIATION,
Intervenor.
_____/

APPEARANCES:

Bruce Campbell, Esq., Assistant Corporation Counsel for Public Employer Wayne County

Zausmer Kaufman August Caldwell & Tayler, PC, by Harvey I. Wax, Esq., for Public Employer Wayne County Sheriff

Frank Guido, Esq., General Counsel for Petitioner Police Officers Association of Michigan

Klimist, McKnight, Sale, McClow & Canzano, P.C., by Patrick J. Rorai, Esq., for Incumbent Service Employees International Union

Law Offices of Anthony S. Spokojny, by Anthony S. Spokojny, Esq., for Intervenor Wayne County Deputy Sheriffs Association

DECISION AND ORDER ON OBJECTIONS TO 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 November 7 and December 9, 2008, before

Administrative Law Judge Doyle O'Connor, of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). Pursuant to Sections 13 and 14 of PERA, and based upon the entire record, including the transcript of hearing and briefs filed by the parties on or before January 16, 2009, the Commission finds as follows:

Background:

In May of 2008, the Police Officers Association of Michigan (POAM) filed an election petition seeking to represent a unit of approximately nine hundred and fifty non-supervisory police officers employed in the Wayne County Sheriff's Department (Wayne County and the Wayne County Sheriff are referred to collectively as "the Employer"). The incumbent union is the Service Employees International Union and its Local Union 502 (collectively, SEIU). The Wayne County Deputy Sheriffs Association filed a petition to intervene in the election.

Pursuant to a consent agreement, ballots were scheduled to be mailed on Monday, October 6, 2008. On Friday, October 3, 2008, in Case No. C08 J-210, the SEIU filed the first of what would ultimately be three unfair labor practice charges, alleging unlawful conduct by the Employer, and the SEIU sought an order blocking the election. On October 6, 2008, the Director of the Bureau of Employment Relations denied the SEIU request that the election be blocked based on the pending unfair labor practice charge, and the ballots were mailed as scheduled. That same day, the SEIU filed its second charge in Case No. C08 J-212, again seeking to block the election.[1] The SEIU filed a third charge on October 17, 2008 in Case No. C08 J-221, but that charge was later withdrawn.

On October 28, 2008, based on the allegations in the second charge and in particular allegations of the holding of improper "captive audience" meetings, the Director of the Bureau of Employment Relations ordered that the counting of the ballots be held in abeyance pending resolution of the pending unfair labor practice charge cases, which were to be handled on an expedited basis. The parties appeared for a scheduled hearing on November 7, 2008; however, at that time the SEIU withdrew its request that the ballots remain sealed, and consented to the opening and counting of the ballots, while preserving its right to file objections to the election. The hearing was adjourned to December 9, 2008, over the objections of the POAM. The POAM raised the concern that as petitioner, and as the potential future exclusive representative, any delay would disadvantage it and the employees in the unit, assuming the application of the rule enunciated in *Huntington Woods*, 1992 MERC Lab Op 389, in which a divided Commission held that a newly certified bargaining representative could not seek retroactive contractual benefits to a point in time preceding certification.

Petitioner POAM received over 72 percent of the total 546 ballots tabulated, while the Incumbent, SEIU, received less than 15 percent of all votes cast. The SEIU filed objections to the election based on alleged Employer misconduct, while the Intervenor, Wayne County Deputy Sheriffs Association, withdrew after receiving approximately 12 percent of the votes cast. The dispute was heard on December 9, 2008, with all the parties except the Wayne County Deputy

[1] A Decision and Recommended Order on the unfair labor practice charges will be issued separately.

Sheriffs Association taking part in the proceedings. The parties rested after the SEIU presentation of witnesses, with no other parties offering additional proofs.

The Objections:

The SEIU, on November 21, 2008, filed timely objections under R 423.149b, asserting three separate grounds for setting aside the election:

1. The Employer, on September 24, 2008, during the pendency of the election petition by a rival labor organization, improperly engaged in contract negotiations with officers of SEIU Local 502, resulting in a tentative agreement that was ultimately rejected by the employees. The Employer's conduct in negotiating with the Incumbent Union is alleged to have caused the affected employees to become disenchanted with the Incumbent Union and to have destroyed the laboratory conditions necessary for a free and fair representation election.
2. The Employer violated the strict neutrality standards during the representation petition period by openly campaigning for one of the challenging unions. It was asserted that on October 6, 2008, which was the day the ballots were mailed, during a morning roll call meeting, a sergeant told employees that it was in their best interest to vote for the POAM.
3. That on October 3, 2008, the Employer held a captive audience meeting with employees of the jail division, presided over by a lieutenant, at which a large group of employees were threatened with layoffs if they did not ratify the tentative agreement, which had been negotiated between SEIU Local 502 and the Employer.

At the December 9, 2008 hearing, the SEIU was allowed, over the objections of the other parties, to additionally put on proofs to support an allegation that had been asserted in Case No. C08 J-212, but which had not been expressly reasserted in its objections to the election. That claim was that the Employer had, on October 3, 2008, engaged in conduct directed at SEIU Local 502 first vice president Robert MacDonagh, which was characterized as coercion, threats and intimidation. Also at the December 9, 2008 hearing, the SEIU withdrew its third objection to the election, related to the alleged October 3, 2008 captive audience speech and threat to layoff employees, on which the initial decision by the Bureau Director to impound the ballots had in part been premised.

Findings of Fact:

I. The Allegedly Improper Contract Negotiations

Although the POAM filed its election petition in May of 2008, the SEIU and the Employer continued to engage in collective bargaining negotiations. All of the parties were aware, by early summer at the latest, that the County was facing a budget deficit that needed to be addressed by the beginning of the next fiscal year in October of 2008. The SEIU was aware, at least since July of 2008, of an impending cut of $14-17 million from the Sheriff's department

budget. The SEIU proposed in July of 2008 that the Employer implement an early retirement scheme which the Union believed would likely aid in avoiding layoffs later that year. No agreement was reached in July.

On approximately September 5, 2008, the SEIU and the Employer met and agreed upon ground rules for bargaining. On or about September 9, 2008, the SEIU and the Employer set a bargaining session for September 16, 2008, which was subsequently adjourned. Then, on or about September 22, 2008, the Employer urgently asked the SEIU to meet on September 24, with both parties aware that the County Board of Commissioners was then scheduled to vote on the next year's budget on September 25, 2008, and it was recognized by all involved that the anticipated major budget cuts would lead to imminent mass layoffs unless some other cost savings could be found.[2]

Representatives of the Employer and the SEIU did meet, at length, on September 24, 2008. A tentative agreement was signed by the parties at 11:30 p.m. that day, and was transmitted to the bargaining unit members by the SEIU Local Union president. The principal focus of the negotiations was on the details of a retirement incentive, which the Employer and the SEIU had been discussing since summer and which both parties anticipated would lead to sufficient retirements, and resulting payroll cost savings, to avoid or minimize projected layoffs.[3] A ratification vote was scheduled by the SEIU for October 6, 2008, the same day that the MERC ballots were to be mailed. The Employer cooperated in the SEIU's efforts to secure ratification of the tentative agreement, by providing written confirmation, at the Local Union president's request, that approximately 250 layoffs were projected to occur if the agreement was not ratified, and that a much smaller number of temporary layoffs would occur if the agreement was ratified. In his letter of September 26, 2008 to the membership, the Local Union president described the Union's bargaining team as having "worked late into the evening to make as many adjustments to the proposal as possible." In his similar letter of October 2, 2008 to the membership, the Local Union president described the tentative agreement, with its retirement incentive, as a benefit for all of the members of the bargaining unit, and a package that positioned the Union well for the next round of contract negotiations.

The SEIU Local Union president contradicted many of the assertions made in, and in support of, the charge. He made clear that he, and not the Employer, had selected the Union representatives who attended the bargaining session of September 24, 2008, and that he had repeatedly sought bargaining with the Employer. The president acknowledged that he could have brought an attorney or a representative from the SEIU International Union to that bargaining session, but chose not to. He also chose not to terminate the bargaining session; agreed voluntarily to enter into a tentative agreement; believed that significant progress had been made in the bargaining session; and considered the tentative agreement a good deal for his

[2] The exigent necessity of that bargaining effort appears to have been acknowledged by both the Petitioner and the Intervenor, as evidenced by their failure to object at the time to either the bargaining or the submission of a tentative agreement to the employees for ratification.

[3] The command officers union, which is not affiliated with any of the parties to this matter, met in negotiations with the Employer simultaneously and reached, and later ratified, a similar contract with retirement incentives to avoid layoffs.

members, as it provided a valuable retirement package both for those who chose to retire immediately and for those who continued to work.

While there was testimony that entering into the tentative agreement on short notice was unpopular, and that the agreement was voted down by the membership, there was no testimony supporting a conclusion that the fact of the tentative agreement being reached significantly affected the votes in the representation election. Even after the membership voted to reject the tentative agreement, the SEIU International representative demanded that the Employer implement the offered retirement incentive package, as a way of avoiding layoffs due to the budget shortfall.

II. The October 6 Alleged Captive Audience Speech

On October 6, 2008, the day that MERC was to mail out ballots in the representation election and the day on which the SEIU chose to hold its contract ratification vote, a routine roll call meeting was held, involving the twelve to fifteen deputies assigned to the Juvenile Court. That five to ten minute meeting was conducted by a sergeant, who had some supervisory authority, although his status was the lowest of six rungs of supervision. The sergeant was a member of the command officers union, which was not affiliated with any participant in the representation election. However, simultaneously with the SEIU, the command officers union did negotiate a tentative agreement with the Employer that included retirement incentives.

After the roll call meeting had concluded, the deputies began to depart for their work stations. Several deputies who were members of the SEIU unit and who were still milling about in the hallway after the meeting, began commenting, in the presence of their sergeant, unfavorably about the SEIU tentative agreement on which they were to vote that day. As described by the SEIU steward who was present, the sergeant responded to the deputies' complaints about the tentative agreement by "blurting out" that if they did not like the SEIU tentative agreement, they should vote for the POAM to try to get a better contract. The sergeant made no other comment at any time regarding the merits of the SEIU-POAM representation election dispute. He made no threats of retaliation or promises of any benefits. There was no indication by him, or any other reason for the involved deputies to believe, that the sergeant was speaking on behalf of the Employer or the POAM. The comment was heard by no more than a dozen of nearly a thousand potential voters. There is no evidence that the comment was otherwise disseminated throughout the ranks. There was no testimony of any other comment or perceived interference in employee free choice by any putative representative of management or the POAM during the election campaign, which lasted from May to October of 2008.

III. The October 3 Alleged Coercion of MacDonagh

Robert MacDonagh is the first vice-president of SEIU Local 502 and is regularly involved in labor relations meetings with the Employer. He participated in the September 24, 2008 bargaining session. On Friday, October 3, 2008, he was called to a meeting to discuss what he understood would be some refinement to the proposed retirement incentives contained in the tentative agreement, which was otherwise to be voted on the following Monday, October 6. The charge filed in Case No. C08 J-212 alleged: that MacDonagh was ordered to "immediately"

come to headquarters to meet with the Employer; that upon arrival he was "ambushed by the Employer's demand" that he sign a document arguably refuting some of the claims made in one of the unfair labor practice charges filed by the SEIU; and that the Employer's conduct constituted "coercion, threats and intimidation."

MacDonagh's testimony refuted each allegation made by the SEIU. He testified that the September 24 meeting was entered into voluntarily by the Local Union officers with the full understanding that its purpose was to attempt to negotiate a contract. As the second in command of the Local Union, he was called and asked to come in on October 3 to meet with the Employer in the apparent absence of the Local Union president. He went to the October 3 meeting voluntarily, with the understanding that there might be some improvements to discuss regarding the tentative agreement that was set to be voted on the following Monday. As MacDonagh put it, he went out of a concern that he not miss an opportunity to bring an improved package to his members. He did not try to reach any other members of the Local Union executive board, the SEIU International representative, or the Local's legal counsel before he went into the meeting.

When MacDonagh arrived for the October 3 meeting, he was asked by an Employer representative to sign a statement asserting that the bargaining that had taken place on September 24 had been conducted in good faith and without coercion. He was not coerced in any way, nor threatened, and he merely dodged signing the statement, which was withdrawn by the Employer when MacDonagh suggested a reluctance, but not a refusal, to sign it. MacDonagh testified unequivocally that he felt no subjective coercion or threat, that he was well familiar with the Employer representatives, had a long-standing cordial professional relationship with them, and felt quite comfortable dealing with them directly. MacDonagh called the International Union's attorney only after the Employer advised MacDonagh of the then recently filed unfair labor practice charge over the bargaining session. It was apparent from his testimony that MacDonagh thought the statement he was asked to sign was accurate, that is, that the September 24 bargaining session had occurred in good faith and without coercion. There was no evidence that the October 3 meeting had any impact on any member of the bargaining unit, MacDonagh included, or on how they voted in the representation election.

Discussion and Conclusions of Law:

In construing PERA, this Commission is guided, but not controlled, by the construction placed on provisions of the National Labor Relations Act (NLRA), as amended 29 USC § 151, where those provisions are analogous. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540 (1998); *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616 (1975). With regard to representation elections conducted by this Commission, we have adopted the National Labor Relations Board's (NLRB) "laboratory conditions" standard, pursuant to which it is our obligation to provide an atmosphere in which an election can be conducted under "conditions as nearly ideal as possible" so that the uninhibited desires of the employees in the proposed bargaining unit may be determined. *Iosco Co Medical Care Facility*, 1999 MERC Lab Op 299; *Huron Co Medical Care Facility*, 1998 MERC Lab Op 670, 677.

In an objections proceeding, the burden of proof is on the party filing the objections to establish grounds for setting aside the election; there is no burden on the Commission to show

that the election was fairly conducted. *Iosco*; *City of Detroit*, 1971 MERC Lab Op 892. In *Waverly Cmty Sch*, 18 MPER 75 (no exceptions), the ALJ held that a party seeking to have an election set aside must show by specific evidence not only that improper conduct occurred, but also that it interfered with the employees' exercise of free choice. *Waverly* in turn relied upon *Safeway, Inc*, 338 NLRB No. 63 (2002), where the NLRB held that isolated instances of unlawful interrogations or threats which were not disseminated to the other unit employees and could not reasonably have affected the results of the election do not form a basis for setting aside an election. Such holdings are not intended to encourage nor to minimize the unlawfulness of the complained of conduct. Moreover, conduct that does not rise to a level such that it independently violates PERA may nonetheless destroy the required laboratory conditions and provide the basis for overturning an election. See, *Detroit Ass'n of Ed Office Employees*, 1980 MERC Lab Op 4, 11. Conversely, conduct that violates Section 10 of PERA may not always warrant overturning an election, such as improper but truly isolated remarks or actions. See, *Clark Equipment Co*, 278 NLRB 498; 121 LRRM 1258 (1986).

I. The Impact of the Allegedly Improper Contract Negotiations

The conduct of the Employer and the SEIU in entering into contract negotiations during the pendency of a representation election may well have been contrary to their mutual obligations under PERA, notwithstanding the legitimate and exigent budget concerns. See, *Fenton Area Pub Sch*, 1987 MERC Lab Op 830; *Paw Paw Pub Sch*, 1992 MERC Lab Op 375; holding that an Employer must maintain strict neutrality upon the filing of an election petition, even to the extent of withdrawing from otherwise obligatory bargaining with an incumbent Union.[4] However, the rationales of the *Fenton* and *Paw Paw* decisions bear little relevance to the present dispute. Here we have the anomalous circumstance of an incumbent Union seeking to set aside a severely lop-sided representation election defeat premised on its own conduct.

The SEIU sought out the Employer, requesting an opportunity to negotiate with the Employer in an effort to avoid, or minimize, the adverse impact of a looming fiscal crisis. The Employer and the SEIU mutually and voluntarily scheduled the September 24, 2008 bargaining session. It was not a circumstance where, during the pendency of a representation election an unscrupulous employer forced a union into a bargaining session for the purpose of favoring, embarrassing, extracting unfair concessions from, or otherwise disfavoring that particular union. Rather, the September bargaining was a seemingly good faith effort by the SEIU and the Employer to reach an accommodation that would avoid or minimize otherwise anticipated mass layoffs of bargaining unit employees.

It bears noting that the goal of the statute, and of the Commissions' review of post-election objections, is solely to protect the right of public employees to freely select or designate an exclusive representative, without improper interference, coercion or intimidation. The statute does not directly concern itself with the interests of potentially competing labor organizations.

[4] The Petitioner in the present case notes that the Commission's employer "strict neutrality" standard on this question is premised on the NLRB's holding in *Midwest Piping and Supply Co, Inc*, 63 NLRB 1060 (1945), which was itself abandoned by the NLRB in *RCA Del Caribe*, 262 NLRB 963 (1982). As did Commissioner Tanzman in his dissent in *Paw Paw*, Petitioner urges that we adopt in this case the assertedly more nuanced view from *RCA Del Caribe*. We do not find it necessary, for purposes of this holding, to revisit that question.

There has been no showing that the bargaining that took place interfered in any material way with the election to determine the uninhibited desires of the employees in the bargaining unit. The SEIU clearly perceived the tentative agreement as favorable to its membership, and presumably for its chances in the representation election, such that it scheduled the contract ratification vote for the very day on which MERC was scheduled to mail the representation election ballots directly to the employees. The fact that the employees voted down the tentative agreement, and simultaneously overwhelmingly voted to oust the SEIU, is a reflection only of the tactical miscalculation by the SEIU, and not evidence of improper conduct by the Employer. Such a tactical choice by an incumbent union cannot be recognized as grounds for setting aside the employees' exercise of their right to collectively select a new exclusive bargaining agent, and the occurrence of the September 2008 bargaining is therefore not grounds for setting aside the election.

II. The Impact of the October 6 Alleged Captive Audience Speech

The evidence in this matter plainly establishes that the problem with the "captive audience speech" objection to this election, is that there was no captive audience and there was no speech. Since the challenged conduct did occur within the critical twenty-four hour period preceding the election, it is therefore subjected to significant scrutiny. Under such examination, we find that a passing comment to a handful of employees about the upcoming election by a single lower level supervisor with no actual or apparent authority to speak on labor relations matters for the Employer is an inconsequential and isolated matter. There was no coercive aspect to that comment nor was it such that it could be construed as having the tendency to influence the election in any material fashion. There is no factual basis to conclude that this isolated comment was made at the behest of the Employer or for its benefit. There is no evidence that the comment affected the votes of the dozen or so employees who were present, nor that it was disseminated among any of the nearly one thousand eligible voters who were not present that day. In the absence of some pattern of Employer interference in employee free choice, that singular incident, witnessed by one percent of the electorate, is not a basis for setting aside the election.

III. The Impact of the October 3 Alleged Coercion of MacDonagh

The allegations related to the October 3 meeting with MacDonagh were not asserted in the post-election objections. Because objections to an election serve to delay certification, they must be brought within a narrow five-day period and must be fact specific. It is not appropriate to attempt to bring in at the hearing stage additional allegations which were not specifically asserted as objections, and for that reason alone the incident does not warrant setting aside the election.

Moreover, there is no evidence in the record that could support a conclusion that the Employer's single meeting with MacDonagh on October 3 had any influence on the election. MacDonagh was not threatened, coerced, nor even inconvenienced. The Employer's conduct in contacting a Union official for the purpose of seeking to have that official sign a statement undercutting the Union's position in a pending unfair labor practice charge case, without expressly making it clear at the time that the officer had the right to decline to take part in the

meeting without the Union's counsel being present, was likely improper. See, *Sunshine Piping*, 351 NLRB No. 89 (2007). Notwithstanding that possible violation of Section 10 of PERA, it cannot constitute grounds for setting aside the election outcome, as the conduct had no impact on the election.

IV. The Impact of the *Huntington Woods* Decision

As noted above, in objecting to the adjournment of the initial hearing date in this matter, the POAM raised the concern that as Petitioner, and as the potential future exclusive representative, any delay would disadvantage it and the employees in the unit, assuming the application of the rule enunciated in *Huntington Woods*, 1992 MERC Lab Op 389. In that decision, a divided Commission held that a newly certified bargaining representative could not seek retroactive contractual benefits to a point in time preceding the certification date. For that reason, the ALJ hearing this matter directed the parties to brief the question of whether or not the Commission should revisit that holding, particularly in light of the later decision in *Quinn v POLC*, 456 Mich 478 (1998).

As urged by Petitioner, we re-examine the *Huntington Woods* rule in light of the holding in *Quinn v POLC*, which recognized, albeit in a footnote, the premise that a newly certified union, which supplanted an incumbent, was entitled to reach back in time to voluntarily undertake representation of bargaining unit members regarding individual grievances which arose before certification of the new agent. We accept that ruling as controlling and see no conceptual distinction between a newly certified union representing some members of the bargaining unit on issues arising before the new agent's certification and representing the entire unit on such issues. We find that the *Huntington Woods* rationale does not survive the superseding Supreme Court decision in *Quinn.* We see no reason why a currently certified bargaining agent should be barred from representing its bargaining unit on any currently unresolved disputes. This is of course not to hold that an Employer is, in any particular situation, obliged to agree to the retroactive application of a particular dispute resolution, nor that an Act 312 panel must grant a union's request for the retroactive application of any awarded change in conditions of employment.

The employees involved in the present case have freely exercised their statutory right to select a new collective bargaining representative. The record reflects that the pre-existing collective bargaining agreement expired on September 30, 2008. The continued application of the *Huntington Woods* rule would preclude the new representative from demanding retroactivity during bargaining, and would preclude an Act 312 arbitration panel from considering such a demand if the dispute ultimately reached interest arbitration proceedings. Such an outcome is contrary to the express statutory mandate that in Act 312 proceeding wages and benefits "may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provision to the contrary notwithstanding." MCL 432.240.

We further find the majority rationale in *Huntington Woods* unpersuasive, largely as the decision gives too little weight to the primary statutory protection of the right of employees to freely choose their exclusive representative. While the *Huntington Woods* majority went so far as to acknowledge that "we see the point of the Union's argument that the ALJ's decision

penalizes the employees for changing their bargaining representative," the majority opinion offers no compelling rationale, and no statutory basis whatsoever, for ignoring that penalty. It would be inappropriate for the Commission to fail to recognize, and to fail to rectify, the fact that when a petitioning union is competing with an incumbent union, particularly over a bargaining unit subject to Act 312, the *Huntington Woods* rule denying retroactive wage increases unless the incumbent wins, has the Commission placing a heavy and inappropriate thumb on the scales. The *Huntington Woods* rule makes it not only predictable, but also entirely appropriate, for an incumbent union to campaign on the basis that a vote for the petitioner would be a vote to give up any possibility of a retroactive wage increase. Where PERA places a primary value upon employee free choice in selecting a bargaining representative, it would be inappropriate for the Commission to continue to enforce a rule that so unreasonably and irrationally favors incumbency, especially in the absence of any express statutory mandate. For that reason, and for the reasons discussed above, we decline to follow the decision in *Huntington Woods*, and hereby overturn that decision, finding instead that a newly certified union possesses the same right to negotiate over any otherwise bargainable subject, including retroactivity, as would have the incumbent union.

CONCLUSION

In summary, we find that none of the objections filed by the Incumbent in this matter, individually or viewed as a whole, warrant the setting aside of the election, especially when viewed in the light of the extremely lop-sided expression of employee desire to select a new representative. Based upon the foregoing, we dismiss the objections to election and order that an appropriate certification of results be immediately issued. As discussed above, we additionally find that the newly selected bargaining agent, Police Officers Association of Michigan, possesses the same right to negotiate over any otherwise bargainable subject, including retroactivity as the incumbent union would have been able to assert.

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: _____