

**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.

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**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 DENYING  
MOTION FOR RECONSIDERATION**

On February 18, 2009, the Commission issued its Decision and Order on Petition for Unit Clarification in the above-entitled matter, finding that the petitions should be dismissed for all but one of the positions at issue because Petitioner, AFSCME Council 25, Local 3052, failed to assert sufficient facts to substantiate its claims that the positions are appropriate for unit clarification. The Commission found that Petitioner also failed to satisfy the minimum pleading requirements of Rule 143 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.143, in that Petitioner did not state the approximate date that each position was created or substantially changed as required in unit clarification petitions. Petitioner was given several opportunities to remedy the defects; but failed to do so. Accordingly, we ordered that the unit clarification petitions, with the exception of one position, the WCHO division manager, be dismissed. The matter regarding the WCHO division manager position was remanded back to the ALJ for an evidentiary hearing in Case No. UC06 J-032-A.

After requesting and receiving two extensions of time, Petitioner filed a motion for reconsideration of our Decision and Order on April 24, 2009, and submitted a supplementary brief in support of the motion. The Public Employer did not file a response to Petitioner's motion for reconsideration.

In its motion, Petitioner requests that we include eighteen additional positions in the remand to the ALJ for hearing. Petitioner now seeks to add to the record information about the date these positions were created or substantially changed, and contends that these positions are

appropriate for unit clarification. As it did in its response to the ALJ's order to show cause, Petitioner claims it was unaware that many positions were supervisory and, therefore, might be eligible for inclusion in its bargaining unit due to the Employer's failure to timely provide Petitioner with necessary and requested information. Again, Petitioner contends that after it became aware certain positions might share a community of interest with those in its bargaining unit, Petitioner requested information from the Employer, but the Employer failed to comply. Petitioner also asserts that during the pendency of this matter, Petitioner's counsel made repeated but unsuccessful attempts to meet with the Employer's counsel to obtain the required information. Petitioner argues that it would have been able to subpoena the required information from the Employer had the matter been set for an evidentiary hearing. According to Petitioner, it was still endeavoring to obtain the required information when the Commission's February 18, 2009 Decision and Order was issued, and that it had obtained the required information on eighteen positions, which it submits with its motion for reconsideration. Petitioner acknowledges that it was aware the Employer filed a motion to dismiss the petition on October 27, 2008 and that it did not communicate with the Commission in response to the Employer's motion. However, Petitioner claims it was waiting to receive a show cause order from the Commission directing it to respond.

#### Discussion and Conclusions of Law:

Commission Rule 167 governs motions for reconsideration and provides in relevant part:

A party to a proceeding may move for reconsideration after a decision and order is issued by the commission. A motion for reconsideration shall state with particularity the material error claimed and, with respect to any finding of material fact, shall specify the page of the record relied upon. Generally, and without restricting the discretion of the commission, a motion for reconsideration which merely presents the same issues ruled on by the commission, either expressly or by reasonable implication, will not be granted.

In its motion for reconsideration, Petitioner contends, as it did in its response to the order to show cause, that it was unable to obtain the information necessary to meet the pleading requirements of Commission Rule 143 as a result of the Employer's failure to comply with Petitioner's information requests. In our February 18, 2009 decision, we did not find that Petitioner's allegations of the Employer's uncooperativeness excused Petitioner's failure to meet the pleading requirements of Rule 143, and we do not do so here. Pursuant to Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), an employer's duty to bargain in good faith requires it to timely provide information requested by the union that would permit the union to engage in collective bargaining and police administration of the parties' contract. *Mundy Twp*, 22 MPER 31 (2009). Petitioner does not assert that it filed an unfair labor practice charge against the Employer alleging that the Employer breached its duty to bargain by failing to comply with Petitioner's information requests. Had Petitioner filed and successfully established the elements of such a charge, the Employer would have been required to provide the requested information.

Petitioner contends that it did not respond to the Employer's October 27, 2008 motion to dismiss because it anticipated receiving an order to show cause from the ALJ and points to Commission Rule 165(3), which governs motions for summary disposition. However, Rule 161 of the Commission's General Rules, 2002 AACS, R 423.161 governs motions in general and states in pertinent part:

(3) Each adverse party may file a written brief in opposition to any motion made before or after hearing. The brief shall be filed within 10 days after service of the motion, or within any other period as specified by the commission or administrative law judge designated by the commission, and served as provided in R 423.182.

Therefore, if a non-moving party chooses to file a response to any motion, including a motion for summary disposition, that party has ten days to respond unless the ALJ or Commission specifies a different time period for the response. When a motion for summary disposition is filed, Rule 161 must be read in conjunction with Rule 165(3), which states:

If the motion for summary disposition is filed before the hearing, then the commission or administrative law judge designated by the commission may issue an order to the nonmoving party to show cause why summary disposition should not be granted. If a response to the order is not filed in a timely manner, then the motion shall be considered and decided without oral argument. (Emphasis added.)

Rule 165(3) does not require the Commission to order the nonmoving party to show cause why summary disposition should not be granted; rather it gives the Commission the discretion to issue such an order.

On September 26, 2008, the ALJ issued an order requiring Petitioner to show cause why the matter should not be dismissed. On October 17, 2008, Petitioner filed a timely response to that order, but the response did not contain the information necessary to cure the deficiencies in the petitions and avoid dismissal. Ten days later, the Employer filed its motion to dismiss. The ALJ did not abuse his discretion by failing to issue a second show cause order.

Two and a half years after it filed the original petition and more than a year after it filed its second petition in this matter, Petitioner seeks to submit additional information regarding eighteen of the petitioned for positions in an effort to comply with the pleading requirements of Rule 143.<sup>1</sup> It appears from Exhibit 6 of the attachments to Petitioner's motion that Petitioner had this information before we issued our February 18, 2009 decision and was able to obtain it without the Employer's assistance. Petitioner's submissions do not persuade us that, in the

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<sup>1</sup> Petitioner seeks to have additional evidence included in the record and could have filed a motion to reopen the record under Rule 166. However, it is not evident that the standard to reopen the record as stated in Rule 166 could have been met.

exercise of due diligence, this information could not have been provided at the time it filed its petitions on October 13, 2006 and February 26, 2008.

The information submitted by Petitioner in Exhibit 7 of the attachments to its motion indicate that several of the eighteen positions were created as early as 2005 or 2006 with the most recent position being created at some point in 2007 or 2008. Thus, on April 24, 2009, when Petitioner sought to provide the information necessary to petition for unit clarification with respect to these positions, each position was at least fourteen months old and some may have been over four years old. Accordingly, it is not evident from these submissions that these eighteen positions can be considered newly created or that there have been recent substantial changes in the positions' duties and responsibilities. In light of the age of these positions, unit clarification is not appropriate as a means of accreting these positions to the bargaining unit represented by Petitioner. See *Washtenaw Cmty Coll*, 1993 MERC Lab Op 781, 787-788. Where a position has been historically excluded from the bargaining unit by acquiescence of the union, as these appear to be, the position can only become part of the bargaining unit after the filing of a proper petition for a representation election. *Lake Orion Cmty Sch*, 1988 MERC Lab Op 296, 298.

After carefully examining all other issues raised by Petitioner, we find nothing that would justify changing the result.

**ORDER**

The motion for reconsideration is denied.

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: \_\_\_\_\_