STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LEELANAU COUNTY and LEELANAU COUNTY SHERIFF,
Public Employers,

Case No. R11 F-050
-and- 12-000242- MERC

TEAMSTERS LOCAL 214,
Labor Organization-Petitioner,

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Incumbent.
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APPEARANCES:

Cohl Stoker and Toskey P.C., by Peter Cohl, for the Public Employer

Robert V. Donick, Business Representative, Teamsters Local 214, for the Petitioner

Frank A. Guido, General Counsel, and George Mertz, Assistant General Counsel, Command Officers Association of Michigan, for the Incumbent Union

DECISION AND ORDER ON CHALLENGED BALLOT

On June 13, 2011, Teamsters Local 214 filed a petition for a representation election pursuant to §12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, seeking to represent a bargaining unit of supervisory command officers employed by Leelanau County and the Leelanau County Sheriff (the Employers). A mail ballot election was conducted in February 2012 pursuant to this petition and a Decision and Direction of Election issued on December 20, 2011 in *Leelanau Co & Leelanau Co Sheriff*, 25 MPER 52 (2011). The ballots were counted on February 17, 2012. One ballot was cast for Petitioner and one for the Command Officers Association of Michigan (COAM), the incumbent labor organization. A third ballot, cast by Ross Arena, was challenged by the COAM on the grounds that Arena was not properly part of the bargaining unit and, therefore, not an eligible voter at the time of the election.

We find that the COAM's challenge to Arena's ballot raises no issues requiring an evidentiary hearing. Pursuant to §12 and Rule 148(2) of the Commission's General Rules, 2002 AACS, R 423.148(2), we determine that Arena was an eligible voter and order that his ballot be opened and counted, for the following reasons.

Background:

As set out in our previous decisions discussed below, the bargaining unit in this case, represented by the COAM, originally consisted of all regular full-time law enforcement sergeants in the Employers' Sheriff's Department. The sheriff and undersheriff, the two positions above the sergeants in the hierarchy of the department, were excluded from the unit. In 2009, there were two sergeants. In April 2009, the Employers decided to create a new position, law enforcement commander, to supervise the sergeants and deputies in the law enforcement division. On April 15, 2009, the COAM made a demand to bargain over the wages, hours, and terms and conditions of employment of the position. The Employers refused to recognize the COAM as the bargaining agent for the new position and contended that the position was an executive. On April 20, 2009, the COAM filed a unit clarification petition seeking to have the law enforcement commander included in its unit. Effective May 1, 2009, the position was filled by Arena. Arena was selected to fill the position by the Sheriff and was not promoted from the rank of sergeant.

On March 24, 2011, after conducting a hearing on the unit clarification petition, we issued a decision granting the COAM's request to clarify its unit to include the law enforcement commander. *Leelanau Co & Leelanau Co Sheriff*, 24 MPER 18 (2011). The COAM then renewed its demand to bargain. It also, on April 28, 2011, demanded that the Employers remove Arena from the law enforcement commander position and leave the position vacant until good faith bargaining had taken place and "a conclusion has been reached." The Employers agreed that they had an obligation to bargain over whether Arena remained in the position. However, the Employers refused to remove him until the parties had reached an agreement on this issue.

On June 23, 2011, Petitioner filed the instant petition for a representation election. The Employers then refused to bargain with the COAM until the question concerning representation was resolved. On August 18, 2011, the COAM filed an unfair labor practice charge, Case No. C11 H-134. The COAM alleged in the charge that the Employers had violated their duty to bargain in good faith by refusing to remove Arena from the law enforcement commander position pending agreement by the parties on how the position should be filled. It also alleged that the Employers unlawfully refused to bargain with the COAM while the representation petition was pending. The COAM sought to have the charge block the petition. By letter dated September 15, 2011, Bureau of Employment Relations Director Ruthanne Okun denied the request, and the petition was assigned to an administrative law judge for an expedited hearing.

The unfair labor practice charge was assigned to the same administrative law judge. On December 7, 2011, the Employers filed a motion for summary disposition of the charge. On February 12, 2012, the administrative law judge issued a Decision and Recommended Order on Motion for Summary Disposition recommending that the charge be dismissed. The administrative law judge found that since the collective bargaining agreement between the Employers and the COAM did not contain any language requiring the Employers to fill a new position of higher rank by promotion from within the bargaining unit, the Employers did not unilaterally alter existing terms or conditions of employment by appointing an individual from outside the bargaining unit to fill the law enforcement commander position. She also held that while the Employers had a duty to bargain over whether Arena should ultimately be allowed to remain in the position or be replaced with someone else chosen by a procedure agreed to by the parties, they had no duty to remove Arena from the position while bargaining took place. Finally, she concluded that the Employers did not violate PERA by refusing to meet with the COAM while the representation petition was pending. No exceptions were filed to the Decision and Recommended Order, and on March 22, 2012, we adopted it as our final order. *Leelanau Co & Leelanau Co Sheriff,* 25 MPER _____ (Case No. C11 H-134).

The parties agreed that there were no disputed questions of fact requiring a hearing on the petition. As noted above, on December 20, 2011, we issued a Decision and Direction of Election directing an election in a unit of all regular full-time command officers, including sergeants and commanders, in the law enforcement division of the Employers' Sheriff's Department. In that decision, we said, "[I]t is undisputed that an individual holding a position in a bargaining unit has the right to vote in a Commission-directed election to determine the exclusive bargaining representative for that unit under §11 of PERA." The payroll eligibility date for the election was the payroll period ending December 20, 2011.

Challenge to Arena's Ballot

The COAM challenged Arena's ballot by letter dated February 13, 2012. The letter stated only that Arena was not eligible to vote because he was not properly part of the bargaining unit. After the ballots were counted and Arena's ballot proved determinative of the results of the election, the COAM was asked to provide a written explanation of its claim that Arena was not properly part of the bargaining unit at the time of the election. On March 21, 2012, the COAM submitted a letter stating that it reiterated the arguments it had made in response to the Employers' motion for summary disposition in the unfair labor practice case. The COAM also asserted that it had learned that Arena retired from the Sheriff's Department on March 16, 2012. It also claimed that Arena had announced "months ago" that he intended to retire. It argued that whether Arena planned his retirement to occur after the election or the timing was coincidental, "the legitimacy of Arena's ballot is questionable at best."

On March 21 and April 2, the Employers submitted written responses asserting that regardless of when Arena announced his intention to retire, Arena remained in active employment and, therefore, was eligible to vote until he actually retired on March 16.

Discussion and Conclusions of Law:

As discussed above, the COAM argued in Case No. C11 H-134 that the Employers had an obligation to remove Arena from his position as law enforcement commander while the parties bargained over whether he should be required to vacate that position. The administrative law judge rejected the COAM's argument. The COAM did not file exceptions, and we adopted her recommended order. The issue of whether Arena was "properly part of the bargaining unit" at the time of the election has, therefore, already been decided and need not be addressed here.

Employees who are employed both on the date established for eligibility purposes and on the date of the election are eligible to vote in that election. *Black Angus,* 1974 MERC Lab Op 29, 34. This includes employees who are on layoff or on a leave of absence on the date of the election, but who have a reasonable expectation of recall. *Arenac Co & Sheriff,* 1989 MERC Lab Op 117, 119; *Black Angus* at 35. In *Washtenaw Co Probate Court*, 1986 MERC Lab Op 83, 84, we held that an employee who submitted his resignation effective the date of the election, but who worked through that day, was eligible to vote. There is no dispute that Arena was employed during the payroll eligibility period and through the date that the mail ballots were counted. We find that Arena was eligible to vote in the mail ballot election conducted in February 2012. We, therefore, direct that Arena's ballot be opened and counted and a revised tabulation of election results be issued reflecting the new count. The appropriate certification shall then issue.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____