STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ROCHESTER COMMUNITY SCHOOLS,
Public Employer,

Case No. R12 J-068
-and- Docket No. 12-001938-MERC

MICHIGAN EDUCATION ASSOCIATION,
Labor Organization-Petitioner,

-and-

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 202,
Labor Organization-Incumbent Union.
_____/

APPEARANCES:

Lusk & Albertson, by William G. Albertson, for the Employer

White, Schneider, Young & Chiodini, P.C., by Erin M. Hopper, for the Petitioner

Miller Cohen, P.L.C., by Teri L. Dennings, for the Incumbent Union

DECISION AND DIRECTION OF ELECTION

Pursuant to §12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, this case was heard on February 15, 2013 by Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based on the entire record, including briefs filed by the parties on March 5, 2013, we find as follows:

The Petition:

On October 31, 2012, the Michigan Education Association (the Petitioner or MEA) filed this petition for a representation election in a unit described in the original petition as all "full-time and part-time paraeducators (paraprofessionals)" employed by the Rochester Community Schools (Employer). This unit is currently represented by AFSCME Council 25 and its affiliated Local 202 (the Incumbent Union). Petitioner represents other bargaining units of the Employer's

employees, including teachers and secretaries. On November 5, 2012, the petition was amended to change the unit description to conform to the description of the unit in the most recent collective bargaining agreement between the Employer and the Incumbent Union. This agreement described the unit as follows:

> All permanent, full-time (working ten (10) hours or more per week) school Paraeducator employees including, but not limited to, those designated in the compensation article, excluding but not limited to: any temporary, part-time or substitute employee, all supervisory and/or executive personnel, custodial, grounds, maintenance transportation employees, teachers, secretaries, food service employees, as well as any other non-certified and certified personnel not herein named.

Dispute over the Unit Description:

As noted above, the amended petition describes the unit as it is described in the recognition clause of the expired contract. It is undisputed that the Employer does not currently employ any paraeducator who works less than ten hours per week. Therefore, no paraeducator would be precluded from voting if an election was directed in the unit as described in the expired contract. However, the Incumbent asserts that after the Employer had reduced the hours of a number of paraeducators for economic reasons during the term of the contract, the Incumbent and the Employer agreed that the unit should include part-time employees. The Incumbent, therefore, proposes that the unit be described as "all full-time and part-time paraeducators." The Employer takes no position as to whether the unit should exclude paraeducators working less than ten hours per week. However, the Employer and Petitioner agree that, for purposes of this election, the unit should be described as "all full-time and regular part-time paraeducators."

We exclude from bargaining units casual and irregular part-time employees whose employment is minimal, sporadic, or temporary. *Wayne Co Cmty Coll Dist*, 20 MPER 4 (2007). The determination of irregular or casual status is made on a case-by-case basis. *Southfield Pub Sch*, 1984 MERC Lab Op 162. We generally find regularly scheduled part-time employees to have a substantial and continuing interest in their employment such that their inclusion in a bargaining unit with full-time employees is appropriate. *Lansing Twp*, 18 MPER 12 (2005); *Deckerville Cmty Sch*, 2000 MERC Lab Op 390, 394-395. However, we have found regularly scheduled employees who work a very small number of hours per week to be irregular part-time employees. See *Lansing Twp*, 18 MPER 12 (2005); *Holland Pub Sch (Food Service Program)*, 1989 MERC Lab Op 584, 588. There is no set number of hours per week that an employee must work in order to be classified as regular part-time. See *L'Anse Creuse Pub Sch*, 1996 MERC Lab Op 613, 616, where we held that regularly scheduled employees who worked from one to two hours per day, or five to ten hours per week, were regular part-time employees.

Since the determination of irregular or casual status is made on a case-by-case basis and not solely on the basis of the number of hours worked per week, we cannot determine whether a hypothetical group of paraeducators working less than ten hours per week would have a substantial and continuing interest in their employment. We agree with Petitioner and the Employer that the appropriate description of the unit is "all full-time and regular part-time

employees," with the understanding and agreement of the parties that all paraeducators employed as of the date of this direction of election are either full-time or regular part-time. If a dispute arises in the future between the Employer and the exclusive bargaining agent over whether particular paraeducators are "regular" or "irregular" part-time employees, the parties may file a unit clarification petition to resolve their dispute.

Incumbent's Objections to the Conducting an Election and Positions of the Other Parties

The Incumbent Union maintains that a fair and free election could not be conducted, and that the petition should be dismissed, for the reasons set forth below.[1] First, the Incumbent asserts that the petition filed on October 31, 2012, should be dismissed because it was filed prematurely. The collective bargaining agreement between the Incumbent and the Employer expired on June 30, 2012, and negotiators for the parties reached tentative agreement on a new contract on October 24, 2012. According to the Incumbent, parties to a tentative agreement have thirty days after reaching agreement to "perfect that agreement and have it ratified." According to the Incumbent, petitions filed by outside unions filed during that thirty day period, like the petition in the instant case, are premature and should be dismissed.

Second, the Incumbent argues that the Employer violated its obligation to remain neutral by refusing to bargain with the Incumbent after the Incumbent's membership rejected the tentative agreement on November 1, 2012. The Incumbent argues that since the petition for election was filed prematurely, the Employer's duty to bargain with the Incumbent was not suspended by the filing of the petition. It also asserts that the Employer had an obligation to engage in further bargaining over the tentative agreement in order to "perfect" that agreement with the thirty day period.

The Employer and Petitioner deny that the petition was filed prematurely or that the tentative agreement served to bar the petition. They also assert that, under established Commission case law, bargaining between the Employer and the Incumbent was required to cease after the petition was filed.

Third, the Incumbent asserts that the Employer violated its obligation to remain neutral and prevented the conduct of a fair election by failing to take action to stop paraeducators in the unit from distributing authorization cards on the Employer's premises in violation of the Employer's no-solicitation policy. It asserts that the testimony of the Employer's executive director of human resources, Elizabeth Davis, that she did not know of this activity lacked credibility, since the scale of the solicitation was so large that it was implausible that it would not have come to her attention. The Incumbent also asserts that the testimony of Petitioner's organizing director, Nancy Knight, that she instructed employees attending Petitioner's informational meetings not to solicit signatures during school hours was also not credible.

[1] The Incumbent Union also filed unfair labor practice charges against the Employer (Case No. C12 L-242) and the Petitioner (Case No. CU12 L-053). The charges were held in abeyance pending the issuance of the decision in this case.

The Employer maintains that it had no knowledge that authorization cards had been distributed on school property, or that employees' school mailboxes had been used to notify employees of Petitioner's informational meetings. In addition, the Employer asserts that its written policy governing solicitations on school property applies only to fundraising activities and did not cover the organizing activity that took place in this case.

Fourth, the Incumbent asserts that the Employer violated its obligation to remain neutral and prevented the conduct of a fair election by failing to take more definitive action after a paraeducator sent an e-mail to other paraeducators that accused the Incumbent of making false statements. This e-mail, sent on December 5, 2012, was sent through the Employer's e-mail system in violation of the Employer's technology use policy. The Incumbent argues that the Employer had an obligation to take steps to distance itself from the comments made in the e-mail and to allow the Incumbent to use the Employer's e-mail system to reply to the false accusations made in the e-mail. The Employer asserts that it acted properly and demonstrated neutrality by warning the paraeducator who sent the e-mail and other paraeducators about improper use of the e-mail system as soon as the December 5 e-mail was brought to its attention.

Findings of Fact:

Filing of the Petition and the Employer's Refusal to Bargain

The parties stipulated to the following facts. On October 24, 2012, a tentative contract agreement was reached between the Incumbent and the Employer. On October 31, 2012, the Petitioner filed the instant petition. On November 1, 2012, the Employer received a copy of that petition. On that same day, a ratification vote was conducted on the tentative agreement among the Incumbent's members, and the tentative agreement was rejected. On November 2, 2012, Incumbent staff representative Brenda Adams contacted Elizabeth Davis, and advised Davis that the tentative agreement that had been reached between the parties had been rejected by membership vote. She also told Davis that she was requesting that the Employer and the Incumbent resume collective bargaining negotiations. During this phone call, Davis told Adams that she had received a copy of the petition for election in this matter, and that she had to discuss the Incumbent's request to bargain with legal counsel. Later that day, Davis advised Adams by e-mail that the Employer deemed itself prohibited from bargaining with the Incumbent because of the filing of the petition for election. On November 5, 2012, Petitioner filed its amended petition.

In addition to the stipulated facts, Adams testified that on November 16, 2012, she participated in a conference call about the petition with representatives of the other parties to this case and a Commission election agent. After that conference call, Adams sent Davis an e-mail again requesting that they return to the bargaining table, and suggesting several dates to meet. Davis replied in an e-mail stating that it was her understanding that the Employer was prohibited from bargaining.

A second conference involving representatives of the parties and the Commission's election agent was held on November 29. During that conference call, Bruce Miller, the

Incumbent's counsel, asked again that Employer representatives return to the bargaining table. The Employer replied that it was prohibited from doing so.

Solicitation on Petitioner's Behalf on Employer's Premises

Petitioner's statewide organizing consultant, Nancy Knight, was responsible for conducting the organizing campaign on behalf of Petitioner in this case. On October 12, 2012, Knight sent a mailing to the home addresses of members of the Incumbent's unit. The mailing included some informational material about the MEA and cards for employees to sign to authorize the MEA to represent them. The mailing also announced that Petitioner would be holding informational meetings for bargaining unit members on October 24, 2012, at the Eagles Lodge and October 29, 2012, at a public library. In addition to conducting these meetings, Knight returned telephone calls from paraeducators who were interested in the MEA or had questions about its representation. Knight testified, without contradiction, that she never telephoned paraeducators while they were at work and never went to any of the Employer's school buildings to talk to them. She also testified without contradiction that she had no conversations with Employer representatives about the election or the petition except during the conference calls conducted by the Commission's election agent.

In October 2012, Pamela Takashima was a paraeducator for the Employer, a trustee of the Incumbent Local Union, and a building representative for the Incumbent. One of Takashima's duties as building representative was to tell paraeducators in her building about union meetings. Sometime during the fall of 2012, Takashima found an envelope in her school mailbox that had "MEA" handwritten on the outside. Inside the envelope were cards, one for each paraeducator in her building. These were not authorization cards, but stated that the MEA would be holding informational meetings for paraeducators and that the paraeducators would be notified later of the dates. The envelope included a note telling Takashima to distribute these cards to paraeducators in her building. Takashima did not know or find out who put this envelope in her mailbox. She did not report this incident to the Employer's human resources office.

In October 2012, Maggie Hay, another paraeducator, was serving as interim secretary for the Incumbent Local Union. Hay did not receive a card regarding the MEA meetings in her school mailbox, but she did receive the letter Knight sent on October 12. Hay attended the MEA informational meeting on October 24, which was conducted by Knight. During the meeting, Knight told the paraeducators that Petitioner had mailed union authorization cards to employees' home addresses, and there was discussion during the meeting about collecting signatures. Knight testified that she told attendees at the October 24 meeting not to solicit during school hours, but Hay did not recall hearing this. Hay and some other employees told Knight that they would try as best as they could to get the information out to the other paraeducators.

Either immediately before or immediately after this meeting, there was a discussion among paraeducators, including Hay, about the Petitioner's mailing. Some paraeducators said they had not received Petitioner's mailing. Several said that since they were receiving so much political mail relating to the November 6 general election at that time, they might have inadvertently thrown the mailing away. Hay volunteered to take an authorization card, scan it,

and send out an e-mail to the Incumbent Local's building representatives asking them to distribute the cards and have them signed as soon as possible. Other paraeducators volunteered to go around to the school buildings and pick up signed cards. Knight was not present during this discussion, and both Hay and Knight testified that Knight did not know of the paraeducators' plans.

After the meeting, Hay went home and prepared an e-mail which, at 2:51 a.m. on October 25, she sent to a group list of the home e-mail addresses of Incumbent's building representatives. Hays' e-mail included an attachment consisting of a union authorization card for the Petitioner. The e-mail asked the building representatives to download and copy the cards and distribute and have them signed by the other paraeducators in their buildings by the end of that day. The e-mail asked the building representatives to place the signed cards in an envelope in their work mailbox, leave it with a "trusted" building secretary so they could be collected on either Friday or Monday, or bring the cards to the MEA informational meeting to be held on Monday, October 29. The e-mail stated that paraeducators who had already signed cards should be asked to sign another one. The e-mail went on to discuss Petitioner's dues structure and the urgency of getting enough signed cards to get a vote before the "contract closed." The e-mail asked the building representatives to distribute a copy of the e-mail to the paraeducators in their buildings in addition to the cards. Hay's e-mail did not caution the building representatives against distributing the cards during working hours, and the implication of the e-mail was that they were to do so. The record does not reflect how many building representatives complied with Hay's request to distribute the cards and/or copies of her e-mail.

The Employer has a written policy entitled "Solicitations on School Property," which reads as follows:

> The Board of Education believes that all students should be educated in the services performed by the humanitarian agencies, and should be encouraged to participate in their financial support as a social and community project. However, no fund-raising drives shall be conducted by nonschool agencies or for nonschool activities among students without prior approval of the Superintendent.
>
> The Superintendent shall also be responsible for the review of any activities on school property which involve the distribution of tickets, merchandise for sale or advertising and the like. In general such distributions shall be limited to those with educational value, and shall exclude those for private gain.
>
> Members of the Board and employees of the District may not use their position to endorse any educational product or private activity.

Hay testified that she never talked to any Employer representative about her e-mail or the plan to collect the cards. Davis testified that she did not hear that cards were being distributed in school buildings until the conferences about the petition with the Commission's election agent held in November. During that conference, the Incumbent alleged that someone was soliciting on Petitioner's behalf at the schools during working hours, but did not provide any further details.

The December 5 E-mail

The Employer has a written policy, adopted on October 12, 2009, entitled "Acceptable Use for Technology Resources." This policy authorizes the use of the Employer's technology resources, including access to the internet, for "the limited purpose of enhancing education within the district and supporting the district's purposes." The policy states that the Employer's superintendent or designee will establish rules and regulations for acceptable use of the District's technology resources, network, and equipment. The policy also states that the District's technology resources are not established as a public forum, either full or limited.

According to Davis, the rules for acceptable use of the Employer's e-mail system basically restrict e-mails to district business and curriculum. However, the Employer and the Incumbent agree that unions representing the Employer's employees were authorized to use the Employer's e-mail system to notify their unit members of the time and place of union meetings. Union representatives, therefore, had access to group e-mail lists of the work e-mail addresses of members of their bargaining units. The record indicated that in addition to this authorized use, the Incumbent used the group e-mail list to send certain other types of e-mails. For example, the Incumbent Local's secretary used the group list to send copies of the minutes of union meetings to Incumbent's members. The group e-mail list was also used by someone, probably an Incumbent representative, to send e-mails about political issues around the time of the November 6 election.

Sometime in November 2012, the Incumbent Local's chief steward, Maggie Clift, used the Employer's e-mail system to send a group e-mail to members of the bargaining unit notifying them that an AFSCME informational meeting had been scheduled for November 28. Among the individuals attending this meeting was paraeducator Deborah Piazza. On Wednesday, December 5, 2012, Piazza drafted a long e-mail entitled "AFSCME Meeting Information – Follow Up" and sent it to all other paraeducators as a "reply all" to Clift's meeting announcement. In this e-mail, Piazza said that after the informational meeting she had decided to check some of the factual representations made by Incumbent representatives at this meeting and had contacted both Petitioner and the Commission to do so. The e-mail then went on to explain the misstatements Piazza believed the Incumbent had made at the November 28 meeting.

Piazza testified that she did not seek permission from the Employer to send the e-mail or tell any Employer representatives that she was going to send it. Piazza did not have access to the group list of paraeducators' work e-mail addresses, and was able to send her e-mail to them only because she was replying to the Incumbent's meeting notice.

Clift forwarded Piazza's e-mail to Davis and asked Davis what she thought of it. Davis replied that she would take care of it. Davis also received a phone call from Incumbent staff representative Adams. Davis told Adams that she needed to check with legal counsel about how to respond to Piazza's e-mail, and sent Adams a copy of the Employer's "Acceptable Use for Technology Resources" policy. In the days following Piazza's e-mail, a number of paraeducators used the "reply all" function to send responses to Piazza's e-mail to the other paraeducators on the group list.

On December 10, Davis sent this e-mail to all the paraeducators:

> Dear Paraeducator:
>
> It has come to our attention that district e-mail is being used for communication regarding the representation issues surrounding the paraeducator union. I must remind you that district e-mail should be used only for district business. This district has a legal obligation to remain neutral regarding the matter. Employees should refrain from utilizing district e-mail to comment upon the election petition or to influence the ultimate vote of the membership. Violations of this policy will result in disciplinary action.

Davis sent the above e-mail without using the group list so that paraeducators could not send e-mails to other employees using the "reply all" function.

On this same date, Davis also sent a separate e-mail to Piazza noting that her e-mail had come to Davis' attention, reminding her that district e-mail was to be used only for district business and stating that it should not be used to comment upon the representation petition or to influence the ultimate vote by the membership. The e-mail said that violation of the directive in the future might lead to disciplinary action. Piazza sent Davis a reply stating that she had not been aware of the Employer's policy since she had received numerous work e-mails about government policies, bills, and proposals.

On December 20, Adams telephoned Davis again about Piazza's e-mail. She told Davis that she thought this e-mail had negative ramifications, and asked Davis if this was something the Employer was allowing employees to do. Davis said that it was not, and that she had already taken action regarding the violation of the Employer's technology resource policy. Adams asked Davis if the Incumbent could send a reply e-mail to its members correcting misstatements that Piazza had made in her December 5 e-mail. Davis said no. Later that day, Davis sent Adams this e-mail:

> I want to confirm our discussion this morning regarding your union's use of the district e-mail system. You may use the system, as you have in the past, only for the purpose of notifying your members of the time and place of meetings. You may not use the e-mail system for the purpose of communication regarding the representation petition, votes, views, etc. As I stated, we sent an e-mail to all paras advising them that district e-mail may be used for district business only.

As of the date of the hearing, no other e-mail had been sent through the Employer's e-mail system on the subject of the petition or representation by either union.

Discussion and Conclusions of Law:

The Thirty Day Rule

Among the rights guaranteed to public employees by §9 of PERA is the right to bargain collectively with their public employers through representatives of their own free choice. However, in the interest of bargaining unit stability, §14 of PERA places certain limitations on when an election may be conducted to decertify or replace an exclusive bargaining representative. These include a prohibition on elections "in any bargaining unit or subdivision thereof where there is in force and effect a valid collective bargaining agreement which was not prematurely extended and which is of fixed duration." Under this rule, when an incumbent union and employer reach agreement on a new contract, petitions by rival unions or petitions to decertify the incumbent union are barred for the term of the contract.

In the public sector, however, a collective bargaining agreement does not usually become binding at the time the agreement is reached at the negotiating table. Except in rare instances, a public employer's governing body must formally approve the agreement reached at the table before it becomes binding. Typically, negotiators for the parties reach a tentative agreement at the bargaining table and the employer's governing body votes on whether to approve the tentative agreement at its next regular meeting or a special public meeting scheduled for that purpose. If the union requires it, the union's membership may also have to vote to approve the tentative agreement before it becomes binding.

In *City of Grand Rapids*, 1968 MERC Lab Op 194, 199-200, the Commission noted that the unavoidable delay in the public sector between the date parties reach a tentative agreement at the bargaining table and the date the agreement becomes binding encouraged disruptive rival union activity. That is, a dissident group of employees dissatisfied with the agreement reached at the table could seek to prevent the agreement from becoming valid by filing a rival union petition before the tentative agreement could be approved by their employer's governing body. In consideration of this factor, and "in the interest of striking a balance between employee freedom of choice and stability of existing bargaining relationships," the Commission announced in that case what has become known as the "thirty-day rule" for contract bar:

> A complete written collective bargaining agreement made between and executed by authorized representatives of a public employer and the exclusive bargaining agent of its employees will, for a period of up to thirty days thereafter, bar a rival union election petition or a decertification petition pending subsequent action on the agreement by the legislative body. *A petition filed within the thirty day period will not be dismissed if the legislative body meets and votes to reject the proposed agreement or takes no action within the thirty day period.* If the legislative body approves the collective bargaining agreement negotiated by its representative within the thirty day period, the petition will be dismissed. [Emphasis added]

The continued applicability of this rule was affirmed by us in *Lake Superior State College*, 1984 MERC Lab Op 301, in which we noted, at 305:

> This [rule] is not unfair to a competing labor organization, since if a majority of the unit employees are disenchanted with the incumbent union, they need only reject the tentative agreement and there will be no bar to a petition for election.

More recently, in *Chippewa Co,* 18 MPER 83 (2003), we relied on the rule to direct an election on a decertification petition filed eighteen days after the union and employer had reached a tentative contract agreement. In that case, the union's membership had voted to ratify all but one provision of that agreement when the petition was filed. The employer's governing body had been prepared to vote on the agreement at its next regular meeting, but decided that it could not lawfully do so after it received notice of the petition. We concluded that since the tentative agreement was not approved by the employer's governing body and never became a legally enforceable collective bargaining agreement, it did not act as a bar to the representation petition.

This case differs from *Chippewa Co* because the petition here was filed before the Incumbent's membership voted on the tentative agreement, and the Incumbent's membership rejected the agreement. However, the significant facts are the same: (1) the employer's governing body did not approve the tentative agreement within thirty days of the date of this agreement; and (2) the tentative agreement did not become a "valid collective bargaining agreement" within the meaning of §14 and, therefore, did not serve as a bar to an election.

The Employer's Refusal to Bargain after the Petition was filed

In the early days of PERA, we adopted the holding of the National Labor Relations Board (NLRB) in *Midwest Piping & Supply Co, Inc*, 63 NLRB 1060 (1945) that an employer's duty to remain neutral when a valid petition for representation is filed by an outside union requires it to stop contract negotiations with the incumbent union during the pendency of the petition. See *City of Dearborn*, 1967 MERC Lab Op 286; *Ionia Co Rd Comm*, 1969 MERC Lab Op 320, 326. In *RCA Del Caribe*, 262 NLRB 963 (1982), the NLRB repudiated *Midwest Piping*, and, since that decision, has held that the filing of a representation petition by a rival union does not prohibit an employer from continuing to negotiate or even entering into a new contract with the incumbent union. However, we have continued to adhere to our original rule, for reasons set forth in *Paw Paw Pub Sch,* 1992 MERC Lab Op 375. These reasons include that permitting an employer to continue bargaining with an incumbent union during the pendency of a challenge to the incumbent's representation status affords multiple opportunities for the employer to influence the election in the direction it prefers. See also *Seventeenth Dist Court,* 19 MPER 88 (2006).

As discussed above, the representation petition filed on October 31, 2012, was not barred by the tentative agreement reached on October 24, 2012, because this tentative agreement was not approved by the Employer's governing body, or the Incumbent's membership, within thirty days. Since this petition was valid, the Employer's obligation to remain neutral in this dispute prohibited it from returning to the bargaining table after it was notified of the petition.

The Incumbent asserts that because a tentative agreement had been reached when the petition was filed, the Employer had an obligation to continue to negotiate with the Incumbent for at least thirty days after the date of that agreement. For this proposition, Petitioner relies on

the unpublished decision of the Court of Appeals in the *Chippewa Co* case discussed above, *AFSCME Council 25 v Chippewa Co,* 2007 WL 3171252. The Court of Appeals concluded that because the belief of the employer in that case that it was precluded from voting on the contract by the filing of the decertification petition was erroneous, that we erred by failing to give the employer's governing body thirty days to vote on the tentative agreement. The Court remanded to us, with the following instructions:

> We remand to the MERC for entry of an order granting respondent's board of commissioners a 30-day period to take action on the original tentative agreement. If respondent's board of commissioners ratifies the agreement within that period, the agreement shall stand as the final agreement of the parties. However, if respondent's board of commissioners rejects the agreement within the 30-day period, or takes no action within the 30-day period, the decertification petition may proceed.

An unpublished opinion of the Court of Appeals is without precedential effect. MCR 7.215(C)(1). In any case, no purpose would be served in this case by the Employer's school board taking a vote on the October 24 tentative agreement. Since the Incumbent's membership rejected the agreement, it could not become the binding agreement of the parties.

The Incumbent cites *Chippewa Co* for the proposition that under the thirty day rule, the Employer and the Incumbent had thirty days from the date of the tentative agreement, in this case October 24, 2012, to "perfect" their agreement. By this, the Incumbent appears to mean that the parties had thirty days to negotiate a new agreement that would be more acceptable to the Incumbent's membership. As discussed above, the thirty day rule represents an attempt to balance the right of employees to seek a new bargaining agent with the need to prevent dissident minorities within a unit from upsetting an established collective bargaining relationship. As discussed above, the purpose of the thirty day rule is to give an employer and union the opportunity to finalize an agreement made at the table by obtaining the approval of their governing body and membership. We conclude that the rule does not extend to negotiating a different agreement more acceptable to one or both of the parties.

Employer's Alleged Breach of its Duty to Remain Neutral

As indicated above, in the fall of 2012 cards announcing that Petitioner would be holding informational meetings for members of the paraeducator unit were placed in the school mailboxes of the Incumbent's building representatives along with a note requesting the building representatives to distribute the cards to the paraeducators in their buildings. No evidence was presented that these envelopes were distributed by anyone who was an employee, officer, or other agent of Petitioner, or that the Employer knew, either before or after the fact, that this had occurred. In addition, in the early hours of Thursday, October 25, 2012, the day after the Incumbent and the Employer had reached a tentative contract agreement, paraeducator and Petitioner supporter Maggie Hay sent an e-mail to the home addresses of these building representatives with a copy of a union authorization card and information about Petitioner. She urged the building representatives to obtain signed cards from other paraeducators in their buildings that day if possible, but at least before Monday, October 29. The building

representatives were to leave the cards in their school mailboxes or with the school secretary, to be picked up later.

The Incumbent asserts that the Employer's duty to remain neutral required it to put a stop to this activity in its school buildings. However, there was no direct evidence that this activity was brought to the Employer's attention in time to put a stop to it. In fact, Davis testified that the first indication she had that this activity might have occurred was weeks after the petition was filed, in a telephone conference with the other parties to this case and the Commission's election agent.

The Incumbent disputes Davis' testimony on the basis that the solicitation was so widespread that Davis must have learned of it. We do not reach this conclusion. First, according to the testimony, the solicitation of signatures on school premises took place on only three days, October 25, 26, and 29. Secondly, no outsiders came into the buildings to solicit signatures. Rather, the signatures were collected by Incumbent building representatives who were themselves unit employees and whose conversations with individual members of the bargaining unit would not necessarily have drawn the attention of the Employer's administrators. Significantly, no witness testified that cards or Hays' e-mail were copied or distributed in the presence of administrators. Third, there is no evidence on the record to support Incumbent's claim that the solicitation of signatures on school premises was widespread, even on the three days in question. Hays sent the e-mail to all the building representatives, and there appears to be no dispute that at least some signed cards were collected during the school day in response to her e-mail. However, not all the building representatives who received the e-mail may have participated in soliciting signatures. In addition, even if some Employer building administrators were aware of the solicitations, it might not have been clear to them that this activity was something that needed to be reported. Although the Employer has a written policy on solicitations on school property, that policy specifically addresses only fundraising and the sale of merchandise or tickets. In short, we conclude that the evidence does not support a finding that the Employer must have learned that signatures for the Petitioner were being solicited during working hours in time to stop it. We also conclude that the solicitation of signatures within the school buildings by unit employees over a relatively brief period, and without the active assistance of administrators, would not have led the paraeducators to conclude that the Employer had condoned or approved this activity. We find that this incident did not communicate to employees that the Employer would prefer that they be represented by Petitioner and did not prevent the holding of a free and fair election.

The record also established that a paraeducator, Deborah Piazza, sent a group e-mail to paraeducators that was critical of the Incumbent. Prior to this e-mail, the Employer's e-mail system was being used to send some e-mails that were not within the scope of the Employer's technology use policy. If the Employer was aware of them, it took no action to put a stop to them. Piazza's e-mail, however, was clearly of a different nature from those e-mails, as evidenced by the fact that her e-mail sparked an e-mail conversation among paraeducators who replied with e-mails of their own. Had the Employer permitted the Incumbent to reply to Piazza's e-mail by sending its own e-mail through the system, this e-mail would almost certainly have sparked more debate among paraeducators, on the Employer's e-mail system, about the relative merits of both unions. We conclude that the Employer's refusal to allow the Incumbent

to send a reply to Piazza's e-mail was consistent with its obligation to remain neutral in the dispute. The Incumbent also suggests that the Employer did not adequately distance itself from the content of Piazza's e-mail. However, Davis acted promptly to notify Piazza and the other paraeducators that comment on the petition or attempts to influence the vote of the membership was improper use of the Employer's e-mail system. Had Davis commented on the content of Piazza's e-mail, as the Incumbent appears to suggest she should have, these comments might have been perceived by the paraeducators as support for the Incumbent. Again, we find the Employer's response to Piazza's e-mail to be consistent with its obligation to remain neutral.

We find no basis for concluding that a free and fair election could not be conducted in this case and employees must be allowed to express their preference for a representative. We will, therefore, direct an election pursuant to the petition as described below.

ORDER DIRECTING ELECTION

Pursuant to the attached Direction of Election, we hereby direct an election in the bargaining unit of employees as set forth below which we find appropriate for collective bargaining within the meaning of §13 of PERA:

> All full-time and regular part-time paraeducators employed by the Rochester Community Schools, excluding temporary and casual employees, supervisors and executives, and all other employees.

The above employees shall vote whether they wish to be represented by the Michigan Education Association, by Michigan AFSCME Council 25 and its affiliated Local 202, or by neither labor organization.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____