STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WOODHAVEN-BROWNSTOWN SCHOOL DISTRICT,
Public Employer,

Case No. R13 A-004
-and- Docket No. 12-000323-MERC

MICHIGAN EDUCATION ASSOCIATION,
Labor Organization-Petitioner,

-and-

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 3552,
Labor Organization-Incumbent Union.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Roy H. Henley, for the Employer

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

Shawntane Williams, Staff Counsel, AFSCME Council 25, for the Incumbent

DECISION AND DIRECTION OF ELECTION

The above petition for representation election was filed on January 18, 2013 by the Michigan Education Association (the Petitioner) pursuant to §12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212. The case was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based on statements of positions submitted by Petitioner, the Employer Woodhaven-Brownstown School District, and the Incumbent Union Michigan AFSCME Council 25 and its affiliated Local 3552; additional documents submitted by the Incumbent; briefs filed by Petitioner and the Incumbent Union on May 1, 2013; and supplemental briefs filed by Petitioner on May 9, 2013, by the Employer on May 13, 2013, and by the Incumbent on May 14, 2013, we find as follows:

The Petition and Positions of the Parties:

Petitioner seeks to represent a bargaining unit of all non-instructional employees employed by the Employer, excluding supervisors, confidential employees, and paraprofessionals. This unit is currently represented by AFSCME Council 25 and its affiliated Local 3552.

The Incumbent objects to an election being conducted pursuant to the petition for the following reasons. It asserts that the 2008-2011 collective bargaining agreement between it and the Employer bars the petition since the collective bargaining agreement automatically renewed and has never been terminated. It also argues that the authorization cards submitted with the petition were tainted because George Blankenbaker, a unit member and president of Local 3552, utilized trickery and deceit to obtain signatures on the cards. According to the Incumbent, Blankenbaker informed other unit members that he was circulating the cards only for the purpose of securing insurance information from the Petitioner, and not for the purposes of obtaining an election. Finally, the Incumbent asserts that the petition should be dismissed because: (1) the Employer permitted Blankenbaker to use the Employer's email system to circulate a petition on behalf of Petitioner during work hours, in violation of the Employer's electronic communication policy, and (2) the Employer acquiesced in Blankenbaker's continued use of the Employer's email system to advocate for representation by Petitioner by failing to monitor his emails after Blankenbaker's misuse of the system was brought to the Employer's attention. According to the Incumbent, by these actions, the Employer provided unlawful assistance and support to Petitioner in violation of §10(1)(b) of PERA and prevented the holding of a free and fair election.

Both the Employer and the Petitioner assert that no basis exists for finding a contract bar, since the Employer and the Incumbent entered into written agreement to extend their 2008-2011 contract and the petition was filed within the "open window period" for the extension agreement.

The Employer agrees with the Incumbent that an employee's use of the Employer's email system for matters related to union representation is contrary to the Employer's electronic communications policy. On November 8, after the Employer's director of human resources, Jeffrey Adams, became aware that Blankenbaker had sent an email soliciting support for Petitioner, Adams told Blankenbaker to stop using the email system for union business. According to the Employer, neither it nor its administrators were aware that Blankenbaker continued to send emails soliciting support for the Petitioner. The Employer admits that it did not thereafter actively monitor Blankenbaker's emails to determine whether Blankenbaker complied with Adams' directive. However, it denies that it provided unlawful assistance or support to Petitioner's organizing efforts.

Petitioner asserts that whether Blankenbaker obtained authorization cards by "trickery or deceit" is not an issue properly before us because the validity of the authorization cards supplied to support a representation petition is solely an

administrative matter. Petitioner denies that Blankenbaker's emails, or the Employer's failure to take more affirmative action to stop them, prevents the holding of a free and fair election in this case. Petitioner points out that the emails submitted by the Incumbent to show that Blankenbaker was violating the Employer's electronic communications policy also show that other Local 3552 representatives regularly used the Employer's email system to discuss internal union business. In addition, according to documents Petitioner attached to its brief, Local 3552 representatives also regularly used the Employer's email system to communicate the times and dates of union meetings to the membership. Petitioner also points out that Incumbent offered no evidence to contradict the Employer's claim that it was not aware of the emails Blankenbaker sent after November 8. Finally, Petitioner notes that we have held that the distribution of union authorization cards by employees, or even nonemployee union organizers, on an employer's premises during work time is not a basis for setting aside an election in the absence of evidence that the Employer acquiesced in, encouraged, or condoned such activity, citing *Buena Vista Sch Dist*, 1983 MERC Lab Op 211; *Newaygo Medical Care Facility*, 1977 MERC Lab Op 589; and *Monroe Co Bd of Commissioners*, 1974 MERC Lab Op 43.

The parties stipulated that that there was no material dispute of fact in this case and that an evidentiary hearing was not necessary.

Facts:

The Collective Bargaining Agreement

The 2008-2011 collective bargaining agreement between the Incumbent and the Employer contained the following termination clause:

> This agreement shall be effective *July 1, 2008*, and shall terminate *June 30, 2011*, if notice of either parties intent to terminate the agreement is submitted, in writing, not less than ninety (90) days prior to the expiration date.
>
> This agreement shall continue in full force and effect each year absent any termination notice and for each year thereafter any subsequent termination date and until notice of either parties intent to terminate, modify or amend this agreement ninety (90) days prior to any subsequent termination date.
>
> This agreement may be modified or amended if notice of either parties intent to modify or amend this agreement is submitted, in writing, not less than ninety (90) days prior to the expiration date. The then existing agreement shall continue in full force and effect during negotiations for modifications or amending this agreement.

> Notice of intent to terminate, modify, or amend this agreement and request for negotiations will be sent by certified mail.
> (Emphasis in original.)

On June 28, 2011, the Incumbent and the Employer executed the following agreement extending their contract:

> This agreement shall be effective *July 1, 2011* and shall terminate *June 30, 2012*, if notice of either parties intent to terminate this agreement is submitted, in writing, not less than ninety (90) days prior to the expiration date.
>
> This agreement shall continue in full force and effect each year absent any termination notice and for each year thereafter any subsequent termination date and until notice of either parties intent to terminate, modify or amend this agreement ninety (90) days prior to any subsequent termination date.
>
> This agreement may be modified or amended if notice of either parties intent to modify or amend this agreement is submitted, in writing, not less than ninety (90) days prior to the expiration date. The then existing agreement shall continue in full force and effect during negotiations for modifications or amending this agreement.
>
> Notice of intention to terminate, modify or amend this agreement and request for negotiations will be sent, by certified mail.
>
> In witness whereof, the parties hereto agree that all terms, benefits, and conditions of this agreement are to become effective on *July 1, 2011*, unless otherwise noted . . . .
> (Emphasis in original.)

On June 18, 2012, they executed another agreement extending the contract. This agreement contained the same language as the previous year's agreement, with new dates:

> This agreement shall be effective *July 1, 2012* and shall terminate *June 30, 2013*, if notice of either parties intent to terminate this agreement is submitted, in writing, not less than ninety (90) days prior to the expiration date. . . .
>
> * * *
>
> In witness whereof, the parties hereto agree that all terms, benefits and conditions of this agreement are to become effective on *July 1, 2012*, unless otherwise noted . . . .
> (Emphasis in original.)

The petition for representation election in the instant case was filed on January 18, 2013.

Blankenbaker's Emails and the Employer's Response

The sections of the Employer's written electronic communications policy that pertain to communications among employees are as follows:

> Electronic communications with other employees should be appropriate in tone, content, and quality. Stalking, harassment, or other unwelcome behaviors are prohibited, . . .
>
> * * *
>
> Electronic communication during work time shall only be allowed for work-related matters or personal emergencies. Work time is defined as all paid work time that is not a designated break or meal period.
>
> The District may require the employee to produce records for review when there is reason to believe that this policy has been violated. Records within the District's control may be reviewed periodically to assure that this policy is being complied with. These may include internet logs, cell phone records, or other similar documentation.

George Blankenbaker is the president of AFSCME Local 3552. AFSCME Local 3552 officers, including Blankenbaker, have routinely used the Employer's email system to send announcements of the time and date of union meetings to the Employer email addresses of unit members through a group list.

On November 4, 2012, Blankenbaker sent an email from his Employer email address entitled "Important: MEA Information" to the group list of unit members. The email read as follows:

> I have had many inquiries about MEA and why we couldn't go back. Some of these people were the ones taking the insurance, some just feeling we could get better representation, and others who never wanted to leave in the first place. I received cards from Nancy Knight at MEA and gave them to those of you who were interested. I have not been able to speak to everyone yet regarding this, but it is a very busy time of the school year for me and I wanted to try and touch base first. I feel that doing it this way is a more personable approach.
>
> Because of providing the information I have to my members I was threatened by Denise Boden stating she was going to have me removed from office and have charges pressed against me (???) There are members

harassing and intimidating other members just because of their interest in going to the MEA. *This is against the law.* A couple members were told that they were the only ones that filled out cards. Well I can tell you that isn't true. We have *30 out of 39* members who have. Keep in mind that I have still not been able to speak to everyone yet.

The Public Employment Relations Act states:

Section 9. It shall be lawful for public employees to organize together or to form, join, or assist in labor organization, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employer *through representatives of their own free choice.*

Section 10(3) *A labor organization shall not do any of the following:*

(a) *Restrain or coerce public employees in the exercise of the rights guaranteed in section 9.*

If anyone is being harassed or intimidated because of their interest in the MEA, then please contact me asap! I will make sure it is taken care of quickly.

As president of the union, I want to make sure my members get the information they want, *and the correct information.*

I want to encourage anyone who has questions or if they need to confirm something they have been told to get it straight from the source. I got answers for some of you from Nancy Knight at MEA, and she said that any one of our members are more than welcome to contact her by phone or email with any question they may have.

Here is her information:

* * *

[Emphasis in original].

Within a few days of this email, AFSCME Council 25 staff representative Leroy Carter visited Employer human resources director Adams to complain about Blankenbaker using the Employer's email system to solicit support for the Petitioner. On or about November 8, Adams told Blankenbaker not to use the Employer's equipment, including email or fax machines, for union business.

At least one member of the bargaining unit replied to Blankenbaker's November 4 email. Her email asked Blankenbaker why he had given cards to some employees, while others did not know that he was distributing cards. Blankenbaker replied, through his

Employer email address, that he "can't use district email or any other equipment for union business now thanks to one of our members and the AFSCME rep." Blankenbaker suggested that the unit member give him her personal email address and he would reply on his lunchtime.

In support of its position statement, Incumbent submitted copies of exhibits that included the emails referenced above. It also submitted an email chain involving emails sent on the Employer's system between Blankenbaker and Denise Boden, also an officer of Local 3552, in late November 2012. In their exchange, Boden and Blankenbaker discussed Local executive board business and a proposal by Boden to increase the pay board members received for attending these meetings. In one of these emails, Blankenbaker told Boden that he wanted to address at the next executive board meeting the fact that the AFSCME staff representative complained to Adams about him using district equipment for union business, "when it was well known that everyone had used it for union business for a long time." The exhibits also included a second email chain sent on the Employer's system involving Boden, Blankenbaker, and Local 3552 vice president Melanie Abair. The chain began with Boden forwarding "insurance quotes from MESSA" to Abair which Boden had apparently received from Blankenbaker. The emails include a discussion of whether the information was reliable, and an email from Blankenbaker asking that insurance be put on the agenda for the next local executive board meeting. According to the documents provided, both email chains were forwarded by Boden and Abair to Incumbent's counsel using their Employer email addresses.

On January 7, 2013, Blankenbaker sent the following email from his Employer address to the group list of unit members' Employer addresses:

> There are quite a few still interested in having the MEA come out to speak to everyone. Nancy Knight from MEA has agreed to come out for those still interested in MEA. It is Monday, January 14th 4:30 pm at the UAW hall on Van Horn just down the road from here. If anyone would like any another [sic] union to come out and speak to us then please let me know and we can try and arrange that too.
>
> If you have any questions or concerns then please let me know.

Blankenbaker sent an additional email on January 14.

> Just a quick reminder that the MEA meeting is today at 4:30 pm. It is at the UAW Hall on Van Horn Rd. just West of Hall Rd.

Discussion and Conclusions of Law:

Contract Bar

Section 14 of PERA, MCL 423.214, states:

> An election shall not be directed in any bargaining unit or subdivision of any bargaining unit if there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration. A collective bargaining agreement does not bar an election upon the petition of persons not parties to the collective bargaining agreement if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

Rule 141(3) of the Commission's General Rules, 2002 ACS, R 423.143(3), provides, in pertinent part:

> Where there is a collective bargaining agreement covering employees in the bargaining unit, a petition for election may be filed during the following periods:
>
> > a. Where the petition covers employees of a public school district or public educational institution and the expiration date of the collective bargaining agreement falls between June 1 and September 30, a petition may be filed between January 2 and March 31 of the year in which the collective bargaining agreement expires.

Our policy of providing an "open window period" in which a petition can be filed during a contract's term, although now incorporated into our rules, goes back to the earliest days of PERA. See *Comstock Park Pub Schs,* 1980 MERC Lab Op 523; *Jackson Co Bd of Supervisors,* 1968 MERC Lab Op 473. Here, in both 2011 and 2012 the Employer and the Incumbent executed agreements extending their 2008-2011 collective bargaining agreement for another year. The instant petition was filed within the open window period for the most recent extension. Although this extension agreement, like the one preceding it, contained an automatic renewal clause, the existence of an automatic renewal clause in a collective bargaining agreement does not affect the timeliness of a petition otherwise properly filed within the open window period. *City of Flushing,* 1970 MERC Lab Op 636, 638. We find the petition in this case to have been timely filed. Whether the extension agreements would have served to bar petitions filed outside the open window period is not at issue here. We conclude that §14 does not prohibit the direction of an election pursuant to the petition in this case.

Authorization Cards

Section 9(c)(1)(A) of the National Labor Relations Act (NLRA), 29 USC §9 requires the National Labor Relations Board (NLRB or the Board), when a petition is filed by an employee, group of employees, or labor organization alleging that a substantial number of employees wish to be represented for collective bargaining, to investigate the petition and, if the Board has reasonable cause to believe that a question concerning representation exists, provide for an appropriate hearing upon due notice. If the Board finds upon the record that a question of representation exists, it is to direct an election by secret ballot.

As set out in *NLRB v J. I. Case Co*, 201 F.2d 597, 598-600 (CA 9 1953), early in its history the Board adopted the practice of requiring petitioning unions in representation cases to submit proof of their interest among employees before it would process a representation petition. According to the discussion in *J. I. Case*, the purpose of this requirement, as indicated by NLRB documents from the time, was "to prevent (the Board's) process and the time and efforts of employees as well as employers from being dissipated and wasted by proceedings instituted by organizations that have little or no chance of being designated as the exclusive representatives by the employees." *J. I. Case* at 598. Thereafter, the NLRB determined, through administrative experience, that unless a union was able to demonstrate at least thirty percent representation in the proposed unit, the probability of its achieving majority support in a secret election was slight. The Board then began requiring a showing of interest of at least thirty percent of the employees in the bargaining unit sought. However, the Board continued its practice of treating the validity of the showing of interest as an administrative matter. If its preliminary inquiry determined that the showing was valid, it refused to allow a formal challenge to this determination. The Court in *J. I. Case* affirmed that the Board's practice of precluding these challenges did not violate the NLRA.

The Board continues to conduct a check of the showing of interest shortly after the filing of a representation petition. While the Board's regional office considers any information presented by a party bearing on the validity and authenticity of the showing, no party has a right to litigate the subject. See *NLRB Casehandling Manual, Part 2, Representation Proceedings* (August 2007), Section 11021. See http://www.nlrb.gov. Parties alleging fraud or misconduct in connection with the showing of interest must present supporting evidence to the regional director in a timely fashion. See Section 11028.1. Where an authorization card on its face clearly declares a purpose to designate the union as collective-bargaining representative, the Board's position is that the only basis for denying face value to the authorization card is affirmative proof of misrepresentation or coercion. *Levi Strauss & Co,* 172 NLRB 732, 733 (1968); *The Guard Publishing Co*, 344 NLRB 1142, 1152 (2005).

The language of §9(c)(1)(A) was incorporated into §12 of PERA, except that §12 explicitly requires that the petition allege that 30% or more of the public employees within the unit claimed to be appropriate wish to be represented for collective bargaining. Following the practice of the Board, we have consistently held that the validity of the showing of interest is an administrative matter and, once established, is not subject to attack. See *Lakeville Cmty Sch*, 1988 MERC Lab Op 641, in which we held that an administrative law judge did not err in refusing to permit an incumbent union to present proofs that the petitioner's showing of interest was obtained on the basis of misleading and false statements, and cases cited therein at 642. Also see *Detroit Pub Sch*, 1994 MERC Lab Op 1047 (no exceptions), in which, in a combined representation and unfair labor practice proceeding, the administrative law judge refused to admit evidence offered by an incumbent union that the authorization cards submitted by the petitioner were obtained under false pretenses, since employees had been advised by petitioner agents that the cards were to be used to convene a meeting and nothing more despite the fact that

the cards on their face stated that the signer wished to designate the incumbent as his or her bargaining representative.

The authorization cards submitted with the petition were reviewed by the Bureau of Employment Relations' election staff and determined to be valid. Blankenbaker's November 4 email clearly indicated that the issue was whether the unit should be "going to the MEA," and not merely investigating Petitioner's insurance. In addition, the Incumbent failed to present any substantive evidence to the Bureau Director that Blankenbaker affirmatively misrepresented to employees that their signatures on authorization cards would not be considered evidence of their interest in being represented by Petitioner.

Blankenbaker's Emails and the Employer's
Alleged Breach of its Duty to Remain Neutral

The Incumbent argues that the Employer violated its duty to remain neutral and prevented the conduct of a fair election by permitting Blankenbaker to use the Employer's email system to circulate a petition on behalf of Petitioner during work hours. It also asserts that the Employer interfered with the holding of a fair election by failing to monitor Blankenbaker's emails after it was brought to their attention that he was circulating a petition during work hours.

Blankenbaker's November 4, 2012 email suggests that he distributed authorization cards for Petitioner primarily by speaking to individual unit members in person, not by email. However, in the November 4 email, Blankenbaker did inform unit members that he had authorization cards. The email also expressed his support for Petitioner. There is no indication either in the documents submitted by Incumbent or in Incumbent's brief that the Employer knew of any of Blankenbaker's activities on behalf of Petitioner before the November 4 email was brought to its attention. Within a few days thereafter, Employer human resources director Adams told Blankenbaker that, consistent with the Employer's Electronic Communications Policy, he was not to use the Employer's email system or other Employer equipment for union business. No other complaints were lodged with the Employer about Blankenbaker's use of the email system before the petition was filed. In fact, from the evidence submitted here, it appears that after November 4, 2012, Blankenbaker only twice used the Employer's email system to communicate with the entire membership about Petitioner, and both of these consisted merely of notifying the members of a meeting with a Petitioner representative. Based on the facts as asserted by the Incumbent, we find that the Employer did not "permit" Blankenbaker to use the Employer's email system to circulate a petition on behalf of Petitioner during work hours. We also conclude that the Employer's response to the single complaint it received about Blankenbaker, which was to instruct Blankenbaker not to use the email system or other Employer equipment for union business, was adequate under the circumstances, and that the Employer's duty to remain neutral in the representation dispute did not require it to begin monitoring Blankenbaker's emails to ensure that he obeyed its instructions. Indeed, singling out Blankenbaker, who the

Employer by then knew to be a Petitioner supporter, for such unusual treatment might have been construed as an expression of Employer support for the Incumbent.

We also find that the emails Blankenbaker sent through the Employer's email system did not communicate to unit employees that the Employer would prefer that they be represented by Petitioner. Even though the Employer's Electronics Communication policy did not on its face permit this, Local 3552 officers, including Blankenbaker, regularly used the Employer's email system to inform the Local's membership about union meetings. In addition, with or without the Employer's knowledge, Local 3552 officers also used the Employer's email system to communicate with each other about union business. The Incumbent produced no evidence that the Employer encouraged, condoned, or ratified Blankenbaker's activities on behalf of Petitioner. In the absence of such evidence, we conclude that Blankenbaker's emails would not prevent the holding of a free and fair election in which employees will be permitted 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 non-instructional employees employed by the Woodhaven-Brownstown School District, excluding superintendent's secretary, business manager's secretary, assistant superintendent's secretary, personnel director's secretary, supervisors, and paraprofessionals.

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 3552, or by neither labor organization.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION[1]

_____
Edward D. Callaghan, Commission Chair

_____
Robert S. LaBrant, Commission Member

Dated: _____

[1] Commissioner Natalie Priest Yaw was unable to participate in the decision in this matter.