STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer,

Case Nos. R08 H-108 & C08 G-141

-and-

PONTIAC EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION MEA/NEA,
Incumbent Labor Organization,

-and-

MICHIGAN ASSOCIATION OF POLICE,
Petitioner-Labor Organization.
_____/

APPEARANCES:

Floyd E. Allen & Associates, by Earnestina Moore and Shaun Ayer, for the Public Employer

Law Offices of Lee & Correll, by Michael K. Lee, and Erika P. Thorn for the Incumbent Union

Pierce, Duke, Farrell & Tafelski, by M. Catherine Farrell, for the Petitioner

DECISION AND ORDER ON OBJECTIONS TO ELECTION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201-423.217, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Employment Relations Commission. Based upon the entire record, including a brief filed by the Incumbent Labor Organization, with both of the other parties waiving briefing and no party requesting oral argument, the Commission finds as follows:

The Petition:

On August 30, 2011, the Pontiac Educational Support Personnel Association (PESPA), MEA/NEA, filed a motion to set aside the results of an election held on October 8, 2008. As the basis for setting aside the election, PESPA alleges that it was the incumbent union for the employees involved in the election and, as such, it should have been listed on the ballot. Further, PESPA claims that the Employer misrepresented the status of the employees involved in the election to the Election Agent and thereby prejudiced PESPA. PESPA asserts that it was further

prejudiced by its failure to receive any notice of the election and by the Employer's failure to furnish it with a list of eligible voters.

Position of the Parties and Findings of Fact:

The Pontiac Educational Support Personnel Association (PESPA), MEA/NEA, was the exclusive bargaining representative for all full-time employees of the Pontiac School District working thirty or more hours per week as clerical assistants, parent coordinators, teacher assistants, research assistants, vocational assistants, and service officers. In early July 2008, the School District eliminated the classification of service officer and laid off thirty-seven employees who were working within the classification. According to PESPA, Pontiac then hired twenty-four police authority officers to perform the duties formerly performed by service officers. As a result, PESPA filed an unfair labor practice charge in Case No. C08 G-141 alleging that the School District violated PERA when it unilaterally eliminated the service officer classification. The charge in C08 G-141 was amended and then settled in part, leaving outstanding only claims related to the disputed election, which were consolidated with Case No. R08 H-108. The remaining claims, which alleged that the School District unlawfully assisted the election of Petitioner and improperly negotiated and executed an agreement with Petitioner in violation of § 10(1)(e), are resolved in this Decision on the consolidated cases.

On August 19, 2008, the Michigan Association of Police (MAP) filed a petition seeking to represent a unit consisting of the twenty-four police authority officers then recently hired by the Pontiac School District. This case was assigned Case No. R08 H-108. On October 8, 2008, the representation election was held without formal notice to PESPA, and MAP was certified as the exclusive bargaining representative. PESPA was not given notice of the results of the election.

On December 8, 2009, a hearing was conducted on the unfair labor practice charge in Case No. C08 G-141. During the course of this hearing, PESPA was informed of the election and certification in Case No. R08 H-108. On August 30, 2011, PESPA filed the instant motion objecting to the results of the election held in Case No. R08 H-108.

On September 9, 2011, the ALJ directed PESPA to file a supplemental brief addressing the delay since December 2009, and since August 2010, in the assertion of its claims. The ALJ noted that PESPA admitted it had notice of the conduct of the election by no later than December 8, 2009, and that the parties had reached a tentative resolution of the dispute in August 2010. The ALJ specifically informed PESPA that its brief must directly address the application of Rule 149b of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.149b, which sets a five day limit for objecting to the conduct of an election.

In response, PESPA argues that Rule 149b contemplates that only a party to the election may file an objection and that it was not a party to the election. PESPA also points out that it first learned of the representation election on December 8, 2009, and promptly stated its intention to amend the charge in Case No. C08 G-141 to allege wrongful recognition and bargaining with another union over the former service officers. PESPA further noted that it engaged in settlement discussions with the School District in lieu of filing a motion to set aside the election

results and that the parties continued to exchange proposals regarding the matter until January 2011.

On November 14, 2011, the ALJ directed PESPA to show good cause why its motion should not be summarily denied as time barred. The ALJ noted that no explanation was offered for the final delay by PESPA from January 2011 until the filing of the motion on August 30, 2011, all related to an election of which PESPA was aware no later than December 2009.

In response, PESPA argued that the instant case involves a unique situation, that it was not a party to the election and that it believed it was preferable to try to settle this matter instead of proceeding to trial. PESPA contended that the parties continued to exchange proposals into January 2011, that it reviewed the Employer's counter-offer and ultimately rejected it in April 2011. Further, PESPA noted that the motion to set aside the October 2008 election was filed some four months after it rejected the Employer's settlement offer.

Discussion and Conclusions of Law:

As we held in *City of Detroit*, 23 MPER 94 (2010):

> The starting premise of any decision on a representation case must be a reaffirmation that the fundamental function of the adoption of PERA in 1965 was to recognize and codify the right of public employees to collectively designate an exclusive bargaining agent and to then compel their employer to deal with the workforce through the employees' collectively "designated or selected" representative, rather than individually. See MCL 423.209 & 423.211. PERA was enacted at the specific command of the people of Michigan, acting through their Constitutional Convention to adopt Const 1963, art 4, § 48. The statute was described by the Legislature as intended to "declare and protect the rights and privileges of public employees," with the fundamental Section 9 right being the right of employees to act through "representatives of their own free choice." MERC is "the state agency specially empowered to protect employees' rights." *Ottawa Co v Jaklinski*, 423 Mich 1, 24 n.10 (1985). The statute, as adopted, did not codify rights of employers or of labor unions, other than as derivative of employee rights. Rather, the statute placed restrictions on the conduct of employers and unions.

Here, the Incumbent Labor Organization seeks to set aside the outcome of an otherwise long-settled election through which employees selected a collective bargaining agent. Notwithstanding the substantial defects in the election process asserted by PESPA, the timeliness of the filing of the objections in this case is controlling. The Commission has consistently held that, under Rule 149b, objections to elections must be filed within five days. *St Clair Co Cmty Coll*, 1980 MERC Lab Op 721, *Harrison Cmty Sch*, 1976 MERC Lab Op 602. However, if we were to find that an exception to Rule 149b should be made based on PESPA's claim that they had no notice of the October 8, 2008 elections, we would only toll the commencement of the five day period until such time as PESPA knew or should have known of the acts that form the basis for its objection. See *Sheraton Motor Inn*, 1971 MERC Lab Op 885. In the present case, there is no dispute that PESPA failed to file its objections to the election within five days of its first

knowledge of the election. Additionally, no adequate explanation was offered by PESPA for its delay of a year and a half from the December 2009 hearing at which PESPA was aware of the disputed election. Furthermore, PESPA did not explain the delay of more than six months from the January 2011 receipt of the Employer's settlement offer, or the four months from its own rejection of the settlement offer until the filing of its motion on August 30, 2011.

Although PESPA has argued that its failure to timely protest the election should be excused because it was engaging in settlement discussions with the School District in lieu of filing a motion, it has long been recognized that a statute of limitations is not tolled by the attempts of an employee or a union to engage in settlement discussions or to seek a remedy elsewhere, including by the filing of a grievance. See e.g. *Univ of Michigan*, 23 MPER 6 (2010); *Wayne Co*, 1993 MERC Lab Op 560.

Although PESPA has also argued that it was not a party to the election and that Rule 149b is, therefore, not applicable, its position is without basis. In view of the facts relevant to this dispute, it is clear that PESPA was an interested party under Rule 149b. Notwithstanding this, if PESPA were not an interested party, it would not have standing to bring the instant motion. Regardless, even if PESPA were excused from the initial failure to file within five days of an election, of which it was arguably unaware, it still had an obligation to act promptly upon receipt of notice that an election had been held.

In conclusion, we find no excusable basis for PESPA's multi-year delay in raising objections to the October 8, 2008 election. To sustain PESPA's objections would undermine the stability PERA was intended to promote. We conclude, therefore, that PESPA's August 30, 2011 objections to the election are without merit and must be dismissed. Moreover, since PESPA's remaining unfair labor practice charges against the School District are based on its contention that the election of MAP was unlawful, those claims are also untimely and otherwise without merit and must be dismissed.

ORDER

The objections are dismissed and the related and consolidated unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Robert S. LaBrant, Commission Member

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Dated: _____ Natalie P. Yaw, Commission Member