STATE OF MICHIGAN

COURT OF APPEALS

UNIVERSITY OF MICHIGAN,

Plaintiff-Appellant,

v

AFSCME COUNCIL 25,

Defendant-Appellee.

UNPUBLISHED

No. 176332
LC No. 92-000012

Before: Murphy, P.J., and Markman and Karl V. Fink,* JJ.

MARKMAN, J. (dissenting).

I respectfully dissent. I do not believe that there was "competent, material and substantial" evidence to sustain MERC's finding that plaintiff violated § 10(1)(e) of the Public Employment Relations Act when it removed ten animal aide positions from defendant's collective bargaining unit and reclassified them as "animal technicians." Rather, I would reinstate the administrative law judge's finding that there was a "significant change" in the nature of the job being performed by employees in the ten positions and that the "employer had the right to do as it did to upgrade animal care to a higher technical level."

Plaintiff's management rights under its contract with defendant provide that:

> All management rights and functions, except those which are clearly and expressly abridged by this Agreement, shall remain vested exclusively in the University . . . such rights and functions include . . . (4) the right to hire, establish and change work schedules, set hours of work, establish, eliminate or *change classifications*, assign, transfer, demote, release or lay off employees. [Emphasis supplied.]

The issue in the instant case therefore is whether plaintiff "change[d] classifications" when it eliminated the animal aide positions and created ten new "animal technician" positions. In support of his finding

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*Circuit judge sitting on the Court of Appeals by assignment.

that such a change of classifications had occurred, the administrative law judge referred to a number of factors contained in the record.

First, the reclassifications were made in response to the concern of the university that compliance with increasingly stringent and complex research regulations from five separate federal agencies required a more experienced animal care staff. Plaintiff had been delinquent in its regulatory obligations and had been receiving poor reports from regulatory authorities. At stake was approximately $70 million in research projects going to plaintiff. As a result, plaintiff informed defendant that the required range of duties of the ten positions was to be restructured as "technical rather than custodial." No apparent pretext was involved in plaintiff's decision to reclassify the positions.

Second, there is evidence that plaintiff's failure consistently to follow federal regulatory standards was contributing to unnecessary laboratory contaminations which resulted in lost time and research by plaintiff's employees. According to the administrative law judge, "[t]he Director concluded that he could not ensure that there would be disease free animals day in and day out."

Third, there was testimony that "scientific needs had changed" and that, in consequence, plaintiff required new levels of experienced and college-trained individuals to provide animal care. Employees were to be provided full-time training and classroom instruction, made subject to closer observation and ongoing critique of their work and certified by an appropriate agency.

Fourth, of the ten employees in the original animal care unit, each was offered the opportunity to remain in the new unit if they were prepared to make an enhanced commitment to animal care as a profession. Eventually, only four employees chose to obtain certification as animal technicians and remain in the new unit; the different nature of the responsibilities involved in the new positions caused the other six employees not to join -- or remain in -- the new unit.[1]

Fifth, of the employees who did enlist originally in the new unit, several filed grievances on the grounds that they were required to perform overly technical work, for which they either were not qualified or not inclined. One employee cited the additional "stress" involved in the new position. Additionally, several of these employees were given warnings for endangering the health of an animal, for animal overcrowding or for otherwise failing to follow proper animal care procedures.

Sixth, with a single exception, each of the animal technicians hired by the university following its reclassification have at least a two-year associate's degree in animal heath care or biology.

In its decision, MERC relied heavily on its finding that there was no "substantive change in job content" that had occurred in the transition from animal care workers to animal technicians. Undoubtedly this is true: both before and after the reclassification, the content of the positions entailed the humane care and treatment of animals being subjected to university research. However, I believe that the more appropriate formulation of the issue for MERC's review is set forth by plaintiff: "The question . . . is not so much what work was being done, but *how* the work was being done." The

manner in which the work was being done after the reclassification was of a significantly more sophisticated character. The new animal technician function required a "more complex understanding of animal care, a higher level of training and a higher level of performance of the job functions and adherence to new and more complicated protocols." I disagree with the majority that "enhanced responsibilities do not change the underlying nature of a position." Sometimes they do and sometimes they don't. That the animal technicians, just as the animal aides before them, fed the animals and maintained their cages is less relevant, in my judgment, than the fact that they performed these tasks with significantly greater effectiveness and/or with a significantly greater level of compliance with federal regulations. In fact, it appears that subsequent to the reclassification, the contamination rate in university laboratories was sharply reduced and that the university was removed from the probationary status under which it had operated for many years.

While the majority opinion is premised upon the proposition that PERA vests MERC with broad discretion to determine what constitutes an appropriate bargaining unit, the broad discretion that is more relevant, in my judgement, is that which belongs to a public employer to manage its affairs in a flexible manner, consistent with its various public obligations. See *Ishpeming Supervisory Employees' v City of Ishpeming*, 155 Mich App 501, 510; 400 NW2d 661 (1986); *United Teachers of Flint v Flint School District*, 158 Mich App 138, 143; 404 NW2d 637 (1986). By virtue of the "management rights clause" entered into between plaintiff and defendant, I believe that plaintiff has effectively retained this latter broad discretion and exercised it in a reasonable manner.

As a result, I would reverse MERC's decision and dismiss the charges of the union.

/s/ Stephen J. Markman

[1] MERC appears to rest its conclusion almost exclusively on the basis of testimony of one of the animal care workers (Sylvia Yakich) that her position was essentially identical before and after the reclassification. In response to her testimony, the administrative law judge noted, "Though this enforcement of the quality of animal care was not a significant change in Technician Yakich's viewpoint, it certainly was to those Aides who grieved that they were being worked out of the Aide classification and to those six Aides who chose not to be subject to the more demanding (technical) adherence to animal care rules. The job did change, judging by the effect on the ten Aids, excepting Yakich who, from all appearances, operated at a higher level of care than the others."