

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ASSOCIATION OF CITY OF  
DETROIT SUPERVISORS,

UNPUBLISHED  
February 19, 1999

Charging Party-Appellant,

v

No. 204946

MERC

CITY OF DETROIT,

LC No. 95-000135

Respondent-Appellee.

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Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

The Association of City of Detroit Supervisors (ACODS), appeals as of right from a decision and order of the Michigan Employment Relations Commission (MERC), dismissing its unit clarification petition and unfair labor practice charge. We affirm.

ACODS first argues that the MERC erred in relying on its decision in *Detroit Water & Sewerage v Sanitary Chemists & Technicians Assoc*, 1990 MERC Lab Op 34, to determine whether the City of Detroit had a duty to bargain regarding the temporary use of nonunit employees to fill the vacant RCPO foremen positions. We disagree. Our review of a decision of the MERC is limited. *Organization of School Administrators and Supervisors v Detroit Bd of Education*, 229 Mich App 54, 64; 580 NW2d 905 (1998). We will set aside a legal ruling of the MERC only if it is affected by a substantial and material error of law. *Id.* The MERC's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. MCL 423.216(e); MSA 17.455(16)(e); *Organization of School Administrators, supra*, 229 Mich App 64.

Although the collective bargaining agreement between the City of Detroit and ACODS provides for the assignment of ACODS members to work out-of-class, the agreement is silent with respect to assignments into the ACODS unit. ACODS asserts that the City had a duty to bargain regarding the temporary assignment of RCPOs, represented by Teamster's Local 214, to work as RCPO foremen. In varying situations, Michigan courts have held that the duty to bargain extends to a public employer's transfer of bargaining unit work to nonunit employees. *Southfield Police Officers Assoc v Southfield*, 433 Mich 168, 178; 445 NW2d 98 (1989); *Detroit Police Officers Assoc v City of Detroit*, 428

Mich 79, 92-93; 404 NW2d 595 (1987) (Boyle, J). However, whether an issue is a mandatory subject of bargaining under the PERA is to be decided case by case. *Southfield Police Officers Assoc, supra*, 433 Mich 178. Here, ACODS asserts that the MERC erred in relying on *Detroit Water & Sewerage, supra*, to determine whether the City had a duty to bargain before making such assignments.

In *Detroit Water & Sewerage*, the City of Detroit unilaterally transferred duties previously performed by employees represented by AFSCME to employees represented by the Sanitary Chemists and Technicians Association (SCATA). *Detroit Water & Sewerage, supra*. Both unions filed unfair labor practice charges, alleging that the City breached its duty to bargain regarding the transfer of duties. *Id.* The MERC described the unfair labor practice charges as alleging “violations in connection with a June 1, 1987 transfer of duties from employees represented by AFSCME to employees represented by SCATA.” *Id.* Similarly, in the instant case, the issue is whether employees from one unit may be temporarily assigned to fill vacancies in another unit and perform the work done by that unit. The issues are essentially the same in that they both involve the transfer of unit work to non-unit employees. Accordingly, we reject ACODS’ attempt to factually distinguish the cases.

ACODS further argues that the MERC erred in determining that the transfer of work did not have a “significant adverse impact” on unit employees. *Detroit Water & Sewerage, supra*. The “adverse impact” test was taken from federal precedent. See *Fibreboard Paper Products Corp v NLRB*, 379 US 203, 215; 85 S Ct 398; 13 L Ed 2d 233 (1964). “Federal precedent is relevant and persuasive only to the extent it is based on similar facts and circumstances and best effectuates the policy of the PERA.” *Southfield Police Officers Assoc, supra*, 433 Mich 184. Under the facts of the instant case, we agree with the MERC’s statement in *Detroit Water & Sewerage*, that “unless the impact on unit employees is significant and real, as opposed to de minimis and speculative, there is no justification for restricting the employer’s freedom to make decisions regarding the assignment of work.” Accordingly, we believe that it was proper to apply the adverse impact test to the instant case. ACODS argues that the MERC erred in its application of the adverse impact test to the facts of the instant case because it examined the impact with respect to the RCPOs assigned to the RCPO foremen positions, rather than examining the impact on the ACODS unit. However, even if the MERC erred in that respect, the error was harmless. A reduction in the number of unit positions is not a sufficient adverse impact to justify a duty to bargain. *Detroit Water & Sewerage, supra*. ACODS failed to demonstrate, for example, that ACODS members were laid off, terminated, or demoted as a result of the assignment. *Id.* Moreover, the RCPOs assigned to the foremen positions are now members of ACODS. Therefore, although ACODS argues that the assignments “siphoned off” unit positions, it failed to demonstrate an adverse impact sufficient to justify a duty to bargain. We therefore conclude that the MERC did not commit a substantial and material error of law by relying on *Detroit Water & Sewerage*.

ACODS next claims that the MERC erred in ignoring its argument, and in failing to find, that the placement of the RCPOs from Teamster’s Local 214, a non-supervisory unit, into the RCPO foremen bargaining unit represented by ACODS, impermissibly intermingled supervisory and non-supervisory personnel within the bargaining unit. We disagree. Although this issue was not addressed by the

MERC, we will review the issue as it presents a question of law and the facts necessary for its resolution are before us. *Frericks v Highland Township*, 228 Mich App 575, 585; 579 NW2d 441 (1998).

ACODS is correct in stating that for purposes of collective bargaining, supervisory and executive personnel should not be in the same bargaining unit as non-supervisory personnel. MCL 423.213; MSA 17.455(13); MCL 423.9e; MSA 17.454(10.4); *Grandville Municipal Executive Assoc v City of Grandville*, 453 Mich 428, 438; 553 NW2d 917 (1996); *Michigan Education Assoc v Clare-Gladwin Intermediate School District*, 153 Mich App 792, 795-796; 396 NW2d 538 (1986). Here, however, while the RCPOs were assigned to work as RCPO foremen, they were not members of the ACODS bargaining unit. Defendant presented uncontradicted testimony that, when a person works out-of-class, that person remains a member of the bargaining unit of which he was a member before he began working out-of-class. Thus, the RCPOs represented by Teamsters Local 214 remained members of that bargaining unit and continued to pay dues to Teamster's Local 214 while they were working out-of-class as RCPO foremen. It was only when they were officially promoted to the RCPO foremen positions that they could, and did, become members of the RCPO foremen bargaining unit represented by ACODS. Accordingly, the temporary placement of RCPOs in the RCPO foremen positions did not violate MCL 423.213; MSA 17.455(13) and MCL 423.9e; MSA 17.454(10.4).

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Martin M. Doctoroff  
/s/ Peter D. O'Connell