

STATE OF MICHIGAN
COURT OF APPEALS

PONTIAC SCHOOL DISTRICT,

Appellee,

and

PONTIAC EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION MEA/NEA,

Appellant,

and

MICHIGAN ASSOCIATION OF POLICE,

Petitioner-Appellee.

UNPUBLISHED
December 23, 2014

No. 317991

MERC

LC Nos. 08-000108; 08-000141

Before: M. J. KELLY, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Appellant, the union known as the Pontiac Educational Support Personnel Association MEA/NEA (PESPA), appeals as of right from an order of the Michigan Employment Relations Commission (MERC) dismissing charges and objections brought by PESPA against the Pontiac School District (PSD). We affirm.

PSD's board voted on June 30, 2008, to lay off 37 security officers and replace them with "police authority officers" (PAOs) under the Private Security Business and Security Alarm Act, MCL 338.1051 *et seq.* On July 11, 2008, PESPA filed an unfair labor practice charge (ULPC) with MERC, alleging that PSD had acted unlawfully by eliminating the security-officer classification without bargaining.¹ In August 2008, the PAOs attended a meeting, with a PESPA representative present; the representative indicated that PESPA was already the officers' bargaining organization. However, the PAOs voted, by a show of hands, to be represented by the Michigan Association of Police (MAP). On August 19, 2008, MAP filed a petition with

¹ The ULPC included additional allegations of wrongdoing that were settled and are not part of the present appeal.

MERC seeking an election and certification as the representative for the PAOs, and on November 3, 2008, MAP obtained this certification.

In December 2009, after an initial hearing with an administrative law judge (ALJ), PESPA filed another ULPC, alleging that PSD improperly recognized MAP instead of PESPA as the bargaining representative for the PAOs. PESPA claimed that MAP's petition for certification violated commission rules because on the petition it failed to list PESPA as an organization claiming to represent the PAOs.² In August 2011, PESPA filed a motion to set aside the election results.

On September 9, 2011, the ALJ issued a preliminary order indicating that PESPA's charges had been consolidated and that "PESPA's motion and brief do not address the obvious question of the delay in PESPA asserting its claims." The ALJ specifically cited 2002 AACs, R 423.149b, which sets a five-day limit for objecting to the conduct of an election. PESPA filed various briefs, and on January 2, 2012, the ALJ issued an additional preliminary order stating that PESPA's objection to the election had been filed far too late and stating, "I am inclined to recommend that the Commission find that there are no material facts in dispute and that [PESPA's charges] should be summarily denied." The ALJ noted that it had given the parties an opportunity to seek oral argument and that "[n]o request for oral argument was submitted and . . . the matter is ready for issuance of a decision on the merits."

On August 15, 2013, MERC issued its decision and order, stating, in part:

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. . . . 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. . . . 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. . . .

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

² PSD had sent a letter on September 2, 2008, to MERC indicating that PESPA was an "interested labor organization" with regard to the PAOs, but MAP's actual petition failed to list PESPA as a party that had claimed recognition as a representative.

of limitations is not tolled by the attempts of an employee or a union to engage in settlement discussions

[I]t is clear that PESPA was an interested party under Rule 149b. . . .

In conclusion, we find no excusable basis for PESPA's multi-year delay in raising objections to the October 8, 2008 election. . . . We conclude, therefore, that PESPA's . . . 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.

The commission specifically noted that “no party [had] request[ed] oral argument”

As stated in *Macomb County v AFCSME Council 25 Locals 411 & 893*, 494 Mich 65, 77; 833 NW2d 225 (2013):

In a case on appeal from the MERC, the MERC's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. Legal questions, which include questions of statutory interpretation and questions of contract interpretation, are reviewed de novo. As a result, an administrative agency's legal rulings are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law. [Citations and quotation marks omitted.]

PESPA argues on appeal that the commission erred in dismissing the motion to set aside the election results without holding a hearing because there was a genuine issue of material fact regarding whether PESPA delayed in filing its motion. This argument is patently without merit and does not warrant an extended discussion. PESPA spends pages of its brief setting forth the proceedings that occurred below but never offers a plausible explanation for its failure to file an objection within five days of learning about the election results. 2002 AACCS, R 423.149b states:

(1) Within 5 days after the election results have been tabulated and furnished to the parties, excluding Saturdays, Sundays, and legal holidays, an interested party may file objections to the conduct of the election or to conduct improperly affecting the results of the election. Objections shall be in writing and shall contain a statement of facts upon which the objections are based and the reasons for the objections. A signed original and 4 copies of the objections shall be filed with the commission, and the party filing objections shall at the same time serve a copy upon each of the other parties to the election with proof of service to the commission.

Clearly, PESPA was an “interested party” under the circumstances of this case. It utterly failed below and utterly fails on appeal to offer a plausible explanation for failing to adhere to this rule. We find no basis to reverse the commission's ruling with regard to the motion to set aside the election results.

PESPA also takes issue with the dismissal of the earlier ULPC, stating that an additional hearing should have been held with regard to it and that the commission's reasoning for dismissing it was faulty. We tend to agree that the commission erred in stating that the earlier ULPC was "based on [the] contention that the election of MAP was unlawful" Indeed, PESPA filed the earlier ULPC before MAP had even been selected as the representative for the PAOs. However, we find persuasive the reasoning employed by PSD on appeal. The commission did not rely *solely* on the "timeliness" line of reasoning in dismissing the earlier ULPC. Instead, it stated, "those claims are also untimely *and otherwise without merit* and must be dismissed" (emphasis added). In other words, the commission acknowledged that the ULPC was without merit, and this conclusion is fully supported by the record.

First, 2002 AACS R 423.165 states that "the commission or administrative law judge designated by the commission may, on its own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party." Second, it is clear that a reorganization effort such as that undertaken by PSD is not a mandatory subject of bargaining. As stated in *Ishpeming Supervisory Employees' Chapter of Local 128, Michigan Council 25, AFSCME, AFL-CIO v Ishpeming*, 155 Mich App 501, 508; 400 NW2d 661 (1986), "the decision to transfer work in pursuit of a legitimate reorganization effort was not a mandatory subject of bargaining, but the impact of that decision was an issue for bargaining." "[T]he decision to eliminate jobs pursuant to a reorganization was within the scope of management prerogative and was not a mandatory subject of bargaining." *Id.* at 511. See also *Local 586, Service Employees International Union v Village of Union City*, 135 Mich App 553, 556; 355 NW2d 275 (1984) (decision to lay off workers not a mandatory subject of bargaining but "impact" of decision is subject to bargaining).

MERC decisions have indicated that the duty to bargain the *impact* of a reorganization decision is conditioned on there being a specific demand related to this impact. See *Detroit Public Schools*, 17 MPER 14 (2004) ("[T]he Union made no specific proposals regarding the impact or effects of the layoffs. We agree with the ALJ that such a bargaining demand must be made before a bargaining obligation on the part of the Employer can be found.") See also *City of Grand Rapids*, 22 MPER 70 (2009) ("Given Charging Party's failure to specify the particular impact issues over which it wished to negotiate prior to the initial hearing, as well as the charge's absence of any specific statement or theory as to how the reorganization impacted . . . members, we agree with the ALJ that Charging Party did not make a demand adequate to trigger Respondent's duty to bargain over the impact of its reorganization decision.")

"The MERC is the sole state agency charged with the interpretation and enforcement of [the] highly specialized and politically sensitive field of [public sector labor] law." *Kent County Deputy Sheriffs' Ass'n v Kent County Sheriff*, 238 Mich App 310; 605 NW2d 363 (1999). We give deference to MERC's expertise. *Grandville Municipal Executive Ass'n v City of Grandville*, 453 Mich 428, 437-438; 553 NW2d 917 (1996). In addition, the reasoning employed by MERC in the above decisions is in accordance with this Court's decision in *Local 586, Service Employees International Union*, 135 Mich App at 557, emphasizing that a duty to bargain is conditioned on a proper request. PESPA made a bargaining request in the present case, but the request contained no specifics regarding the impact of the possible layoffs.

PESPA's demand to bargain stated, in pertinent part:

One group covered by this contract is the position of security personnel. It has come to my attention that the district is considering a major change in the responsibility of building and student safety.

Please let this letter serve as a demand to bargain if any change in this position occurs. This includes the elimination of the job title and group as a whole.

I stand ready to meet with you as soon as possible if the district moves forward with the above mentioned action. If no action is taken we will work through the negotiations process to reach a fair contract.

This extremely general demand was insufficient to trigger a necessity to bargain over the impact of the reorganization decision and we simply cannot find a basis for reversal. The commission acted within its powers in dismissing the ULPC without a further hearing.

In a reply brief, PESPA attempts to raise the doctrine of “unclean hands.” We decline to address this issue because a reply brief is not the proper place to raise a new appellate issue. *Bronson Methodist Hosp v Michigan Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012).

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter