STATE OF MICHIGAN

COURT OF APPEALS

OAKLAND COUNTY and OAKLAND COUNTY SHERIFF'S DEPARTMENT, Respondents-Appellees,	FOR PUBLICATION February 3, 2009 9:05 a.m.
v	No. 280075 MERC
OAKLAND COUNTY DEPUTY SHERIFF'S ASSOCIATION, Charging Party-Appellant.	LC No. 06-000031 Advance Sheets Version

Before: Jansen, P.J., and O'Connell and Owens, JJ.

JANSEN, P.J.

Charging party, the Oakland County Deputy Sheriff's Association (the union), appeals by right the decision and order of the Michigan Employment Relations Commission (MERC), which dismissed in part the union's petition for binding arbitration under 1969 PA 312, MCL 423.231 *et seq*. (commonly referred to as "Act 312"), and severed the union's existing bargaining unit into two units—one consisting of employees eligible for Act 312 arbitration and the other consisting of employees not eligible for Act 312 arbitration. We affirm.

The union represents a bargaining unit of approximately 750 uniformed employees of respondent Oakland County Sheriff's Department. In August 2006, the union filed an unfair-labor-practice charge against the Sheriff's Department and a petition seeking Act 312 compulsory arbitration for "all sworn sheriff's department employees below the rank of sergeant." Respondents, Oakland County and the Oakland County Sheriff's Department, moved to dismiss the petition for arbitration, alleging that several classes of employees were ineligible for Act 312 arbitration or to clarify the existing bargaining unit and declare certain groups of employees ineligible for arbitration.[1] The MERC granted respondents' motion to dismiss in part

[1] The public employment relations act (PERA), MCL 423.201 *et seq.*, prohibits public employees from striking. MCL 423.202. "'[A]s a necessary tradeoff for the prohibition against striking'" in police and fire disputes, the Legislature enacted 1969 PA 312, MCL 423.231 *et seq*., which provides for compulsory arbitration for labor disputes in police and fire departments. *Jackson Fire Fighters Ass'n, Local 1306 v City of Jackson (On Remand)*, 227 Mich App 520, (continued…)

and severed the union into two separate bargaining units—namely (1) a unit consisting of all employees eligible under Act 312, consisting of "all positions previously within the bargaining unit that are assigned to the Patrol Services Division (including the complex control [sic] assignments), or assigned to the Investigative and Forensic Services Division (excluding forensic laboratory specialists), and require [certification under the Commission on Law Enforcement Standards Act] or are assigned to positions as dispatchers" and (2) a unit consisting of "all positions previously within the bargaining unit that are assigned to the Corrections Division or to circuit court investigator or forensic laboratory specialist positions."

In *Branch Co Bd of Comm'rs v Int'l Union, United Automobile, Aerospace & Agriculture Implement Workers of America*, 260 Mich App 189, 192-193; 677 NW2d 333 (2003), this Court set forth the standard that governs our review of MERC decisions:

> We review MERC decisions pursuant to Const 1963, art 6, § 28, and MCL 423.216(e). MERC's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. In contrast to . . . MERC's factual findings, its legal rulings are afforded a lesser degree of deference because review of legal questions remains de novo, even in MERC cases. [Citations and quotation marks omitted.]

The union argues that there was no legal or factual reason for the MERC to sever the bargaining unit for the benefit of the employer and that severance improperly served only to punish the union for filing the unfair labor practice charges. We disagree.

Although less deference is afforded an agency's legal conclusions, appellate courts traditionally have acknowledged "'the MERC's expertise and judgment in the area of labor relations.'" *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323 n 18; 550 NW2d 228 (1996) (citation omitted). Further, a determination of the appropriate bargaining unit "'is a finding of fact, not to be overturned . . . if it is supported by competent, material and substantial evidence.'" *Mich Ed Ass'n v Alpena Community College*, 457 Mich 300, 307; 577 NW2d 457 (1998) (citation omitted); see also *Police Officers Ass'n of Michigan v Grosse Pointe Farms*, 197 Mich App 730, 735; 496 NW2d 794 (1993).

As an initial matter, we find no error in the MERC's legal determination that an employer is permitted to seek severance of a mixed bargaining unit, even in the absence of a request by an employee. Although the MERC recognized the general policy against disturbing existing bargaining units and acknowledged that severance at the request of an employer had not previously been considered, it also noted that it had not been rejected either. In any event, the

(…continued)

523; 575 NW2d 823 (1998) (citation omitted). Only certain employees are eligible for arbitration under Act 312, specifically, "employees engaged as policemen, or in fire fighting or subject to the hazards thereof, emergency medical service personnel employed by a police or fire department, or an emergency telephone operator employed by a police or fire department." MCL 423.232(1).

MERC is permitted to reexamine prior decisions, depart from precedents, promulgate law though rulemaking, break from past decisions, or reconsider previously established rules. *Melvindale-Northern Allen Park Federation of Teachers, Local 1051 v Melvindale-Northern Allen Park Pub Schools (After Remand)*, 216 Mich App 31, 37-38; 549 NW2d 6 (1996). "If the departure from precedent is explained, appellate review is limited to whether the rationale is so unreasonable as to be arbitrary and capricious." *Id*. at 38.

As the MERC observed, an employer has the same statutory right to raise a representation issue as an employee or a labor organization acting on the employee's behalf. See MCL 423.212. The MERC also properly observed that Act 312 is intended to protect both employers and employees. The union did not identify below, and has not identified on appeal, any law prohibiting an employer from seeking severance of a mixed bargaining unit. Against this backdrop, the MERC concluded that there was

> no basis under PERA or under Act 312 to hold that a covered employer may never seek severance of a mixed bargaining unit, where the circumstances make severance appropriate. It is the employer that is principally burdened by Act 312, by having its ordinary prerogatives truncated. . . . There is no logical basis for precluding an employer from seeking clarification of a unit's coverage by Act 312, where the statutory structure expressly allows that same employer to petition for arbitration under the Act in precisely the same fashion as a union may initiate proceedings.

Additionally, although the MERC acknowledged its past practice of avoiding severance of preexisting mixed units, it stated that this practice should not be inflexibly applied:

> We must have always foremost in mind our obligation to "decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and to otherwise effectuate the purposes of this act, the unit appropriate for the purpose of collective bargaining" taking into account the need to define a unit which "will best secure to the employees their right of collective bargaining." MCL 423.213 and 423.9e. Here, we find that the existing mixed unit is not effectuating the purposes of the Act; to the contrary, the continued existence of this mixed unit has interfered in the normal and healthy give and take of bargaining anticipated under PERA and under Act 312.

The union has not shown that MERC's decision to sever its bargaining unit violated any constitutional or statutory provision or that the decision was based on a substantial and material error of law. Further, contrary to the union's argument, the MERC provided factual support for its conclusion that severance was appropriate under the circumstances of this case. As the MERC explained, the

> parties' collective bargaining agreement expired in 2003. This has left the parties frozen in place, with no immediate mechanism for adjusting conditions of employment. By a significant margin, the majority of the existing bargaining unit are in job categories not covered by Act 312. The Act 312 arbitration petition seeks to have an arbitrator set conditions of employment for County road patrol

> officers and for over 400 employees who clearly function as jail guards. The bargaining process itself has been skewed by the inability of the parties to agree, or otherwise resolve, which groups of employees are covered by which dispute resolution mechanism. The intractable nature of the dispute between the parties was evidenced by the filing of an extraordinary number of unfair labor practice charges.
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> Severing the existing unit results in one Act 312 covered unit of nearly 350 employees and a non-Act 312 unit of over 400 employees. Both resulting units are large by comparison with other public employee bargaining units and would clearly be of sufficient size to effectively engage in collective bargaining with the Employer over issues peculiar to their respective unit members. The two separate units may continue to be represented by the Union, which will act separately on behalf of each unit. The Employer will be able to bargain separate agreements with the two units without having issues that should properly be limited to one group impinging on negotiations involving the other. Therefore, we find it appropriate to direct the severing of the existing unit in order to foster more productive bargaining and to thereby effectuate the purposes of the Act.

We find no support in the record for the union's assertion that the MERC punished it for filing unfair labor practice charges. Rather, the MERC observed that the parties had been operating without a collective bargaining agreement since 2003 and that the bargaining process had been hindered because of disagreement over the appropriate dispute resolution mechanism applicable to a majority of the employees. The MERC's severance decision was intended to foster more productive bargaining for all affected employees, all of whom would still be represented by the union. The MERC's decision was neither arbitrary nor capricious, and it was supported by competent, material, and substantial evidence on the whole record.

Nor do we find merit to the union's argument that the proceedings below were procedurally flawed. The union argues that it was entitled to an evidentiary hearing before a hearing referee to allow it to establish that various classes of employees qualified for Act 312 arbitration. The decision whether to hold an evidentiary hearing is within the discretion of the MERC. *Sault Ste Marie Area Pub Schools v Michigan Ed Ass'n*, 213 Mich App 176, 182; 539 NW2d 565 (1995).

The referee who was assigned to this matter originally scheduled an evidentiary hearing, recognizing that the parties were disputing whether certain classes of employees were eligible for Act 312 arbitration and that an evidentiary hearing would likely be necessary to resolve the disputed issues of fact. The referee issued a pretrial order directing the parties to, among other things, provide specific information regarding the disputed factual issues. The union responded by filing a brief that listed a number of areas in which it intended to present proofs, but did not state what the proofs would show. Further, it did not even discuss several positions that respondents had asserted were not eligible for Act 312 arbitration, such as positions in the crime lab, circuit court investigators, circuit and district court staff, and complex patrol officers. The referee found that the union's brief had failed to comply with the pretrial order, but agreed to give the union additional time to file a conforming supplemental brief. The referee also issued a supplemental pretrial order directing the union to substantively address its claim that the Oakland

County Sheriff's Department was "factually unique," to identify any material disputes of fact regarding each of the contested employee groups,[2] and to list and address any material disputes of fact regarding the appropriate treatment of each classification under Act 312, including specific offers of proof. Despite being granted this extension, the union failed to timely submit a supplemental brief. Consequently, the referee granted respondents' petition to dismiss the issue of Act 312 arbitration with respect to employees working in the crime lab, in the circuit and district courts, and as circuit court investigators. However, the referee declined to dismiss the petition with respect to officers assigned to complex patrol and granted oral argument for further consideration of that issue.[3] A week later, the union filed a supplemental brief and a motion for reconsideration, but the referee declined to grant reconsideration because the supplemental brief still failed to establish the existence of a material factual dispute.

The union was given several opportunities to show the existence of disputed factual issues that required an evidentiary hearing, but repeatedly failed to do so. Under these circumstances, the referee did not abuse his discretion by failing to hold an evidentiary hearing. See *Swickard v Wayne Co Med Examiner*, 184 Mich App 662, 668; 459 NW2d 92 (1990) (observing that "since there were no disputed issues of fact, an evidentiary hearing would have served no purpose").

The union also challenges the referee's authority to order briefing, to "morph" an Act 312 issue into a unit clarification action, and to enter an order of dismissal. However, the MERC rules clearly provide authority for these matters. See Mich Admin Code, R 423.173 (providing that a referee "may direct the filing of briefs when the filing is, in the opinion of the commission or administrative law judge, warranted by the nature of the proceedings or the particular issues involved"); Mich Admin Code, R 423.172(2) (permitting a referee to hold pretrial conferences, dispose of motions, regulate the course of the hearing, and take other actions as necessary and authorized by the rules); Mich Admin Code, R 423.165(1) (stating 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").

The union also claims that the hearing referee mischaracterized the facts. The union, however, advised the referee that there were no "significant issues of fact" and failed to take advantage of several opportunities to present offers of proof and to identify disputed issues of fact. The union's refusal to brief below the factual disputes that it now asserts on appeal precludes appellate relief. See *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006), aff'd 478 Mich 348 (2007); see also *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

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[2] These groups specifically consisted of the corrections division, crime lab employees, circuit court investigators, circuit court and district court staff, and complex patrol officers.

[3] Respondents later conceded that complex patrol officers were eligible for arbitration under Act 312.

Finally, the union argues that the MERC erroneously construed MCL 423.232(1) by concluding that the statutory language "or subject to the hazards thereof" modifies only the phrase "engaged . . . in fire fighting" and does not modify the phrase "engaged as policemen." We find it unnecessary to resolve this issue of statutory construction because it is not necessary to the outcome of this case. However, even assuming arguendo that the language "subject to the hazards thereof" could be construed as modifying the phrase "engaged as policemen" in MCL 423.232(1), it is well settled that county corrections officers and other employees who are not police officers are not subject to the hazards of police work. *Police Officers Ass'n of Michigan v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580, 593-596; 599 NW2d 504 (1999); *Capital City Lodge No 141, Fraternal Order of Police v Ingham Co Bd of Comm'rs*, 155 Mich App 116, 118-119; 399 NW2d 463 (1986); *Local No 214, Teamsters v Detroit (On Remand)*, 103 Mich App 782; 303 NW2d 892 (1981). Moreover, as discussed previously, the union was given an opportunity to demonstrate why its corrections officers and other employees who were not police officers were factually unique, such that they might be entitled to coverage under the language "subject to the hazards thereof." Nonetheless, the union failed to do so. In other words, even if some police employees who are not actually police officers might potentially qualify for coverage under Act 312, the union failed to establish a factual issue with respect to whether its corrections officers could so qualify in this case.

Affirmed.

Owens, J., concurred.

/s/ Kathleen Jansen
/s/ Donald S. Owens