STATE OF MICHIGAN

COURT OF APPEALS

MACOMB COUNTY,

Respondent-Appellee,

v

MICHIGAN FRATERNAL ORDER OF POLICE LABOR COUNCIL,

Charging Party-Appellant.

UNPUBLISHED
December 17, 2019

No. 346617
MERC
LC No. 16-000125-K

Before: LETICA, P.J., and GADOLA and CAMERON, JJ.

PER CURIAM.

The Michigan Fraternal Order of Police Labor Council (FOPLC) appeals as of right the decision and order of the Michigan Employment Relations Commission (MERC) dismissing its claim that respondent, Macomb County (the County), committed an unfair labor practice under the Michigan Public Employment Relations Act (PERA), MCL 423.201 *et seq*. We affirm.

In the fall of 2016, a consent election was held to determine whether the bargaining representative for Macomb County Sheriff's Department's deputies and dispatchers should be changed. At the time, the employees were represented by the Police Officers Association of Michigan (POAM) pursuant to a negotiated collective-bargaining agreement (CBA) that was scheduled to remain in effect until December 31, 2016. The consent election was held to determine if the FOPLC should replace the POAM as the union members' bargaining representative. During the election campaign, the FOPLC offered to decrease members' dues by approximately one-third every month and to provide assistance from its Legal Defense Plan at no added cost. By a vote of 108 to 13, the members decided to have the FOPLC replace the POAM as their bargaining representative. The election results were certified by MERC on October 18, 2016.

In a letter to the POAM dated October 19, 2016, the FOPLC offered to assume the daily duties of representing the bargaining unit for the remainder of the then-current CBA term effective November 2, 2016, in exchange for the POAM agreeing to cease collecting dues on that date. In part, the FOPLC extended this offer because of complaints from members during the

election period that the POAM had failed to represent members at disciplinary hearings. The FOPLC recognized in its letter that the POAM would be obligated to carry out its responsibilities under the CBA without an agreement. The POAM did not respond to the FOPLC's letter.

According to the FOPLC, after MERC certified it as the bargaining representative in October 2016, the County voluntarily recognized it as the union's representative during disciplinary investigations and also engaged in good-faith negotiations with the FOPLC that resulted in modification of the union's health insurance plan under the CBA. However, when the FOPLC contacted the County about the transfer of dues collected by the County from union members in order to place union members into the FOPLC's Legal Defense Plan, the County informed the FOPLC that it would not recognize it as the bargaining representative until January 1, 2017.

On November 9, 2016, the FOPLC sent a demand to the County, seeking to be immediately recognized as the union's bargaining representative. The FOPLC's letter demand was copied to the POAM.

The next day, the POAM wrote to the County, copying the FOPLC. The POAM indicated its intention to fully perform its obligations under the CBA until it expired and expressed its expectation that the County to do the same.

On November 22, 2016, the FOPLC filed a petition with MERC, alleging that the County had engaged in an unfair labor practice by continuing to recognize the POAM as the union's bargaining representative for the remainder of the CBA (November through December 2016), depriving members of effective representation because the POAM was not fulfilling its duties to them. The FOPLC further asserted that MERC's policy of allowing an outgoing union to continue to represent members during a transition period permitted the outgoing union and the employer to effectively undermine the CBA. A consequence of the County's decision to not recognize the FOPLC as the bargaining representative was to require union members to proceed without union representation because the outgoing union was not complying with its duty of fair representation. Moreover, doing so also prevented union members from participating in the FOPLC's Legal Defense Plan because membership was effective upon recognition and payment of dues. However, the FOPLC acknowledged that the County had permitted it to be present during disciplinary proceedings, although the County would not recognize it as the exclusive bargaining representative while the then-existing CBA, negotiated with the POAM, was still in effect.

The FOPLC moved for summary disposition of its unfair labor practice charge on the ground that there was no need for an evidentiary hearing because the material facts were not in dispute. The FOPLC's motion was effectively a request for MERC to change its prior policy regarding the transition period when an existing CBA is still in effect, but members have voted to replace their representative. The FOPLC argued that because the transition period can create confusion for members and the outgoing union representative may not always represent members during disciplinary proceedings, once a newly elected incoming union gives notice that it will voluntarily commence representation under the terms of the existing CBA, the transition between the representatives is complete and the employer should fully recognize the newly elected representative.

In response, the County filed a cross-motion for summary disposition on the ground that the FOPLC failed to state a claim for which relief could be granted. The County contended that there was no question of fact that it had an existing CBA with the POAM and that it was required to comply with the terms of that CBA until it expired. Moreover, the FOPLC had no right to assume administration of the CBA or receive the dues collected in accordance with the CBA until that agreement expired. Consequently, the County was required to continue to remit collected dues to POAM and, if it failed to do so, it would be in breach of the CBA and subject itself to grievances or an unfair labor practice charge from the POAM because the POAM never disclaimed any interest in continuing to act as the bargaining unit's representative for the duration of the CBA. Furthermore, when the FOPLC offered to serve as the unit's representative, it was well aware that the CBA would continue to be followed until it expired. According to the County, once the CBA expired, it began remitting dues paid by members to the FOPLC. The County denied that it imposed any restrictions on union members' rights to be represented during investigatory meetings that could lead to discipline. Members subject to investigatory questioning were permitted to be accompanied by a representative from the POAM or the FOPLC, at their discretion, because it did not matter to the County which union's representative was involved. The County asserted that it worked with the FOPLC during the transition, but it did not voluntarily recognize the FOPLC as the exclusive bargaining representative.

The administrative law judge (ALJ) determined that the FOPLC's pleadings were devoid of any factual allegations that the County did not act in accordance with the PERA and existing MERC precedent when the County allowed the FOPLC to participate in investigatory meetings on behalf of its members and to bargain over changes to healthcare coverage. And it was well-established that, when an election occurs during the term of an existing CBA, the CBA continues in effect until its expiration even when the incumbent union representative is defeated. The ALJ recognized that there was longstanding MERC precedent allowing the County's continued remittance of collected dues to the POAM while the CBA was still in effect, and the FOPLC failed to show grounds for overturning that established precedent. Thus, the ALJ rejected the FOPLC's claim that the County was required to transmit union members' dues to it during the transition period before the CBA expired. The ALJ explained that adopting the FOPLC's position would require the County to disregard the CBA's terms although the FOPLC was aware of and had consented to them when it chose to participate in the election. After reviewing the ALJ's decision, MERC dismissed the FOPLC's unfair labor practice charge in its entirety. MERC specifically rejected the FOPLC's claim that the County did not have a legal obligation to continue to remit collected dues to the POAM after the POAM lost the consent election to the FOPLC.

The FOPLC appeals MERC's decision dismissing its unfair labor practice charge.

I. STANDARD OF REVIEW

MERC is charged with the interpretation and enforcement of public sector labor law. *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 313; 605 NW2d 363 (1999), aff'd in part 463 Mich 353; 616 NW2d 677 (2000). We review MERC decisions "pursuant to Const 1963, art 6, § 28, and MCL[] 423.216(e)." *Grandville Municipal Executive Ass'n v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). MERC's "findings of fact are

conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Id*. 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." *Id*., citing MCL 24.306(1)(a), (f). We afford MERC's legal determinations a lesser degree of deference than its factual ones, as we still review legal questions de novo. *St Clair Co Ed Ass'n v St Clair Co Intermediate School Dist*, 245 Mich App 498, 513; 630 NW2d 909 (2001). But we give respectful consideration to MERC's legal conclusions because it is the agency charged with the duty of executing the legislation. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97, 103; 754 NW2d 259 (2008). Nonetheless, MERC's interpretation does not bind us and it cannot conflict with the Legislature's intent as expressed in the statutory language. *Id.*

We review a decision on a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for failure to state a claim for relief tests the legal sufficiency of a claim by the pleadings alone. See *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996).

II. ANALYSIS

Preliminarily, the ALJ did not conduct an evidentiary hearing because there was no genuine issue of material fact and established precedent did not support the FOPLC's claim of an unfair labor practice.[1] Summary disposition may be granted in administrative proceedings for failure to state a claim for relief and where there is no genuine issue of material fact. Mich Admin Code R 423.165(2)(d) and (f).

Here, MERC did not err by ruling that the FOPLC failed to establish a material factual dispute and that the County was entitled to dismissal of the unfair labor practice charge as a matter of law.

The FOPLC contended that the County committed an unfair labor practice by violating MCL 423.210(1)(a) and (e), and MCL 423.211. In relevant part, MCL 423.210(1) provides:

> (1) A public employer or an officer or agent of a public employer shall not do any of the following:

[1] To the extent that this is an issue on appeal, we conclude that MERC properly decided this matter without conducting an evidentiary hearing because the relevant facts were not in dispute. Also, to the extent that the FOPLC attempts to challenge "findings of fact" on the basis that they were not supported by competent, material, and substantial evidence on the record as a whole, its arguments are misplaced because no evidentiary hearing was held and MERC did not make any factual findings. Instead, throughout this process, the FOPLC has only challenged MERC's legal rulings.

(a) Interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9 [MCL 423.209.]

* * *

(e) Refuse to bargain collectively with the representatives of its public employees, subject to section 11 [MCL 423.211].

The "rights guaranteed in section 9" include employees' rights to "[o]rganize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice[,]" or to refrain from participating in any of the same activities. MCL 423.209(1). And MCL 423.211 provides:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

The FOPLC primarily argues that MERC's long-established policy in situations when union representatives change during the course of an unexpired CBA should be changed. This policy is discussed in *In re Hartland Consol Sch*, 19 Mich Pub Emp Rep 81 (2006) (Case Nos. R06 A-008, CU06 C-006), as follows:

> The Commission has consistently held that when a representation election is conducted during the term of an existing contract, that contract continues in effect until its expiration even if the incumbent representative is defeated. *Ionia Co Road Comm*, 1969 MERC Lab Op 82; *Garden City Pub Schs*, 1974 MERC Lab Op 364; *Jonesville Bd of Ed*, 1980 MERC Lab Op 891. An employer is obligated to comply with the terms of that contract, including provisions requiring it to deduct dues for the former incumbent from employees' paychecks. *West Bloomfield Pub Schs*, 1985 MERC Lab Op 24, citing *Fender Musical Instruments*, 175 NLRB 873, 874 (1969).[2] The employer, however, has a duty to

[2] We also decline to adopt the FOPLC's contention that *Fender* creates instability in the workplace. Instead, we conclude that MERC's reliance on *Fender*'s reasoning was appropriate as this decision from the National Labor Relations Board (NLRB) reflects the need for stability

> bargain with the new representative, even though the new representative is also bound by the terms of the contract during its term. *City of Romulus*, 1988 MERC Lab Op 504.

MERC commented on this rule in *In re City of Romulus*, 1988 MERC Lab Op 504, when there was a consent election before the expiration of an existing CBA, explaining that it minimizes any disruption of stable labor relations and avoids a hiatus between old and new contracts. The terms of the existing contract should be enforced until the CBA expires because a change of representatives could destabilize labor relations.

In *In re West Bloomfield Sch Dist*, 1985 MERC Lab Op 24, a case factually similar to this case, the bargaining representative changed before the existing CBA had expired. The incoming representative challenged the employer's remittance of collected dues to the outgoing representative until the CBA expired. MERC reasoned that members have the right to select a new representative at any time, but for purposes of maintaining stability in labor relations, an existing agreement should remain in place during a period of transition between union representatives as a matter of contract law. Thus, MERC determined that it would enforce the existing CBA's terms to require that the dues be paid to the outgoing representative.

Here, MERC followed its line of authority consistently holding that a consent election that results in the replacement of a union's representative while a CBA is still in effect does not change the obligations of the parties to the CBA. The employer is still obligated to collect and remit dues to the outgoing representative under the terms of the CBA unless the outgoing representative deems it appropriate otherwise. In this case, there is no dispute that POAM did not express an intent to discontinue its duties to members under the CBA for the remainder of the CBA's term.[3] The FOPLC argues that it cannot represent its members in investigatory matters during the transition period, given the longstanding policy of allowing the employer to continue to remit collected dues to the outgoing union. However, it is undisputed that the County did not oppose or object to the FOPLC's representation of union members after its certification as the newly elected bargaining representative. The FOPLC primarily asserts that it cannot, or will not, provide legal representation to members until it receives dues. We disagree. Despite the election, the POAM was obligated to continue to represent members during the transition period. The FOPLC admitted in its pleadings that the County allowed it to represent or assist members at investigatory meetings held during the transition period. The County did not prevent the FOPLC

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by allowing the incoming union to bargain for its members while still complying with the terms of the bargained-for CBA. See *Fender*, 175 NLRB at 874 (determining that the dues checkoff authorizations under the terms of the unexpired CBA were still in effect for the outgoing incumbent union upon expiration of the labor agreement, but that its decision "in no way affect[ed] the right of the newly selected representative to bargain for new terms and conditions of employment; nor d[id] it relieve the employer of the duty so to bargain").

[3] To the contrary, POAM informed the County that it stood "ready to fully perform any obligations its possesses under the CBA, through the expiration of the agreement on December 31, 2016."

from representing union members. If the FOPLC is unwilling to provide assistance to union members because it is not receiving dues, that is a matter between the FOPLC and its members; it is not one that the County should involve itself in. MERC noted that the FOPLC was well aware of its prior decisions on this subject, and therefore, it had knowledge that it could not receive dues payments until a new CBA went into effect. The fact that the FOPLC did not receive the dues collected during the transition period did not prevent union members from receiving legal assistance from the FOPLC during investigatory matters.

The FOPLC also argues that it was, or should have been, recognized as the *exclusive* bargaining representative for members after the POAM failed to represent members' interests once it lost the election and the County recognized the FOPLC as the union representative. The FOPLC contends that the County voluntarily recognized it as the members' bargaining representative because the County participated in healthcare negotiations with the FOPLC and it allowed the FOPLC to represent members during investigatory proceedings.

As an initial matter, to the extent that the FOPLC contends that POAM was not complying with its duties to its union members, we conclude that an unfair labor practice charge against the County was not the proper forum for addressing that argument. See *Goolsby v City of Detroit*, 419 Mich 651, 660-664; 358 NW2d 856 (1984). The County should not be concerned with internal union matters. Moreover, the FOPLC declined to add POAM as a necessary party to these proceedings and the ALJ denied the County's motion to add POAM as a party after the FOPLC opposed the POAM's joinder.

The FOPLC also argues that *Quinn v Police Officers Labor Council*, 456 Mich 478; 572 NW2d 641 (1998), supports its argument that this Court should recognize that it was willing to voluntarily assume the duties as the members' representative as soon as the election results were certified, and therefore, the County should have recognized the FOPLC as the exclusive bargaining representative. In *Quinn*, our Supreme Court addressed whether a newly elected union representative or the outgoing representative should pursue a union member's grievance that began while a previous CBA was in effect. The Court held that the previous representative, who had filed and pursued the grievance, should proceed with the grievance because it was in the best position to efficiently and knowledgeably see it through. *Id*. at 485-486. In a footnote, the Court stated:

> We note that nothing in this opinion should be construed as preventing the new representative from *voluntarily* assuming pursuit of existing grievances, provided the aggrieved employee or employees consent to the new representative's assumption of the duty. Further, we note that this situation does not concern a competing union claiming to be the contemporary bargaining representative. [*Id*. at 486 n 5.]

While the FOPLC argues that this footnote supports its position that it should be recognized as the exclusive bargaining representative, the Court recognized the continuing rights of the competing, outgoing union in these situations. Thus, this decision is consistent with enforcing the status quo during periods of transition to ensure stability in labor relations.

The FOPLC's claim that the County had voluntarily recognized it as the *exclusive* representative of its unionized employees once the election results were certified is also meritless. In *In re Garden City Pub Sch*, 1988 MERC Lab Op 1050, MERC addressed the voluntary recognition of a new union representative:

> The Commission in *Flint Bd. of Ed*., 1983 MERC Lab Op 215, 216, rejected a claim that a labor organization can achieve the status of an exclusive bargaining representative merely because of its informal dealings with an employer. In *Flint*, the Commission refused to find *de facto* recognition, stating at 216:
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> > In order for a public employer to be bound by its own voluntary recognition of a labor organization as exclusive bargaining agent for its employees, there must be a clear showing that the Board of Education entered into a bargaining relationship. It is not enough that the Employer chose to sit down and discuss grievances with some employees, or with an employee representative, or even participate in mediation with individual employees. See *Village of Hesperia*, 1980 MERC Lab Op 757.
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> In this case there has not been any showing that the Respondent voluntarily acquiesced in a bargaining relationship or consented to recognize the Charging Party as the exclusive representative of any of its employees. Lacking Voluntary consensual recognition from the Employer as exclusive bargaining agent, this labor organization cannot expect to attain legal status as the exclusive bargaining agent without invoking Commission election procedures and submitting its claim of majority status to the test of a Commission-supervised election.

While the FOPLC was elected to replace the POAM, the FOPLC has not shown that the County recognized it as the exclusive bargaining representative, to the exclusion of the POAM, after the election results were certified. Instead, the County honored its contractual obligations under the existing CBA by dealing with the POAM, but agreed to address issues with the FOPLC that impacted future negotiations (i.e., healthcare) and allowed employees to seek assistance from either representative during the transition period. The FOPLC contends that the County simultaneously interacted with both representatives, which created confusion for members. Again, however, that is an internal union matter; it does not affect the County's obligations under the existing CBA.

The FOPLC asserts that problems or inequities may occur when bargaining representatives are ousted when a previously negotiated CBA is still in effect, comparable to what can occur when an employer undergoes organizational changes, such as by merger, acquisition, or dissolution. Because this case deals only with the PERA and public employers, the FOPLC's comparison to nongovernmental employers is not appropriate. Nonetheless, it could also be problematic and harmful to union members if changes in representation during an existing CBA are allowed to void rights or obligations under the CBA, which could also cause disruption in employment matters if a newly elected representative must simultaneously assume its new role and renegotiate an agreement with the employer. MERC's established policy

permits the new representative to become knowledgeable about issues facing its members, while ensuring that the parties are still required to adhere to the existing CBA during the transition period. This promotes continued stability in labor relations.

Furthermore, as we noted, MERC has fully addressed the circumstances involved in this case in previous decisions, which did not involve successor employers, and the County was obligated to follow those decisions or it could have been liable for an unfair labor practice. Indeed, the FOPLC is effectively claiming that the County committed an unfair labor practice by following MERC's past decisions consistently recognizing that employers are obligated to follow the terms of an existing CBA when there is change in the bargaining representative before the CBA expires. As a matter of law, the County did not engage in an unfair labor practice when it continued to work with the POAM during the duration of the existing CBA, in accordance with the terms of that agreement, while also recognizing the FOPLC's authority to be involved in matters at members' discretion or matters that impacted future negotiations.

The FOPLC also challenges MERC's longstanding policy on the ground that it is based in equity, not legal authority. "Administrative tribunals do 'not have equitable jurisdiction' unless expressly authorized by statute." *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497-498; 813 NW2d 763 (2011). Although MERC lacks powers of equity, it did not exercise any such powers in this case. Consistent with its duty to implement the provisions of the PERA, MERC addressed whether there was evidence to support the FOPLC's claim of an unfair labor practice under MCL 423.210(1)(a) and (e), and MCL 423.211. As noted, MERC has exclusive jurisdiction over unfair labor practices, which includes imposing appropriate remedies when it finds an unfair labor practice. *Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich 104, 117-118; 252 NW2d 818 (1977); MCL 423.216. As the FOPLC points out, MERC must engage in a balancing of multiple factors to reach a just result. Our appellate courts have held that MERC's statutory duties with regard to addressing unfair labor practices include a balancing of competing equities to reach the best result consistent with the PERA:

> Ignoring for the moment the other policy ramifications of reinvolving the circuit courts in the public labor relations sector . . . the jurisdiction of MERC would be seriously eroded. The circuit courts would be forced to make the same unfair labor practice determinations as to the federations heretofore exclusively reserved to MERC. The unpleasant specter of the courts and MERC sharing this authority, combined with the very real possibility of conflicting decisions, could only further confuse labor relations in the public sector. The Court of Appeals ably pointed this out in its well-reasoned opinion in this case:
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> > "However, even if a civil damage action were allowed under these conditions, it would nevertheless cause an irreconcilable conflict with other provisions of the PERA. The PERA gives to MERC and not to the courts the primary responsibility to balance the competing equities when unfair labor practices or other misconduct have been committed by both sides. See *Rockwell* [*v Bd of Ed of Sch Dist of Crestwood*], *supra*, [] 639 [393 Mich 616; 227 NW2d 736 (1975)]. Thus, if we permitted the courts to become directly

> involved in this determination we would be seriously undercutting the statutory responsibility given to the MERC." [*Lamphere Sch v Lamphere Federation of Teachers*, 67 Mich App [331,] 337 [; 240 NW2d 792 (1976), aff'd 400 Mich 104; 252 NW2d 818 (1977)]. [*Lamphere Sch*, 400 Mich at 119.]

The record demonstrates that MERC properly ruled only on legal issues involving the County's adherence to an existing CBA in situations when a representation election is conducted during the term of the existing contract, and whether its treatment of the FOPLC during this interim period involved an unfair labor practice. The FOPLC has not shown that MERC's decision violated a constitutional or statutory provision, or was based on a substantial and material error of law.

Affirmed.

/s/ Anica Letica
/s/ Michael F. Gadola
/s/ Thomas C. Cameron