STATE OF MICHIGAN

COURT OF APPEALS

JACKSON COUNTY DEPUTIES ASSOCIATION,

Petitioner-Appellant,

v

JACKSON COUNTY SHERIFF'S DEPARTMENT,

Respondent-Appellee.

UNPUBLISHED
July 9, 1996

No. 174820
LC No. 93-000067

Before: Neff, P.J., and Smolenski and D.A. Johnston,* JJ.

PER CURIAM.

The Jackson County Deputies Association (union) appeals as of right an April 1994 decision and order of the Michigan Employment Relations Commission (MERC) determining that deputy sheriffs employed by the Jackson County Sheriff's Department (sheriff's department) as corrections officers and animal control officers are not eligible for arbitration under 1969 PA 312, MCL 423.231 *et seq.*; MSA 17.455(31) *et seq.* (the act or act 312 arbitration). We affirm.

I. The Relevant Law

The act's relevant statutory language is found in §§ 1, 2(1) and 3 respectively:

> Sec.1 It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed. [MCL 423.231; MSA 17.455(31).]

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

> Sec. 2 (1) Public police and fire departments means any department of a city, county, village, or township having employees engaged as policeman, 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); MSA 17.455(32)(1).]
>
> Sec 3. Whenever in the course of mediation of a public police or fire department employee's dispute . . . the dispute has not been resolved to the agreement of both parties within 30 days of the submission of the dispute to mediation, or within such further additional periods to which the parties may agree, the employees or employer may initiate binding arbitration proceedings by prompt request therefor, in writing, to the other, with copy to the employment relations commission. [MCL 423.233; MSA 17.455(33).]

In *Metropolitan Council No 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299, 307; 294 NW2d 578 (1980), the question presented was whether seventeen prosecutor's investigators employed in the Oakland County Prosecutor's Department were eligible for act 312 arbitration. In answering this question, a plurality of our Supreme Court adopted the following analysis:

> First, the particular complainant employee must be subject to the hazards of police work . . . . Second, the interested department/employer must be a critical-service county department engaging such complainant employees and having as its principal function the promotion of the public safety, order and welfare so that a work stoppage in that department would threaten community safety . . . . [*Id.* at 335 (Williams, J., with Coleman, C.J., and Fitzgerald, J., concurring).]

Justice Williams explained that this analysis "employs both the literal § 2(1) scope provision and the § 1 purpose provision in determining whether the dispute is embraced by the act's intended coverage." *Id.* at 336.

Applying this analysis to the facts, Justice Williams concluded that the investigators were not eligible for act 312 arbitration. *Id.* at 336. Although finding that the investigators and the prosecutor's office were both within the literal terms of § 2(1) of the act, Justice Williams concluded that the prosecutor's office did not constitute a public police department:

> [W]e are unpersuaded that the Oakland County Prosecutor's Department constitutes an intended "public police department" such that allowing either itself or its investigators to resolve their dispute pursuant to Act 312 will effectuate the whole act's intent as either (1) "requisite to the high moral of [the Oakland County Prosecutor's Department] employees" or (2) requisite "to the efficient operation of [the Oakland County Prosecutor's Department]" or (3) necessary for averting critical-service strikes which would likely impede the public safety, order and welfare. [*Id.*]

Justice Ryan concurred with the result reached by Justice Williams on the ground that "the Oakland County Prosecuting Attorney's investigators are not 'employees engaged as policeman' whose strike would be likely to cause an imminent and serious threat to public safety and were not intended by the Legislature to be included within the provisions of 1969 Act 312." *Id.* at 337-338.

In *Capitol City Lodge No 141, Fraternal Order of Police v Ingham Co Bd of Comm'rs*, 155 Mich App 116, 118; 399 NW2d 463 (1986), the question presented was whether Ingham County jail security officers were eligible for act 312 arbitration. This Court stated that Justice Williams' analysis in *Metropolitan Council* set forth the two conditions necessary for act 312 coverage. *Id.* This Court further noted that under Justice Williams' "plurality opinion . . . and under Justice Ryan's concurring opinion, a finding that a strike would threaten public safety is prerequisite to act 312 coverage." *Id.* at 120. Applying this analysis, this Court held that the jail security officers were not eligible for act 312 arbitration because, even assuming arguendo that the jail security officers were subject to the hazards of police work, the record did not contain competent, material and substantial evidence that a strike by the jail security officers would pose a threat to community safety. *Id.* at 121. See also *City of Detroit v Detroit Firefighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 548; 517 NW2d 240 (1994) (In order for an employee to be eligible for act 312 arbitration, the employee must be engaged in or subject to the hazards of police work or fire fighting, and also must be an employee whose services are critical to the protection of the public.").

II. Factual and Procedural Background

In this case, the union represents a collective bargaining unit that includes all employees of the sheriff's department subject to the sheriff's direction and control, including "deputy sheriffs, sergeants, corrections officers and deputies assigned to the animal shelter." In August 1993, the union petitioned the MERC for act 312 arbitration. The sheriff's department answered, alleging that the corrections officers and animal control officers were not eligible for Act 312 arbitration. In November 1993, an evidentiary hearing on this issue was held before an administrative law judge, during which the parties stipulated that the corrections officers and animal control officers were employed by a public police department within the meaning of the act, and that the corrections officers were subject to the hazards of police work. In its April 1994 decision, the MERC, relying on *Metropolitan Council, supra*, and *Capital City Lodge, supra*, determined that the corrections officers were not eligible for act 312 arbitration because they could be replaced and, therefore, a strike among them would not threaten community safety. The MERC also determined that the corrections officers' fire fighting responsibilities did not rise to the level of being "engaged . . . in fire fighting" within the meaning of § 2(1) of the act.

The MERC found that the animal control officers were not eligible for act 312 arbitration because they were not subject to the hazards of police work and a strike among them would not threaten community safety.

III. Standard of Review

Findings by the MERC with respect to questions of fact are considered conclusive if supported by competent, material, and substantial evidence on the whole record. *Detroit Fire Fighters, supra* at 552. Substantial evidence is defined as more than a scintilla, but substantially less than a preponderance of the evidence. *Sault Ste Marie v Fraternal Order of Police Labor Council, State Lodge of Michigan*, 163 Mich App 350, 354; 414 NW2d 168 (1987). The determination of an appropriate bargaining unit is a question of fact. *Detroit Fire Fighters, supra* at 558. Further, this Court may review the law, regardless of the MERC's factual findings. *Detroit Fire Fighters, supra* at 552.

IV. Corrections Officers

The union first argues that the corrections officers in this case are per se eligible for act 312 arbitration because, being sworn and uniformed deputy sheriffs, they are police officers within the meaning of the act. In so arguing, the union relies on *City of Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 1992 MERC Lab Op 698, aff'd in part on other grounds, rev'd in part on other grounds, and vacated in part on other grounds, *Detroit Fire Fighters*, 204 Mich App at 559. In this MERC decision, the MERC held that the analysis set forth in *Metropolitan Council, supra*, for determining act 312 eligibility "was not intended to apply to 'employees engaged . . . in firefighting' who are employed in a public fire department and are sworn firefighters. Employees in this category are automatically subject to the Act." *Detroit Fire Fighters*, 1992 MERC Lab Op at 705. We express no opinion on the merits of this MERC decision. However, we reject the union's contention for the following reasons.

In *Metropolitan Council*, Justice Williams made the following observation:

> While the act as a whole was obviously engineered to avert critical-service work stoppages arising from the nonresolution of a "public police . . . department employee's dispute", the act is inherently ambiguous regarding eligibility to invoke its intended coverage. [*Id.* at 308.]

In arriving at the analysis previously discussed for determining an employee's eligibility for act 312 arbitration, Justice Williams specifically rejected an analysis that focused only on the literal status of either the employer or employee. *Id.* at 308-312. Justice Williams noted:

> [A] thing which is within the spirit of a statute is within the statute, although not within the letter; and a thing within the letter is not within the statute, unless within the intention. [*Id.* at 313.]

We find Justice Williams' rejection of a literal interpretation of eligibility for act 312 arbitration particularly persuasive in this case. We acknowledge that the corrections officers at issue in this case are sworn and uniformed deputy sheriffs. However, in its opinion and order, the MERC noted that the employer claimed that these corrections officers possessed only a limited deputization not including law enforcement powers because they are not required to be certified police officers pursuant to the Michigan

Law Enforcement Officers Training Council Act, MCL 28.601 *et seq.*; MSA 4.450(1) *et seq.* In addition, the MERC found that corrections officers could not carry weapons, but instead regularly carried pepper gas canisters to repel prisoner assaults. These findings are supported by competent, material and substantial evidence and do not constitute an error of law. Thus, rather than focusing on the literal status of the corrections officers as "deputy sheriffs," we believe the analysis enunciated by Justice Williams in *Metropolitan Council* is appropriate in this case to determine whether the corrections officers come not only within the literal terms of the act, but also its spirit. We find further support for this conclusion in the opinions of this Court that have, as indicated previously, determined the eligibility of corrections officers for act 312 arbitration under the analysis enunciated by Justice Williams in *Metropolitan Council*. See *Capital City Lodge, supra*; see also *Local No 214, Teamsters v City of Detroit (On Remand),* 103 Mich App 782; 303 NW2d 892 (1981). The MERC did not commit an error of law in failing to find that the corrections officers were per se eligible for act 312 arbitration.

Next, the union argues that the corrections officers were per se eligible for act 312 arbitration because, in light of their fire fighting responsibilities, they are "employees engaged . . . in fire fighting" within § 2(1) of the act. The union argues that the MERC erred in finding otherwise. We disagree. The evidence indicated that the jail is equipped with fire extinguishers and sprinklers. Corrections officers are given the discretion to determine whether a fire can be extinguished with fire extinguishers or whether the fire department should be called and prisoners evacuated, with a preference for the latter option unless the fire can be contained by fire extinguishers. Air packs are provided for the purpose of evacuating prisoners. Thus, we conclude that the MERC's finding that the corrections officers were not "employees engaged . . . in fire fighting" was supported by competent, material and substantial evidence.

Next, the union argues that *Capital City Lodge, supra*, was wrongly decided because it erroneously added a third component, i.e., a finding that a strike would threaten community safety, to the analysis enunciated by Justice Williams in *Metropolitan Council, supra*. We disagree. In *Capital City Lodge, supra*, this Court correctly recognized that in *Metropolitan Council, supra*, a majority of justices determined that eligibility for act 312 arbitration required a finding that a strike would threaten public safety. Cf. *Capital City Lodge, supra* at 120, with *Metropolitan Council, supra* at 311, 336 (Williams, with Coleman, C.J., and Fitzgerald, J., concurring), 337 (Ryan, J., with Coleman, C.J., concurring in the result); see also *Detroit Fire Fighters,* 204 Mich App at 588.

Next, the union argues that the corrections officers are eligible for act 312 arbitration under the analysis enunciated in *Metropolitan Council, supra,* and *Capital City Lodge, supra*, because, contrary to the MERC's finding, the corrections officers could not be adequately replaced in the event of a strike. We disagree.

In this case, the MERC found that the sheriff's department maintained four divisions within the department: law enforcement or road patrol, corrections, animal control and emergency 911 dispatch. The MERC further noted that the parties agreed that the positions of road patrol officer and corrections officer are generally separate career paths with very little interchange.

The MERC found that corrections officers receive four to six weeks on-the-job training. The MERC found that although eighty to eighty-five percent of the corrections officers in this case had gone through a 160 hour course necessary for certification as a corrections officer, certification was not necessary to be so employed at a local facility. The sheriff testified that in the case of a strike by corrections officers the jail could be immediately maintained with road deputies and supervisors and that the hiring of new corrections officers, for which position numerous applications were on file, would be expedited. The MERC further found that several road patrol officers had worked as corrections officers in the past, and that several supervisors had also previously worked at the jail and would be familiar with its policy and procedures. Our review of the record indicates that these findings were supported by competent, material and substantial evidence.

In light of these findings and this Court's opinion in *Capital City Lodge, supra*, the MERC concluded that the corrections officers were not eligible for act 312 arbitration because they could be replaced and, therefore, a strike among them would not affect community safety. Although the corrections officers are well trained in their various duties, in light of the evidence that in the event of a strike by these employees public safety could nevertheless be upheld at the jail with the use of road patrol officers, supervisors and new hires, we conclude that this decision was supported by competent, material and substantial evidence and not affected by error of law. *Capital City Lodge, supra*.

Accordingly, we affirm the MERC's decision that the corrections officers are not eligible for act 312 arbitration.

IV. Animal Control Officers

The Union argues that the animal control officers are per se eligible for act 312 arbitration because they are sworn and uniformed deputy sheriffs. We rejected a similar argument in Part IV of this opinion. After reviewing the record, we conclude that the MERC's determination that the animal control officers were not subject to the hazards of police work or that a strike among them would not affect community safety was supported by competent, material and substantial evidence, and not affected by error of law. *Capital City Lodge, supra.*

Accordingly, we affirm the MERC's decision that the animal control officers are not eligible for act 312 arbitration.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Donald A. Johnston