STATE OF MICHIGAN

COURT OF APPEALS

UNIVERSITY OF MICHIGAN,

Plaintiff-Appellant,

v

AFSCME COUNCIL 25,

Defendant-Appellee.

UNPUBLISHED
July 12, 1996

No. 176332
LC No. 92-000012

Before: Murphy, P.J., and Markman and K.V. Fink,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a Michigan Employment Relations Commission (MERC) decision and order finding that plaintiff violated § 10(1)(e) of the Public Employment Relations Act (PERA), MCL 423.210; MSA 17.455(10), by removing ten animal aide positions from defendant's collective bargaining unit without defendant's consent. We affirm.

Plaintiff argues that the MERC's finding that there were no differences in the work performed by animal aides and the work performed by animal technicians is not supported by the evidence. We disagree. The MERC's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. *Goolsby v Detroit*, 211 Mich App 214, 219; 535 NW2d 568 (1995). In reviewing the factual findings of the MERC, due deference must be accorded to its administrative expertise. *Id*. Reviewing courts should not invade the fact-finding province of the administrative agency by displacing an agency's choice between two reasonably differing views of the evidence. *Id*.

The MERC is "reluctant to allow employees to be removed from an established bargaining unit without a radical change in their job duties and functions." *Saginaw Valley State College*, 1988 MERC Lab Op 533, 543. Sylvia Yakich, a former animal aide who remained after the position was designated as animal technician, testified that there was no difference between the job duties of animal aide and animal technician. Moreover, none of plaintiff's witnesses testified that there were any radical changes in the duties and functions of an animal aide and an animal technician. At most, plaintiff's

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

witnesses testified that the responsibilities of the animal technician were enhanced. However, enhanced responsibilities do not change the underlying nature of a position. *Id*. In sum, our review of the whole record reveals that there was not a radical change in the job duties and functions when the position was changed from animal aide to animal technician. In light of Yakich's testimony and the absence of evidence from plaintiff that the two positions were radically different, we conclude that the MERC's factual finding that there was no difference in the work performed by animal aides and the work performed by animal technicians was supported by substantial, material, and competent evidence on the whole record.

Plaintiff next argues that the MERC erred in finding that plaintiff violated PERA by reassigning the work of animal aides to animal technicians without defendant's consent because plaintiff's actions were authorized by the management rights clause in the parties' collective bargaining agreement and that by agreeing to the management rights clause, defendant waived its right to bargain over the removal of the animal aide position from the bargaining unit. We disagree. Plaintiff cites language in the collective bargaining agreement that grants plaintiff the right to "establish, eliminate or change classifications, assign, transfer, promote, demote, release and lay off employees[.]" The MERC has previously rejected arguments that similar language amounts to a waiver of the union's right to bargain regarding the removal of positions from a bargaining unit. *Michigan State University*, 1992 MERC Lab Op 120. Therefore, we find plaintiff's argument to be without merit. Plaintiff also relies on language in the management rights clause that grants plaintiff "full and exclusive control of the . . . assignment, direction and determination of the size and type of its working forces" in support of its argument that defendant waived its right to bargain regarding the removal of positions from the bargaining unit. A waiver must be clear and unmistakable. *Lansing Fire Fighters Union v Lansing*, 133 Mich App 56, 66; 349 NW2d 253 (1984). We conclude that the language quoted by plaintiff is not sufficiently clear and unmistakable to constitute a waiver of defendant's right to bargain regarding the removal of the animal aide position from the bargaining unit. In sum, we conclude that plaintiff was not authorized by the management rights clause in the collective bargaining agreement to remove the animal aide position from the bargaining unit and that defendant did not waive the right to bargain regarding the removal of the animal aide position from the bargaining unit. The MERC did not err in concluding that plaintiff violated PERA by removing the animal aide position from the bargaining unit without defendant's consent.

Plaintiff finally argues that defendant failed to sustain its burden of proving that plaintiff's elimination of the animal aide position was not pursuant to a legitimate reorganization plan and that the work was exclusively performed by animal aides. Plaintiff cites *Local 128, AFSCME v Ishpeming*, 155 Mich App 501; 400 NW2d 661 (1986), in support of its argument that the decision to eliminate jobs pursuant to a legitimate reorganization plan is within the scope of management prerogative and is not a mandatory subject of bargaining. We do not read *Ishpeming* as establishing an affirmative obligation upon defendant to prove that plaintiff's removal of the animal aide position from the bargaining unit was not pursuant to a legitimate reorganization plan. Rather, we view the reorganization argument as a shield for a public employer to use to defend against charges of unfair labor practice. Moreover, we note that nowhere in *Ishpeming* did we state that it is the union's burden of proving that the employer's action was not pursuant to a legitimate reorganization plan. Plaintiff cites *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168; 445 NW2d 98 (1989), for the proposition that it

had no duty to bargain because defendant failed to prove that the work was performed exclusively by animal aides. This argument is unpersuasive because it does not address the crux of the issue, which is whether plaintiff could unilaterally transfer unit work out of the bargaining unit and assign it to nonunion employees. When, as in this case, there is no significant change in job duties, the question is one of appropriate unit placement rather than one of the employer's authority to reassign work. *Ingham Co*, 1993 MERC Lab Op 808, 812. Under § 13 of the PERA, MCL 423.213; MSA 17.455(13), unit placement is a matter for the MERC to decide. *Id*. Accordingly, we find plaintiff's argument to be without merit.

Affirmed.

/s/ William B. Murphy
/s/ Karl V. Fink