STATE OF MICHIGAN

COURT OF APPEALS

KENT COUNTY DEPUTY SHERIFF'S ASSOCIATION,

Petitioner-Appellant,

v

KENT COUNTY SHERIFF and COUNTY OF KENT,

Respondents-Appellees,

and

KENT COUNTY EMPLOYEES UNION,

Intervenor-Appellee.

UNPUBLISHED
August 19, 1997

No. 195601
Michigan Employment Relations Commission
LC No. 92-000250

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

Petitioner Kent County Deputy Sheriff's Association (the Association) appeals as of right from the order of the Michigan Employment Relations Commission dismissing the Association's unfair labor practice charge against respondents Kent County Sheriff and Kent County (collectively "the County"). We affirm.

I

The Association and intervenor Kent County Employee's Union (the Union) are two of the several bargaining units that represent various employees of the County. The County's collective bargaining agreement (CBA) with the Association contained the following provision:

> The Employer hereby agrees to recognize the Association as the exclusive collective bargaining representative . . . for all employees employed by the Employer in

the following described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment:

> All full-time employees employed in the Sheriff's Department of Kent County, classified and/or occupying the position of Sergeant, Detective Sergeant, Detective Patrol Officer, EMT III Officer, Patrol Officer, Emergency Communications Supervisor, Emergency Communications Operator, *Corrections Officer* and Radio Technician *BUT EXCLUDING* the Sheriff, Undersheriff, Captains, Lieutenants, polygraph examiners *and all other employees*.[emphasis added.]

Other relevant provisions in the CBA reserved to the County the right to "make or to reassign work assignments."

In contrast, the CBA between the County and the Union states that the Union is recognized as the exclusive bargaining representative for "[a]ll employees employed by the County of Kent, but excluding . . . (d) all uniformed law enforcement employees in the Kent County Sheriff's Department." The Union's membership primarily consisted of clerical, janitorial, and maintenance employees of the County.

In June 1992, the County created four new positions within the corrections division as a result of a construction and renovation program, which increased the county's inmate capacity from 400 to 950 and the number of corrections officers from 115 to 150. Three of these new positions are at issue in this case: reception/booking clerk, property/mailroom clerk, and inmate accounting clerk. The fifteen employees who would fill the new positions were not required to wear uniforms, be deputized, or supervise inmates. The salary of the new employees would be approximately $10,000 less than that of a corrections officer. The Association and the County met to discuss the new positions and the changes that would arise from the construction and renovation program, but no official position was taken at that meeting by either party.

After the positions became effective on August 1, 1992, the Association filed an unfair labor practice charge against the County, alleging that the County had unilaterally removed work from its members and refused to bargain over the issue. The Association subsequently amended its charge to include the claim that respondents unlawfully refused to recognize the Association as the exclusive bargaining representative for the newly hired employees. A hearing was held before a hearing referee on the Association's charges and the referee recognized the intervention of the intervening Union.[1] In his decision, the hearing referee recommended that MERC find that the Association's charge was without merit because the duties of the employees in the new positions had not been performed exclusively by the corrections officers represented by the Association and that the corrections officers' primary duty, supervising inmates, had remained unchanged.[2]

MERC agreed that the Association had not borne its burden of proving that the contested work had been performed exclusively by the Association's members. Therefore, MERC concluded that the County was under no duty to bargain with the Association over the decision to transfer work and that

no unfair labor practice had occurred, and dismissed the unfair labor charge. The Association appeals from the MERC order.

II

Appellate review of a MERC decision is limited. *Detroit Police Officers' Ass'n v Detroit*, 212 Mich App 383, 388; 538 NW2d 37 (1995), aff'd 452 Mich 339 (1996). We will not set aside MERC's findings if they are supported by competent, material, and substantial evidence on the whole record. MCL 423.216(e); MSA 17.455(16)(e); *Michigan Police Officers' Ass'n v Lake Co*, 183 Mich App 558, 561; 455 NW2d 375 (1990). However, even if the MERC decision is supported by substantial evidence, it may be set aside if it is based on a "substantial and material error of law." *Detroit Police Officers' Ass'n, supra* at 388.

Pursuant to a provision in the Public Employee Relations Act (PERA), MCL 423.209; MSA 455(9), public employees may organize and engage in collective bargaining with their employers "through representatives of their own free choice." Further, a public employer is required to bargain collectively with the recognized representatives of its public employees. MCL 423.215; MSA 17.455(15). Certain issues, including "wages, hours and other terms and conditions of employment," are considered to be mandatory subjects of bargaining. *Id*. Whether a particular issue is a mandatory or permissive subject of bargaining is important because unilateral actions on the part of a public employer, or its refusal to engage in collective bargaining with respect to a mandatory subject, may constitute an unfair labor practice under MCL 423.210(1)(e); MSA 17.455(10)(1)(e). *Southfield Police v Southfield*, 433 Mich 168, 178; 455 NW2d 98 (1989).

III

The Association argues that the creation of the new positions due to the remodeling and construction of the county jail was a mandatory subject for bargaining because the job descriptions for the new positions included duties that had exclusively been duties of the corrections officers whom the Association represents. Accordingly, the Association argues that the County committed an unfair labor practice by unilaterally transferring the job duties of corrections officers to the employees in these new positions. We disagree.

In *Southfield Police, supra* at 178, our Supreme Court observed that Michigan courts have long held that a public employer must bargain with its employees when it diverts work performed by employees of the bargaining unit to nonunit employees or subcontracts unit work to independent contractors. The Court went on to state:

> It seems elementary that a prerequisite to any determination concerning a duty to bargain about the transfer of work is a finding that the work is "bargaining unit work." The exclusivity rule developed by the MERC recognizes that before a bargaining unit may lay sole claim to a particular work assignment, the unit must establish that the work was performed exclusively by its unit members. If the work has not been assigned exclusively to one unit, then there is no obligation on the part of the employer to bargain before shifting duties among the employees to which he work has

been assigned. The exclusivity rule represents the logical first step in a duty-to-bargain analysis. [*Id*. at 185.]

In the present case, MERC properly determined that the Association failed to make this initial showing that its corrections officers had exclusively performed those duties described in the job descriptions for the new positions, such as data entry, collecting inmate property, sorting mail, and processing new inmates.[3] The evidence presented to the hearing referee indicated that persons other than corrections officers, including nurses, cadets, inmate trustees, and others, had previously performed these duties. The Association argues that the occasions when employees other than corrections officers were performing the duties in question were de minimus. We disagree. The evidence presented to the hearing referee was not that the nonunit employees merely offered minimal or occasional assistance. In fact, the testimony regarding some duties was the opposite.[4]

IV

The evidence in this case indicates that the duties assigned to the new positions were not exclusively performed by the Association's members. Consequently, the Association has not established that the County was under a duty to bargain over these positions. Because we find that the Association failed to meet this threshold showing, our analysis need go no further. MERC's dismissal of the Association's unfair labor practice charge was supported by competent, material, and substantial evidence on the whole record, and was authorized by law.

Affirmed.

/s/ Henry William Saad
/s/ Janet T. Neff
/s/ Maureen Pulte Reilly

[1] Intervenor Union, apparently as the result of an election by the employees, was replaced with a different bargaining unit, the United Auto Workers, but without modification to the recognition provision in the collective bargaining agreement that the Union had previously negotiated with the County.

[2] The hearing referee also determined that the Association's charge was moot because the recognition provision in its successor CBA with the County did not include the three new positions. MERC disagreed with this finding, reasoning that this case was pending at the time the parties entered into the successor CBA and that there was no evidence in the record that the Association specifically agreed to the exclusion of the contested work from its bargaining unit.

[3] We reject the Association's argument that it should not bear the burden of proving the exclusivity of the work at issue. As clearly stated by the Supreme Court, the bargaining unit must establish this prerequisite. *Southfield Police*, *supra* at 185.

[4] For example, the administrative clerks and cadets were supervised by a corrections officer who acted as a "straw boss" or "foreman." Similarly, the corrections officers occasionally and "indirectly" assisted the cadets and inmate trustees who "basically" ran the property room. The witness once made

the distinction between the nonunit person who performed the work and the corrections officer who "was responsible" for the work.