STATE OF MICHIGAN

COURT OF APPEALS

CAPITOL CITY LODGE NO. 141,

Petitioner-Appellee,

v

INGHAM COUNTY BOARD OF COMMISSIONERS and INGHAM COUNTY SHERIFF,

Respondents-Appellants.

UNPUBLISHED
February 7, 2003

No. 233838
MERC
LC No. 99-000110

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Respondents Ingham County Board of Commissioners and Ingham County Sheriff appeal by right from a Michigan Employment Relations Commission (MERC) decision finding a public employment relations act (PERA), MCL 423.201 *et seq*., violation by respondents against petitioner Capitol City Lodge No. 141. We affirm.

This appeal arises from the MERC's order requiring respondents to cease and desist making light-duty policy changes without first bargaining and to restore the parties' light-duty policy in effect before respondents' unilateral revisions. The MERC's holding that respondents' implementation of a new policy restricting light-duty assignments to employees with job-related injuries was a mandatory subject of bargaining overruled the hearing referee's recommendation. The MERC also disagreed with the referee's conclusion that petitioner waived its right to require respondents to bargain over the new policy when it gave the sheriff the exclusive right to determine assignments in the parties' collective bargaining agreement (CBA).

We review MERC decisions "pursuant to Const 1963, art 6, § 28, and MCL 423.216(e) . . . ." *Grandville Municipal Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). The MERC's fact findings "are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Id*., citing *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 322; 550 NW2d 228 (1996). This evidentiary standard is equal to "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *St. Clair Co Ed Ass'n v St. Clair Co Intermediate School Dist*, 245 Mich App 498, 512; 630 NW2d 909 (2001), quoting *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994).

Legal conclusions made by the MERC "may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Grandville Municipal Executive Ass'n, supra* at 436 (citations omitted). The MERC must "give due deference to the review conducted by the referee, in particular with respect to the findings of credibility." *City of Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 554; 517 NW2d 240 (1994).

The first issue respondents raise on appeal is whether the MERC erred in holding that the light-duty policy was a mandatory bargaining subject. Relying on *Local 1277, Metropolitan Council No 23, American Federation of State, Co, and Municipal Employers [AFSCME], AFL-CIO v City of Center Line*, 414 Mich 642, 660; 327 NW2d 822 (1982), respondents suggest that the MERC erred by failing to address the exception that a subject posing serious questions to political accountability or restricting an employer's decision-making abilities regarding size and scope, or the employer's ability to function effectively, is not required to be bargained.

Under MCL 423.215(1), an employer and its employees' representative must "bargain for wages, hours, and other terms and conditions of employment . . . which constitute mandatory subjects of collective bargaining." *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 550-551; 581 NW2d 707 (1998), citing *Pontiac Police Officers Ass'n v Pontiac* (*After Remand*), 397 Mich 674, 679; 246 NW2d 831 (1976). The obligation to bargain in good faith before imposing policy changes applies only to those subjects deemed "mandatory subjects" of bargaining. *Detroit Police Officers Ass'n, supra* at 54.

Michigan law does not expressly indicate whether respondents' unilateral implementation of the new light-duty policy is a mandatory subject of bargaining. Whether a subject is a mandatory subject of bargaining "must be decided case by case." *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 178; 445 MW2d 98 (1989) (citations omitted). Because public employees are restricted from striking, the courts generally construe the scope of a public employer's bargaining obligation broadly. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 277-278; 273 NW2d 21 (1978).

Respondents have failed to explain their reasoning regarding how the MERC's requirement, that the light-duty policy be bargained, unduly restricts respondents' "ability to make decisions regarding the size and scope of services or to function effectively . . . ." Respondents merely argue that the MERC "totally neglected to address th[e] exception to the rule" (emphasis in original). However, the MERC held

> that the [hearing officer's] application of [the] general rule fails to adequately address the specific issue presented in this case. The record indicates that employees who are denied light duty assignments pursuant to Respondents' new policy must use personal or sick leave, vacation time, or other forms of compensatory time in order to secure compensation during their absence from work.

As the MERC noted, case law clearly demonstrates that fringe benefits are mandatory subjects of bargaining. *Detroit Police Officers Ass'n, supra* at 55. Before the new policy was implemented, employees with non-duty related injuries or illnesses, including pregnancies, had

the opportunity to receive light-duty assignments. However, the new policy only grants light-duty assignments to employees injured on duty. Employees injured off duty or those who are ill or pregnant, who are no longer able to perform their regular position, must use sick or vacation time. Thus, respondents' employees' fringe benefits are directly impacted by the new, light-duty policy. We conclude that because the new, light-duty policy will directly impact the employees' fringe benefits, the MERC's holding that the written light-duty policy was a mandatory subject of bargaining was supported by competent, material, and substantial evidence on the record *Grandville Municipal Executive Ass'n*, *supra* at 436.

Next, respondents argue that the MERC erred in holding that petitioner's bargaining rights regarding the light-duty policy were not waived by provisions contained in the parties' CBA. Respondents contend that the parties' CBA grants the sheriff the exclusive right to determine job assignments, and that petitioner waived its right to negotiate this issue by its inclusion in the CBA. Specifically, respondents note that Article 2 of the CBA provides:

> **Section 1.** The Division recognized that the Sheriff reserves and retains, solely and exclusively, all rights to manage and direct his work force and to manage and operate the Sheriff's affairs.
>
> **Section 2.** All rights, functions, powers and authority which the Sheriff has not specifically abridged, delegated or modified by this Agreement are recognized by the Division as being retained by the Sheriff.
>
> **Section 3.** The Sheriff shall have the right to amend, supplement or add to his official departmental rules and regulations during the term of this Agreement. The Sheriff shall notify the Division of any such amendments, supplements or additions in advance of their effective date.

And, article 27, section 6(a) states "There are no agreements which are binding on any of the Parties other than the written provisions contained in this Agreement. No further agreements shall be binding on any of the Parties until it has been put in writing and signed by the Parties to be bound."

"To create a term or condition of employment through past practice, the practice must be mutually accepted by both parties . . . . Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be 'tacit agreement that the practice would continue.' " *Port Huron Ed Ass'n*, *supra* at 325, quoting *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 454-455; 473 NW2d 249 (1991). Here, the CBA is clearly silent regarding any light-duty policy. "Where the agreement is silent or ambiguous, proof of mutual acceptance may arise 'by inference from the circumstances.' " *Id*. at 328, quoting Elkouri & Elkouri, *How Arbitration Works* (4th ed), p 439.

The evidence presented at trial "indicate[s] that the parties' acceptance of and the adherence to the past practice at issue modified the parties' contract language to the contrary." *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 346; 551 NW2d 349 (1996). Therefore, the record supports a finding that a light-duty assignment practice directly impacting fringe benefits was in place before the new policy was implemented. The MERC's conclusion that

petitioner did not waive its rights regarding the light-duty policy was based on competent, material, and substantial evidence on the record. *Grandville Municipal Executive Ass'n*, *supra* at 436.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio