In the Matter of:

KENT COUNTY AND KENT COUNTY SHERIFF,
   Public Employers-Respondents,
       -and-

KENT COUNTY DEPUTY SHERIFF’S ASSOCIATION,
   Labor Organization-Charging Party.

APPEARANCES:
Robert J, Chovanec, for Respondents
Alison L. Paton, for Charging Party

DECISION AND ORDER

On November 16, 2016, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: December 22, 2016
In the Matter of:

KENT COUNTY AND KENT COUNTY SHERIFF, Respondents-Public Employers,

- and -

KENT COUNTY DEPUTY SHERIFF’S ASSOCIATION, Charging Party-Labor Organization.

APPEARANCES:

Robert J, Chovanec, Esq., for the Respondents

Alison L. Paton, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On June 23, 2015, the Kent County Deputy Sheriff’s Association (Charging Party or Union), which represents a bargaining unit of corrections officers employed by Kent County and the Kent County Sheriff (Respondents or Employers), filed an unfair labor practice charge alleging that Respondents violated Section 10(1)(a), (b), and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of the Act, the charge was assigned to Travis Calderwood of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). A hearing was held on October 26, 2015, before the undersigned in Lansing, Michigan. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties on or before December 29, 2015, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

Charging Party alleges that on March 30, 2015, Respondents unilaterally, without providing prior notice or an opportunity to bargain, terminated a long standing practice of permitting Union representatives to tape-record investigatory interviews of bargaining unit members. The Union contends that the Respondents’ unilateral action is an unlawful interference with bargaining unit members’ exercise of their Section 9 rights and/or is an unlawful interference
with the administration of a labor organization. Alternatively the Union asserts that the issue of tape-recording investigatory interviews is a mandatory subject of bargaining and as such the Respondents were obligated to bargain over the issue.

Findings of Fact:

Charging Party is the authorized bargaining representative of a bargaining unit of corrections officers employed by Kent County and the Kent County Sheriff. The parties are signatories to a collective bargaining agreement effective from January 1, 2012, through December 31, 2015.

The Command Structure of the Kent County Sheriff’s Department (Department) begins with the Sheriff followed by the Undersheriff, Chief Deputy, Captains and finally the Lieutenants. Undersheriff Michelle LaJoye-Young assumed that position in June of 2015; previously she served as the Chief Deputy since January of 2010. While serving as Chief Deputy, Undersheriff LaJoye-Young was responsible for employment matters, including investigatory interviews and the grievance/arbitration process. Captain Mark Neumen, the Administrative Captain, and Captain Charles DeWitt, the Security Captain, are the two Captains in charge of the Kent County Correctional Facility (Facility). Captain Neumen assumed that position in January 2014, previously serving as a Lieutenant at the Facility since 2006. Captain DeWitt held his position in the Facility since June 2013.

The parties’ contract contains several sections dealing with disciplinary and investigatory matters. Section 2.5, entitled “Investigatory Interview” states:

(a) An employee who is called into an interview with a representative of the Employer and can reasonably anticipate disciplinary action stemming from the interview is entitled, upon his request, to have an Association representative present at the interview.

(b) The employee has the right to be informed prior to the investigatory interview of the subject matter of the interview and nature of any charge or impropriety (not however, the specific rule or regulation violated).

(c) An employee, who seeks to have an Association representative present, may, upon request, engage in a reasonable but brief pre-interview conference with the Association representative, or the request may come from the Association representative.

(d) An Association representative shall be able to:

1. Assist the employee by eliciting favorable facts, and save the Employer production time by getting to the bottom of the incident occasioning the interview.
2. Assist the employee and may attempt to clarify facts or suggest other employees who may have knowledge of them.

3. If requested by the Employer representative, the Association representative will delay his comments until the employee has given his statement.

(e) An Association representative shall not disrupt the investigatory interview, and the Employer representative has no duty to bargain with the Association representative who attends the interview.

Section 6.2, entitled “Association Representation”, provides:

At any hearing, conference or meeting which may result in disciplinary action to an employee in the bargaining unit, the employee may and is encouraged to request the presence of an Association representative. The Employer must, if requested by the employee, allow sufficient time for the employee to arrange to have Association representation.

Sections 4.1 and 4.2, of the contract delineate the following as the reserved powers retained by the Employer:

Section 4.1. Reserved Rights. It is understood and hereby agreed that the Employer reserves and retains, solely and exclusively, all of its inherent and customary rights, powers, functions and authority of management to manage the Employer's operations and its judgment in these respects shall not be subject to challenge. These rights vested in the Employer include, but are not limited to, those provided by statute or law along with the right to direct, hire, promote, transfer within the department, assign, and retain employees in positions within the County consistent with the employee's ability to perform the assigned work. Further, to suspend, demote, discharge for just cause, or take such other disciplinary action which is necessary to maintain the efficient administration of the Employer. It is also agreed that the Employer has the right to determine the method, means and personnel, employees or otherwise, by which the business of the Employer shall be conducted and to take whatever action is necessary to carry out the duty and obligations of the Employer to the taxpayers thereof. The Employer shall also have the power to make reasonable rules and regulations relating to personnel policies, procedures and working conditions not inconsistent with the express terms of this Agreement.

Section 4.2. Maintenance of Rights. Nothing contained herein or within the Rules, Regulations, Policies and Procedures of the County of Kent and/or Sheriff of Kent County shall be construed to deny or restrict any employee covered by this Agreement, or the Association, rights each may have under the laws of the State of Michigan or the United States, or the Constitution of Michigan and the United States.
During the hearing, several witnesses testified with respect to the Employer’s process of handling investigatory interviews of members of the Union’s bargaining unit. Typically, at the onset of an investigation of a unit member for the imposition of possible discipline, the member is interviewed and asked questions about the matter being investigated. The interview is usually conducted by a Lieutenant. Both parties agreed that the Employer, sometimes, but not always, makes a tape recording of the investigatory interview. Undersheriff LaJoye-Young, testified that if the Employer makes a recording, it does not provide a copy of the recording to the Union unless there is a grievance arbitration where the Employer decides to introduce the recording or a transcript thereof.

In January and February of 2015, there were at least five investigatory interviews of unit members during which a Union representative recorded the proceeding without any objection from the Lieutenant conducting the interview.

- On January 16, 2015, Union President Sargent Nick Holk attended an investigatory interview of a unit member conducted by Lieutenant Tim Kraii and attended by Lieutenant Scott Swem. Lieutenant Swem testified that he was aware that the Union had recorded that interview.

- On or about January 22, 2015, Union Representative Andres Castillo attended an investigatory meeting of a unit member conducted by Lieutenant Swem. Lieutenant Swem testified that he only became aware that Castillo had recorded the interview after the interview was finished and Castillo removed the recorder from his pocket to turn it off.

- On or about February 2, 2015, a Union representative attended an investigatory interview of a unit member conducted by Lieutenant Swem. Lieutenant Swem testified that he was aware that the Union had recorded that interview.

- On or about February 5, 2015, a Union representative attended an investigatory interview of a unit member conducted by Lieutenant Kraii. The Employer admits that it was aware that the interview was recorded.

- On February 6, 2015, Sargent Holk attended an investigatory interview of a unit member conducted by Lieutenant Thorne. The Employer admitted that is aware that the interview was recorded. Sargent Holk testified that he openly recorded the interview and received no objection from Lieutenant Thorne.

Sargent Kolk also testified that he discovered a tape recording in the Union’s files from a June 16, 2011, investigatory interview of a unit member conducted by Lieutenant Swem. Lieutenant Swem testified that while he recalled that interview, he could not recall that the Union had recorded it. Sargent Kolk further testified that he attended an investigatory interview of a unit member in December of 2014 conducted by Captain Charles Dewitt, in which he was unable to record the interview because he did not have a Union recorder at the time. Sargent Kolk claimed that following that interview he expressed his frustration with taking handwritten notes to Captain Dewitt and that he, Kolk, intended to purchase a tape recorder.
Captain Dewitt admitted that he had a discussion with Sargent Kolk about the tape recorder but claims that his response was non-committal with respect to whether it was allowed or not because he was not aware of the Employer’s position with respect to the recordings.

In mid to late January, Captain Dewitt, was informed by Lieutenant Kraii that the Union had in fact recorded the investigatory interview of a unit member that took place on or around January 16, 2015, conducted by Lieutenant Kraii. Captain DeWitt testified that because he was not sure of the Department’s position on allowing interviews to be recorded he brought the issue up during a meeting that took place sometime in February with other Department Captains and Undersheriff LaJoye-Young. Sometime after that meeting the decision was made to not allow future investigatory interviews to be recorded.

On March 30, 2015, Sargent Kolk attempted to tape record an investigatory interview of a unit member but was informed by Lieutenant Kraii, who was conducting the interview, that recording was not allowed. The incident at the beginning of the March 30, 2015, investigatory interview is the only instance put in into the record in which the Association attempted to tape record an interview and was forbidden to do so by the Employer.

Discussion and Conclusions of Law:

The Union approaches the prosecution of its unfair labor practice charge from several different angles. First, the Union asserts that the Employers’ recent prohibition on the Union’s recording of investigatory interviews violates Section 10(1)(a) and (b) of PERA, in so far as it is an unlawful interference with the rights as set forth under Section 9 of PERA and/or interferes with its internal affairs. Next, the Union argues that the issue of recording in this context is a permissive subject of bargaining and that it, the Union, has an equal right to that of the Employer to record the investigatory interviews. Alternatively, the Union asserts that recording is a mandatory subject of bargaining and that the Employers were precluded from taking unilateral action without providing the Union with prior notice and an opportunity to bargain.

Unlawful Interference with Employee Rights/Internal Administration

It is well established that the right to union representation at an investigatory interview is based on the right of public employees under Section 9 “to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for ... mutual aid and protection.” Kent County, 21 MPER 61 (2008). In that respect, the act of requesting union assistance is, in and of itself, engaging in concerted activity. Wayne-Westland Cmty Sch v Wayne-Westland Ed Assn.176 Mich App 361 (1989). Further, the union representative is “expected to play an active advocacy role, not merely serving as a witness, and is entitled to consult privately with the individual employee.” Kent County, Id. One fundamental purpose of having the union representative present is to aid the employee in answering questions asked by the employer and in presenting facts. City of Oak Park, 1995 MERC Lab Op 576 (no exceptions). The Commission, in adopting the reasoning of NLRB v Weingarten, Inc, 420 US 251 (1971), has held that an employee is entitled to union representation at an investigatory interview when the employee reasonably believes that the interview may lead to discipline, and invokes his right by requesting the presence of a union representative. City of Kalamazoo, 1996 MERC Lab Op 556; Charter Twp
of Clinton, 1995 MERC Lab Op 415. The Court in Weingarten at 259-260 recognized that a balance must be struck between an employer’s right to conduct its investigation without interference and an employee’s right of assistance from the union during such investigation and stated:

The Representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation.

The Commission has been asked to address whether various restraints placed on union representatives by employers during disciplinary interviews are unlawful under PERA or otherwise violate Weingarten. In such disputes the issue presented to the Commission almost invariably involves whether representation was provided if asked for or whether the employer’s actions unlawfully restrained the representative from being able to engage in an active advocacy role. In City of Saline, 29 MPER 53 (2016) the Commission declined to find a violation despite the police chief's directive for the union representative to act only as an observer at an investigatory meeting. In Chesterfield Township, 23 MPER 35 (2010) (no exceptions), the ALJ concluded that the employer had violated Section 10(1)(a) of PERA when it specifically informed the union representative that he was to act only as a “witness” at an investigatory interview, forbade the union representative from intervening on any questions, and refused the employee the opportunity to confer with the union representative. In distinguishing City of Saline from Chesterfield Township, the Commission found significant that the representative in City of Saline, was allowed to speak at the conclusion of the interview and that he testified that he conducted the interview as he would have done in the absence of the directive to remain silent, while in Chesterfield Township, the representative was not provided an opportunity to speak at all at the interview and the record did not indicate whether the employee or union representative was told about the purpose of the interview or the charges against the employee before the interview began.

An employer violates Section 10(1)(a) of PERA when it engages in conduct which it can reasonably be said tends to interfere with the employees' free exercise of the rights protected by Section 9. See City of Detroit, 19 MPER 15 (2006). Here there is no argument by the Union that a unit member was ever denied representation at an investigatory interview or that the representative was ever denied the opportunity to act as an active advocate; the act of recording an interview is not advocating on behalf of a bargaining unit member. Additionally, while the Union argues that because its representatives are unable to make a tape recording and must instead take handwritten notes, however they are prevented from doing the best possible job in their role as an advocate, there is no right under PERA that employees receive the best representation possible. Accordingly, it is my conclusion that restricting a union from recording an investigatory interview does not constitute a violation of Section 10(1)(a) of PERA or in any way is contrary to the principles set forth in Weingarten or its progeny cases as issued by the Commission.

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1 Following such logic would inevitably lead to the conclusion that attorneys be provided to all unit members during any and all interactions with an employer that could reasonably lead to discipline.
The Union next claims that the Employer’s policy unlawfully interferes with the Union’s right under Section 10(1)(b) of PERA to freely govern its internal affairs. In support of this argument, the Union asserts that a vital part of its internal administration is to take measures to protect itself from liability and paying damages to a member or former member who brings claims against the Union. While I agree with the Union’s premise that protecting itself from liability is important and necessary for its internal administration, I disagree that prohibiting the Union from recording interferes with or prevents the Union from doing so. Accordingly I find that the Employer’s prohibition on the recording of investigatory interviews is not a violation of Section 10(1)(b) of PERA.

Permissive Subject of Bargaining/Mandatory Subject of Bargaining

Under Section 15 of PERA, a public employer is required to bargain collectively with the representatives of its employees over "wages, hours, and other terms and conditions of employment." Once a specific subject has been classified as a mandatory subject of bargaining, neither party to a collective bargaining relationship may take unilateral action on the subject absent an impasse in negotiations. Central Michigan Univ Faculty Ass'n v Central Michigan University, 404 Mich 268, 277 (1978). A party may offer to bargain a permissive subject, but the law does not require that the parties do so, and neither side may insist on bargaining to impasse on a permissive subject. AFSCME Local 1227 v Center Line, 414 Mich 642, 652-653, 327 NW2d 822, 826 (Mich 1982). A party may take unilateral action on a permissive subject without first entering into the bargaining process. Wayne Co Airport Auth, 20 MPER 34 (2007). However, a party may not take unilateral action on a permissive subject that is embodied in a bargained agreement. Kalamzoo County and Kalamazoo County Sheriff, 22 MPER 94 (2009).

While the present situation is one of first impression, our Commission has dealt with other situations involving the recording of meetings or interactions between employers and authorized bargaining representatives, both in situations intertwined with the bargaining process and situations outside that scope. With respect to instances involving negotiating sessions or grievance meetings, it is well established that a party violates PERA by insisting that such interactions be recorded. See Kenowa Public Schools, 1980 MERC Lab Op 967 (no exceptions); Carrollton Twp (Dep’t of Public Works), 1983 MERC Lab Op 346 (no exceptions). In both cases, the rationale for finding the violation in the bargaining context is that tape recording of bargaining sessions is a “threshold matter” unrelated to the obligation to bargain in good faith regarding wages, hours, and other conditions of employment and, thus, constitutes a permissive, rather than a mandatory, subject of bargaining.

In Wayne County Community College, 16 MPER 19 (2003) (no exceptions), the ALJ was faced with a situation involving recording a termination hearing. There the ALJ found that the hearing was neither an inherent part of the bargaining process, nor an extension thereof and held that the employer did not violate its duty to bargain under PERA by insisting on the presence of a court reporter throughout a termination hearing as it involved a permissive subject of bargaining. I see no difference between the present situation and that in Wayne County Community College, as it relates to whether recording the interview is a mandatory or permissive subject of bargaining.

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Just like the employer in Wayne County Community College, Respondents herein are conducting a meeting to determine whether disciplinary action is necessary or appropriate to levy against a bargaining unit member. However, the question of whether the interview or meeting is being recorded does not by itself impact on wages, hours and other conditions of employment of unit members. Accordingly, I find that the dispute between the parties involves a permissive subject of bargaining.

Having established that the recording of an investigatory interview is a permissible subject of bargaining, the question remains whether the Employer can lawfully restrict the Union from doing so. Further complicating this question is the fact that the Employer has recorded these interviews in the past and only provides copies of the recordings or transcripts thereof if it intends on using such during arbitration. The Union argues in its post-hearing brief that if it had been the union that wished to record the termination hearing in Wayne County Community College, that the result should have been the same, i.e., the union had the right to do so; I disagree.

Management decisions on subjects that "are fundamental to the basic direction of a corporate enterprise," "lie at the core of entrepreneurial control," or “impinge only indirectly upon employment security” are not mandatory subjects. Detroit Police Officers Association v City of Detroit, 61 Mich. App. 487 (1975); Westwood Community Schools, 1972 MERC Lab Op 31; Royal Oak Township, 2001 MERC Lab Op 117, 126. In the instant case, the Employer is conducting the investigatory interview in furtherance of its duty to institute disciplinary actions against a unit member and it is the opinion of the undersigned that the employer may conduct that interview in whatever manner it sees fit as part of its management prerogative so long as its actions do not violate established law or contractual provisions. Accordingly, as determined above, because the prohibition on recording said interviews does not violate the individual unit member’s Weingarten rights, nor does it violate Section 10(1)(a) or (b) of PERA, it is my finding that the Employer is entitled to prohibit the recording of investigatory interviews by the Union.

I have considered all other arguments as set forth by the parties and have determined such do not warrant a change in the conclusion. As such, and for the reasoning set forth above, I recommend that the Commission issue the following order dismissing the charge in its entirety:

**RECOMMENDED ORDER**

The unfair labor practice charge filed by the Kent County Deputy Sheriff’s Association against Kent County and the Kent County Sheriff is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 16, 2016