STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

KALAMAZOO COUNTY AND KALAMAZOO COUNTY SHERIFF,
Public Employers-Respondents in Case No. C13 A-004/Docket No. 13-000011-MERC,

-and-

KALAMAZOO COUNTY SHERIFF'S DEPUTIES ASSOCIATION,
Labor Organization-Respondent in Case No. CU12 J-049/Docket No. 12-001760-MERC,

-and-

ROBERT SCHREINER, SARAH SWAFFORD, DON BOVEN, AND GREG SHUTES,
Individual Charging Parties.
_____/

APPEARANCES:

Warner, Norcross, and Judd LLP, by Kevin McCarthy, for Public Employers-Respondents

Fraser, Trebilcock, Davis and Dunlap, P.C., by Brandon Zuk, for Labor Organization-Respondent

Varnum LLP, by Joseph J. Vogan, for Charging Parties

DECISION AND ORDER

On May 19, 2015, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondents have engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: June 16, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

KALAMAZOO COUNTY AND KALAMAZOO COUNTY SHERIFF,
Public Employers-Respondents in Case No. C13 A-004/Docket No. 13-000011-MERC,

-and-

KALAMAZOO COUNTY SHERIFF'S DEPUTIES ASSOCIATION,
Labor Organization-Respondent in Case No. CU12 J-049/Docket No. 12-001760-MERC,

-and-

ROBERT SCHREINER, SARAH SWAFFORD, DON BOVEN, AND GREG SHUTES,
Individual Charging Parties.
_____/

APPEARANCES:

McCarthy Smith Law Group, by Kevin McCarthy, for the Public Employers-Respondents

Michael F. Ward and Fraser, Trebilcock, Davis and Dunlop, P.C., by Brandon Zuk, for the Labor Organization-Respondent

Varnum, Attorneys at Law, by Joseph J. Vogan, for the Charging Parties

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Lansing, Michigan on March 26, July 24, and August 28, 2014, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including the charges, motions and responsive pleadings and post-hearing briefs filed by the parties on October 14, 2014, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges and History of the Proceeding:

The Charge Against the Union

Charging Parties Robert Schreiner, Don Boven, and Greg Shutes are sworn deputies employed by Kalamazoo County and the Kalamazoo County Sheriff (the Employers), and Charging Party Swafford is a clerk-typist in the Sheriff's Department.[1] Charging Parties are part of a bargaining unit represented by the Kalamazoo County Sheriff's Deputies Association (the Union). This bargaining unit includes sworn deputies, up to the rank of lieutenant, and nonsworn civilian employees of the Department, including clerical employees, dispatchers, cooks, and nurses. This case began as a dispute between Charging Parties and the officers of the Union over the Union's refusal to permit Charging Parties to participate in an internal union election. The charge against the Union, Case No. CU12 J-049/12-001760-MERC, was originally filed on October 28, 2012. The charge was amended on January 9, 2013.

On May 3, 2012, the Union's executive board notified all members of its bargaining unit that a group of employees, including the four Charging Parties, would not be allowed to vote in an election for Union officers to be held on May 8, 2012, because they were not Union members in good standing. In addition, four people who had been nominated for positions on the Union's executive board, including Schreiner, Boven, and Swafford, were informed that their names would be removed from the ballot. The Union's president then explained to Charging Parties that they were not considered members in good standing because they had ceased paying the portion of their monthly union dues allocated to membership in Kalamazoo Lodge No. 98 of the Fraternal Order of Police (the FOP), an organization with which the Union is affiliated.

The charge, as filed on October 28, 2012, alleges that the Union violated its duty of fair representation, and interfered with Charging Parties' exercise of their rights under §9 of PERA, by barring them from participating in the May 8, 2012, election under the circumstances of this case. These circumstances include that the Union allowed Charging Parties to discontinue paying the FOP portion of their dues, but failed to advise them, until a week before the Union officer election, that they would lose their status as Union members in good standing as a consequence. Charging Parties also allege that the Union violated its duty of fair representation by refusing Charging Parties' offer to pay their back dues to regain their places on the ballot and by refusing to postpone the scheduled election so that others could be nominated to take Charging Parties' places on the ballot.

The charge, as filed on October 28, 2012, also alleges that the Union violated its duty of fair representation, and interfered with Charging Parties exercise of their PERA rights, by harassing the Charging Parties, and/or failing to stop other employees from harassing them, because Charging Parties opposed what they honestly and reasonably believed was a violation of their rights under §9 of PERA, i.e., the requirement that unit members be members in good standing of the FOP in order to be members in good standing of the Union. [2]

[1] Between the time the charge was filed and the hearing, Charging Party Schreiner was promoted to sergeant.
[2] The charge alleged that the Union's actions violated §10(3)(a)(i) of PERA. Effective March 28, 2013, that section became §10(2)(a).

On November 9, 2012, I issued an order to Charging Parties to show cause why their charge against the Union should not be dismissed on these grounds: (1) the Union's establishment of qualifications for union office and for voting in elections for union officers, and its conduct of such elections, were internal union matters outside the scope of PERA; (2) it was not a violation of the Union's duty of fair representation for the Union to require individuals, as a condition of being members of the Union and not employment, to contribute to the Union's expenditures for non-collective bargaining purposes; and (3) the facts as alleged in the charge did not indicate that Union representatives had participated in the alleged harassment.

On December 10, 2012, Charging Parties responded to my order. On January 9, 2013, they amended their charge against the Union. In both their response to my order to show cause and the amended charge, Charging Parties alleged that the Union violated PERA by permitting sergeants, whom Charging Parties assert are supervisors, to hold office in the Union, bargain on behalf of nonsupervisory employees and serve as their Union representatives, take an active role in the Union's administration, and use their supervisory authority to "manipulate and intimidate" other union members. They also alleged, in both the response and amended charge, that the Union violated §10(3)(b) of PERA by causing the Employers to discriminate against Schreiner and Boven in violation of §10(1)(c) of the Act by removing them from their assignments as classification specialists because they failed to pay the full amount of their union dues.[3]

On April 4, 2013, the Union filed a motion for summary disposition asserting that the charge, as amended, failed to state a claim upon which relief could be granted under PERA. The Union conceded that sergeants had long served as members of the Union's executive board, represented employees in disciplinary and grievance hearings, sat at the bargaining table, and otherwise taken an active role in administration of the Union. However, it denied that the sergeants are supervisors as the Commission defines that term.

On July 9, 2013, I issued an interim recommended order on the Union's motion for summary disposition and a motion for summary disposition filed by the Employers (see below). I concluded that Charging Parties' allegation that the Union violated §10(2)(b) of PERA by causing the Employer to discriminate against Schreiner and Boven presented issues of fact that required an evidentiary hearing. I reached the same conclusion with respect to Charging Parties' allegation that the Union violated PERA by allowing sergeants to bargain on behalf of and take an active role in the Union's administration. I concluded, for reasons set out in the discussion section of this opinion, that the Union's motion for summary disposition should be granted as to the remaining allegations in the charge.

On the first day of the evidentiary hearing, Charging Parties withdrew their allegation that the Union unlawfully caused the Employer to discriminate against Boven and Schreiner and their allegation that the Union violated PERA by allowing sergeants to represent and bargain on behalf of nonsupervisory unit members. However, Charging Parties continue to assert that the sergeants are supervisors within the meaning of the Act and that the Employers have violated PERA by permitting the sergeants to act as Union representatives for the remainder of the unit.

[3] Section 10(3)(b) is now §10(2)(c).

The Charge Against the Employers

On January 9, 2013, at the same time that they amended their charge against the Union, Charging Parties filed the charge against the Employers in Case No. C14 A-004. This charge alleges that the Employers unlawfully interfered with the internal affairs of the Union, in violation of §§10(1)(a) and (b) of PERA, by permitting the sergeants to bargain on behalf of nonsupervisors and otherwise take an active role in the administration of the Union. As a remedy, Charging Parties ask that the Employers be required to cease and desist from any further bargaining with the Union until sergeants have been removed from the unit and that Charging Parties be reimbursed for their costs and attorneys' fees.

The charge also alleged that the Employers unlawfully discriminated against Charging Parties for their failure to pay the full amount of their Union dues by removing Schreiner and Boven, at the Union's instigation, from their classification specialist assignments.

On March 28, 2013, the Employers filed a motion for summary disposition asserting that the charge filed against them should be dismissed for failure to state a claim. In their motion, the Employers argued that the charge failed to allege facts establishing that the sergeants were supervisors. In response, on April 24, 2013, Charging Parties filed a brief in opposition to the Employers' motion, including affidavits and documents in support of Charging Parties' claim that the sergeants were supervisors. As noted above, on July 9, 2013, I issued an interim order in which I concluded that certain allegations in the charge against the Union should be dismissed for failure to state a claim under PERA. However, I concluded that the Charging Parties' claim the Employers had violated §10(1)(b) by permitting the sergeants to bargain on behalf of, and otherwise serve as Union representatives of, nonsupervisory employees involved issues that required an evidentiary hearing.

On the first day of hearing, Charging Parties withdrew their allegation that the Employers unlawfully discriminated against Boven and Schreiner, leaving only the allegation that the Employers had interfered with the §9 rights of their employees and with the administration of the Union by permitting sergeants to bargain on behalf of and take an active role in the administration of the Union. The Employers and the Charging Parties then proposed to stipulate that all sergeants in the Department, with the exception of detective sergeants, are supervisors as the Commission defines that term. Charging Parties then argued that because the supervisory status of the sergeant was no longer at issue, I should immediately issue a recommended order requiring the Employers to cease and desist from any further bargaining with the Union until the sergeants were removed from the bargaining unit.

The Union opposed the stipulation, and I refused to allow it. I ruled that the Union had the right to introduce evidence that sergeants were not supervisors and that the continued inclusion of the sergeants in the bargaining unit, and their active participation in representing other members of the unit, did not violate PERA.

At the hearing, all three parties presented evidence on the issue of whether sergeants are supervisors as the Commission defines that term. Evidence was also offered regarding the role played by supervisors in collective bargaining and grievance processing. No evidence was

offered at the hearing by any party with respect to the allegations against the Union which I had recommended be dismissed in my July 9, 2013, interim order.

Case No. CU12 J-049

Facts:

Union's Refusal to Permit Charging Parties to Participate
In the Executive Board Election

The facts pertaining to this allegation are set out in the charge in Case No. CU12 J-049 and in Charging Party's response to the Union's motion for summary disposition. The statement of facts below was included in my interim order in this case sent to the parties on July 9, 2013.

The collective bargaining agreement between the Employers and the Union that expired on December 31, 2012 required all employees hired after the effective date of the agreement, or January 1, 2008, to become and remain members in good standing of the Union or pay a representation fee equivalent to their fair share of the cost of negotiating and administering the collective bargaining agreement as determined by the Union. Employees not members of the Union as of January 1, 2008, were excluded from this requirement.

The Union is an independent labor organization. Although it is affiliated with the FOP, FOP staff members do not provide it with collective bargaining or grievance handling services. The monthly dues paid by the Union's members include money paid to the FOP as membership fees in that organization. These sums are used by the FOP for lobbying services and to help support a private club/bar operated by the local FOP for its members. The Union's bylaws explicitly state that a member must remain in good standing with the FOP in order to remain a member in good standing with the Union.

The Union is governed by a seven member elected executive board which elects the Union president and other officers from among its members. Members of the executive board serve as the Union's bargaining team in negotiations with the Employers and represent employees in grievances and disciplinary matters. Per the bylaws, the board includes two members elected from the uniformed services section, two members elected from the jail division, one member elected from the criminal investigations section, one deputy-at-large, and one representative from members in civilian classifications. The Union's bylaws state that all members in good standing may vote in elections to elect the executive board.

On June 14, 2011, Charging Party Schreiner sent an email to a member of the executive board, Stephen Beers, asking to see the Union's financial statements. Schreiner also asked Beers why Union dues were so high and why the Union required its members to be members of the FOP since the FOP provided the Union with no collective bargaining services. Beers responded that Schreiner had a point and that Beers would discuss it with the rest of the board. On July 21, 2011, Schreiner sent an email to another executive board member stating that he had heard that the Union's attorney had told the board that "we cannot be forced to belong to the FOP." Board member Donald McGehee, a sergeant, responded to Schreiner's email in the affirmative. Later

that day, Schreiner sent McGehee another email asking if McGehee was confirming that the attorney had said that "we cannot be forced to belong to the FOP and that we have a right to drop our dues down by $9.50." McGehee replied again that this was his understanding. Schreiner then called McGehee, who repeated on the phone what he had said in his email. Sometime around this same time, Boven sent an email to an executive board member asking about the FOP membership fee and received a reply stating that he did not have to pay the $9.50 per month FOP membership fee.

In late July 2011, the four Charging Parties and other members of the Union notified the Union's executive board that they no longer wished to be members of the FOP. Their notice stated that henceforth they would reduce the amount of dues that they paid to the Union by $9.50 per month to reflect the fact that they did not want to pay the FOP membership fee. The Union accepted the Charging Parties' reduced payments and did not tell them that reducing the amount of their dues would have an effect on their status as Union members in good standing or on their rights as Union members.

A Union meeting was held in April 2012 to nominate new board members to be elected at a Union meeting on May 8, 2012. Charging Parties Schreiner and Boven were among the five nominees for board members from the jail division. Then-Union president Sergeant James Delabarre was also a candidate for one of the jail division seats. Sergeant James Sandlin, who later became Union president, was nominated for a uniformed services seat. Charging Party Swafford was a nominee for the civilian seat. The nominees for the uniformed services seats included another member who had ceased paying the FOP portion of his dues.

At an executive board meeting held on May 1, 2012, the Union's board made the decision to exclude individuals who had ceased paying the FOP portion of their dues from voting in the election. It also decided that individuals who had been nominated to run in the May 8 election, but had ceased paying the FOP portion of their dues, would not be on the ballot. On May 3, 2012, the board sent an email to all its members notifying them that the Charging Parties, and other individuals specified by name, would not be allowed to vote in the May 8 election or run as candidates because they were not members of the Union in good standing. The following day, May 4, board member Beers told Charging Parties Schreiner and Boven that he did not agree with the board's decision. He also told them that after the decision was made Union President Delabarre stated that he "wanted to wait" before sending the email, leading Charging Parties to believe that Delabarre wanted to prevent them from taking any action to stop their being barred from the ballot until it was too late.

On May 7, the four persons who had been removed from the ballot, including Schreiner, Boven and Swafford, attended a meeting with Delabarre to discuss the board's May 3 email. Delabarre told them that after discussing the issue with its attorney, the board had concluded that, under the Union's bylaws, individuals could not be on the ballot or vote unless they were members in good standing with the FOP. He also told them that they were not members in good standing with the FOP because they had not been paying their FOP membership fee. One of the four individuals asked Delabarre why this issue was just coming up now, and Delabarre said that the board had just thought of it. Several or all of the four offered to pay the back dues to get back in good standing and back on the ballot. Delabarre told them that he did not know how to restore

them to good standing or if they were allowed to pay the money back. The four individuals asked that the vote be postponed so that other people could be nominated, but Delabarre rejected their request.

Later in the day on May 7, Delabarre asked the four individuals to meet with him again in the presence of executive board member McGehee. During this meeting, the four individuals asked what they could do to rectify the problem. One or more of them again offered to pay their back dues immediately if they could get back on the ballot, but their offer was rejected. Schreiner and Boven accused Delabarre and McGehee of deliberately failing to bring up the dues issue until shortly before the election in order to increase the chances that the sergeants remaining on the ballot would be elected to the board. They also asked McGehee and Delabarre why the board would not postpone the election and let the members nominate new people; McGehee and Delabarre said that the Union "was not going to waste its time with that." After leaving the meeting with McGehee and Delabarre, Charging Parties Schreiner and Boven accessed the FOP's website and discovered that they were both listed as active and current members of the FOP on that site. All four Charging Parties remained listed as active members on the website until on or shortly after May 14, when the FOP removed their names from the list.

The Union election was held on May 8, 2012. Schreiner attempted to vote, but was turned away. Four of the seven candidates elected to the board in this election were sergeants.

Some of the employees who had ceased paying the FOP membership portion of their dues resumed doing so after the election and had their status as Union members in good standing restored. The four Charging Parties did not resume paying the FOP membership fee.

Alleged Harassment

The facts pertaining to this allegation, contained in the original charge against the Union, are set out in that charge and in Charging Party's response to the Union's motion for summary disposition.

On May 4, 2012, Boven was changing clothes in the locker room at work when other deputies asked him why he was not a union member in good standing. Jokes were made regarding his status. In the locker room later that day, Boven was the butt of more jokes along the same vein. During his shift that day, two deputies in the receiving area said to him, "We don't have to listen to you; you are not even in our union." Schreiner also received similar comments from other deputies on that date.

On May 7, 2012, Schreiner and Boven approached the undersheriff about the jokes and ridicule they were receiving from other deputies. The undersheriff told them that it was a union issue and that he could do nothing about it. Later that day, Boven was subjected to yet another joke about not being a union member while he was in the locker room. In addition, another deputy asked him why he was not paying union dues.

At the first of the May 7 meetings with Delabarre to discuss Charging Parties being barred from the election, Delabarre interrupted Swafford while she was speaking. He told her,

"We all know you have self-control; you need to exercise it." Swafford interpreted this as an order to keep quiet.

After the May 8 election, Beers was no longer a member of the Union's executive board. On Monday morning, May 14, Beers told Swafford that FOP Lodge No. 98 President John Cross was planning to file a complaint against her with the Kalamazoo County Prosecutor's office for displaying a FOP registration plate on her vehicle. Swafford then contacted the FOP offices in Lansing and was told that she was currently in good standing with the FOP at both the state and local level. Swafford was never contacted by the Prosecutor's Office and heard nothing more about a complaint against her.

Also on May 14, 2012, a sergeant who was walking behind Boven said, "Hey, Don, you are not in good standing, union brother."

On May 16, 2012, Schreiner attempted to join a group of officers eating lunch. Someone in the group said "this is only for Union people in good standing." Others in the group echoed the statement and laughed.

Around this same time, a sergeant questioned Swafford in an intimidating fashion behind closed doors regarding the amount of dues she was paying. The sergeant was a former president of the Union, but not a current member of the executive board. In addition, according to Swafford, someone whom she believes was acting on behalf of the Union ran her license plates through the Law Enforcement Information Network (LEIN) system, a violation of law. Swafford did not indicate how she learned that the search had been performed or whether she had any information about who had done the search. A number of employees also mentioned to Swafford that they had heard that she was not paying her dues. Swafford complained to the Union's executive board about the incidents mentioned in this paragraph. She was told to "practice self-control."

On May 23, Boven was eating lunch with four other deputies when one of them said, "You need to be quiet, only members in good standing are allowed to talk." Shortly thereafter, Boven heard from another deputy that during a discussion among employees regarding Charging Parties' union status, Union Executive board member Bill Dean had commented, "It's their own f—ing fault."

In the locker room on June 14, a former member of the Union's executive board told Boven, "Only people who are in the union are allowed in here."

On June 18, Boven complained to the Sheriff about his treatment by other employees after they were told that Boven was no longer a Union member in good standing. The Sheriff told him that he would send an email instructing employees to discontinue this behavior, but no email was sent.

In November 2012, Schreiner was a deputy assigned to the transport division. On November 15, 2012, Schreiner was called into the office of his transport sergeant and accused of leaking information to the press. Schreiner was then told by another sergeant, and by a

lieutenant, that his name had been "thrown out" as spreading rumors and possibly leaking information. Schreiner eventually asked a command officer, Captain Timmerman, if he was under suspicion. Timmerman told Schreiner that he was investigating leaks, but that Schreiner's name had never come up in his investigation.

While in the transport unit, Schreiner was the butt of jokes and the subject of hostile comments by other employees related to the fact that the Union did not consider him a member in good standing. Several employees accused Schreiner of hating unions. When Schreiner attempted to join his fellow deputies in conversation, he was told, "You cannot come in here. You are not a union member," or employees simply moved away. None of the individuals making jokes or hostile comments to Schreiner was a current member of the Union's executive board, although executive board member Dean was present on some of the occasions on which these comments were made.

Shortly after the filing of the charge against the Union in October 2014, the Union changed the location of its meetings from the Sheriff's department to the FOP offices.

As noted above, in December 2012, Charging Parties filed a response to my order to show cause in which they asserted that sergeants were supervisors. After a pre-hearing conference, the Employers suspended negotiations with the Union on a new contract on the ground that questions had been raised as to whether the bargaining unit was unlawful. The sergeants then formed their own association and filed a petition with the Commission for a representation election to sever from the Union's bargaining unit. On January 4, 2013, the Union posted the following letter on the Union bulletin board:

> I am sure by now that you have all heard that there is something going on regarding our Union and the Sergeants. This letter is to inform you of the information we have, as of this time.
>
> A couple of months ago, four individuals that are from this department filed a suit with the Michigan Employment Relations Committee [sic]. They were upset that the last time we had an election, they were not allowed to vote because they had not been paying their FOP dues, and therefore were not members in good standing. Their claim was that they were not fairly represented. MERC disagreed. They also filed a claim stating that the sergeants on the Executive Board greatly outnumbered the non-Sergeants, and they were not looking out for the best interests of the rest of the Union. This was not proved not to be true, however, MERC did respond with an opinion that Sergeants should not be in with the rest of the Union because they are Supervisory.
>
> We have spoken with our labor attorney Mike Ward, and are scheduled for a phone conference with MERC on January 11, 2013. Until that time, we will not have any further information. As far as contract negotiations, they are on hold as of this time. We are awaiting answers to several questions that we have asked the County. The County stopped negotiations when they were served with a copy of the opinion from MERC.

> As of right now, your executive board Members remain the same, with Sgt. Sandlin as President and Dep. Dean as Vice President.
>
> Unfortunately, as of this time this is all of the information that we have. When we have more information, we will hold a meeting and pass it on to you.

Boven posted a rebuttal letter, but it was removed from the Union bulletin board. The Union's letter stirred up resentment against Charging Parties among the other employees, and they were once again the subject of hostile comments from other employees.

In January 2013, the sergeants concluded that they were not supervisors and withdrew their petition for an election. The Union and Employer returned to the bargaining table and eventually entered into a new collective bargaining agreement.

Discussion and Conclusions of Law:

In my interim order issued on July 9, 2013, I concluded that the Union did not violate PERA as alleged in Case No. CU12 J-049 for the reasons below.

Section 10(2)(a) of PERA states:

> A labor organization or its agents shall not do any of the following:
>
> (a) Restrain or coerce public employees in the exercise of the rights guaranteed in section 9. *This subdivision does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.* [Emphasis added].

Section 10(2)(a) replaced §10(3)(a)(i) in March 2013; the language of these two sections is substantively identical.

In *Abood v Detroit Board of Education*, 431 US 209 (1977), the Supreme Court held that public employees who were not members of the union, but who were required by their collective bargaining agreement to pay a service fee pursuant to §10(2) of PERA, had a constitutional right not to be forced to contribute to the union's expenditures for purposes other than collective bargaining, contract administration, and grievance adjustment. It is now well established that a union that represents public employees is constitutionally required to have in place procedures to safeguard the rights of nonmembers under *Abood* if it seeks to compel nonmembers to pay agency or service fees. *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson*, 475 US 292 (1986).[4] However, in the instant case, the Charging Parties did not resign their membership

[4] Effective March 2013, PERA prohibits public employees from being compelled as a condition of continuing or obtaining employment to "Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative." However, the Act explicitly exempts employees of police and fire departments eligible for arbitration under MCL 423.232.

in the Union or attempt to invoke their rights under *Abood* and *Hudson.* To the contrary, Charging Parties were seeking to obtain leadership positions in the Union.

In *Garden City Sch Dist and Garden City Ed Association,* 1978 MERC Lab Op 1145, 1151, the Commission held that a union violated §10(3)(a)(i) and §10(3)(b) of PERA by demanding, as a condition of their continued employment, that two employees who had resigned their union membership pay a representation fee that included sums expended by the union for purposes other than collective bargaining, contract administration and grievance adjustment. See also *Dearborn Local 20779 and Kempner,* 1982 MERC Lab Op 287, *aff'd* 126 Mich App 452 (1983); *Bridgeport-Spaulding Cmty Schs,* 1986 MERC Lab Op 102; *American Federation of Teachers, Local 3550,* 26 MPER 1 (2012) (no exceptions). However, these cases, like *Abood,* involved employees who were required to pay a service or representation fee as a condition of continued employment after they refused to join the union or resigned their union memberships. As noted above, a union has the right under PERA to prescribe its own rules for membership. The Commission has never held that it is unlawful for a union to include sums expended for political or other noncollective bargaining purposes in the dues it requires for membership. I conclude that the Union did not violate PERA by making membership in the FOP a condition of membership in the Union.

I also conclude that the Union's refusal to allow Charging Parties to participate in the election for members of its executive board, and the manner in which this was carried out, were internal union matters that do not fall within the scope of the Union's duty of fair representation under §10(2)(a) of PERA. The Commission has held that §10(2)(a)'s predecessor, §10(3)(a)(i), did not extend to strictly internal union affairs involving union structure and governance. As the Commission has found, a union's obligations towards members of its bargaining unit under §10(2)(a)/§10(3)(a)(i) is limited to actions that have an effect on its members terms and conditions of employment or their relationship with their employer. *SEIU Local 517,* 2002 MERC Lab Op 104; *AFSCME Council 25, Local 1918,* 1999 MERC Lab Op 11; *Private Industry Council,* 1993 MERC Lab Op 907; *MESPA (Alma Pub Sch Unit),* 1981 MERC Lab Op 149.

In *Wayne Co Cmty College Federation of Teachers,* 1976 MERC Lab Op 347, 352, the Commission noted that because internal union policies and practices may have a substantial impact on the relationship of members of the unit to their employer, not all intraunion conduct is exempt from the duty of fair representation under §10(3)(a)(i). It held in that case that the duty of fair representation not only encompassed the failure to process grievances and the overall administration of collective bargaining agreements, but also applied to decision making procedures whereby union members were denied "meaningful input into the collective bargaining process." In that case, the union maintained a weighted voting formula which it applied to contract ratification elections, elections for members of its bargaining team, and elections for members of its executive board. Under this formula, the votes of part-time faculty members could not exceed twenty percent of the total votes cast. This was accomplished by counting the votes of full-time and part-time members separately, and, if the percentage of the total number of votes cast by part-timers exceeded twenty percent of the total, allocating the part-timers' twenty percent of the vote based on how the part-timers had actually cast their votes. Significantly, although the part-timers taught only one or two classes per semester, at the time

the charge was filed the part-time faculty constituted a majority of the bargaining unit. Although both the Commission and the administrative law judge held that the union was not required to give the same weight to the votes of full-time and part-time members, the Commission concluded that, by applying its existing formula to elections to select the bargaining team and elections to ratify the contract, the union effectively denied part-time employees, even those who opted to become union members, any meaningful input into the collective bargaining process. Therefore, the Commission concluded, the weighted voting procedure violated the union's duty of fair representation towards part-time employees in the bargaining unit.

In *Service Employees International Union, Local 586,* 1986 MERC Lab Op 149, the Commission affirmed the administrative law judge's interpretation of *Wayne Co Cmty College Federation of Teachers* as extending the duty of fair representation to cover contract ratification elections, on the basis that such elections have a significant effect on employees' terms and conditions of employment and/or their relationship with their employer. The Commission further concluded that the union in that case acted arbitrarily and capriciously in refusing to allow certain union members - all of whom had signed dues deduction cards and were having dues deducted from their paychecks - to vote in an election to ratify a collective bargaining agreement.

By contrast, the Commission has held that the establishment of qualifications for holding union office, and the conduct of elections for union offices, are strictly internal union matters not subject to the duty of fair representation. In *Detroit Association of Educational Office Employees,* 1984 MERC Lab Op 947, the Commission held that a union's establishment of qualifications for holding union office was strictly an internal union matter and not subject to the union's duty of fair representation. See also *ATU, Local 1039,* 25 MPER 61 (2012) (no exceptions) (alleged irregularities in the conduct of an election for union officers was strictly an internal union matter); *International Union, UAW,* 19 MPER 9 (2006) (no exceptions) (a union's failure to follow its own bylaws in conducting an election for union officers was an internal union matter); *Detroit Fed of Teachers,* 16 MPER 54 (2003) (no exceptions) (union's establishment of qualifications for voting in elections for local building representatives was an internal union matter outside the scope of §10(3)(a)(i).)

Charging Parties argue that the Union's procedures for selecting its officers should be subject to the duty of fair representation because the Union's officers make decisions that affect employees' terms and conditions of employment, e.g., negotiate tentative contract agreements, and affect their relationship with the Employers, e.g., process and resolve grievances. It is true that in *Wayne Co Cmty College Federation of Teachers,* the Commission found that the union's arbitrary and discriminatory weighted voting procedure for internal union elections violated its duty of fair representation. In that case, the same procedure was used for both elections for union officers and contract ratification elections. In concluding that this voting procedure denied part-time union members effective input into any aspect of the collective bargaining process, the Commission did not specifically mention that the fact that the Union also applied this voting procedure to elections for members of its executive board. I find no indication in *Wayne Co Cmty College Federation of Teachers* that the Commission intended to extend the duty of fair representation to the selection of union officers who make fundamental policy decisions for the union, even though these decisions may have an impact on employees' terms and conditions of

employment or their relationship with their employer.[5] Moreover, in a subsequent decision, *Detroit Ass'n of Educational Office Employees*, the Commission reaffirmed, at 948, that "PERA does not authorize us to regulate the internal affairs of a labor organization, including its structure, officership requirements, or voting procedures, when such matters do not directly impinge on collective bargaining rights." I conclude that the Union's decision that Charging Parties were not members in good standing in May 2012, and its decision to exclude them on that basis from running for union office or voting in the election for members of the executive board, was an internal union matter not subject to the duty of fair representation under §10(2)(a) of PERA.

Charging Parties also allege that the Union has violated §10(2)(a)/§10(3)(a)(i) of PERA by harassing them, and/or failing to stop employees from harassing them, because they exercised their rights under §9 of PERA to concertedly oppose the Union's requirement that they be members of the FOP in order to maintain their status as union members. The most serious allegations are those made by Swafford, who alleges that "someone from the Union" ran her license plate through the LEIN system. However, the affidavit that Swafford submitted in response to the Union's motion for summary disposition did not state who was responsible for this criminal misuse of the LEIN system, whether this person was a member of the Union's executive board or how she knew that this action was authorized by the Union. Thus, Swafford's affidavit did not tie the act she alleges to constitute unlawful harassment to any person authorized to act on the Union's behalf. Charging Parties did not introduce any additional evidence at the hearing to support Swafford's claim that the Union was responsible for this action. In her affidavit, Swafford also asserts that she was told by a sympathetic fellow employee that the president of the FOP Lodge, John Cross, intended to file a complaint against her with the Kalamazoo County Prosecutor's office for having a law enforcement license plate on her vehicle. There was no indication in Swafford's affidavit, however, that a complaint was actually filed. Even assuming that filing such a complaint would have constituted unlawful interference with her §9 rights, however, Swafford has not alleged that anyone authorized to act on the Union's behalf ever actually filed or attempted to file a complaint against her.

Charging Parties Boven and Schreiner alleged that they have been the butt of hostile jokes, and excluded from conversations among employees, because the Union does not consider them to be members in good standing. Boven asserted in his affidavit that he heard from another deputy that Union executive board member Bill Dean had made a hostile comment about the Charging Parties to other employees when none of the Charging Parties were present. Schreiner asserted that because Dean was present when other employees made negative remarks about his union status, Dean was "part of the comments." However, neither Boven nor Schreiner alleged that any of the seven members of the Union's executive board made hostile comments directly to them about either their membership status or their filing of the charge. [6]

[5] I also note that nothing in *Wayne Co Cmty College* suggests that a union violates its duty of fair representation by excluding employees who are not members in good standing from union elections, including contract ratification elections.

[6] For purposes of this decision, I assume that the comments described by Boven and Schreiner could, in context, be considered coercive.

As Charging Parties correctly note, common-law principles of agency govern the question of who acted for whom for purposes of determining culpability under PERA. *St Clair Intermediate School Dist v Intermediate Ed Assn/Michigan Ed Assn,* 458 Mich 540, 559-561 (1998). Fundamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him. *Capitol City Lodge No. 141, FOP v Meridian Twp,* 90 Mich App 533, 541, (1979), citing *NLRB v Local No. 64, Falls Cities District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 497 F2d 1335, 1336 (CA 6, 1974). Under the common law of agency, an agency relationship exists only if there has been a manifestation by the principal to the agent that the agent may act on his account and consent by the agent to so act. A principal may also give an individual apparent authority to act for the principal if the words or other conduct of the principal, reasonably interpreted, cause the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. In other words, a union may create an agency relationship either by directly designating someone to be its agent or by taking steps that lead third parties reasonably to believe that the putative agent was authorized to take certain actions. *Police Officers Ass'n of Michigan,* 16 MPER 46 (2003), citing *Overnite Trans Co v NLRB,* 104 F3d 109, 113 (CA 7, 1997). However, apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. *Meretta v Peach,* 195 Mich App 695, 699 (1992); *Overnite Tran, supra.*

Members of a union's bargaining unit are not, under the above principles, agents of the union for all purposes. In this case, there is no indication that any of the union members who allegedly treated Charging Parties in a hostile fashion had been designated by the Union as its agents. I also find that Charging Parties have not alleged that the members of the Union's executive board did anything from which Charging Parties could have reasonably concluded that the Union's members had been authorized by the Union to take the actions that constituted the alleged harassment. At most, board members were present in the workplace when other employees made hostile comments to the Charging Parties about their union status. Whether or not members of the Union's executive board agreed with the sentiments expressed by Charging Parties' fellow employees, the silence of a board member in this situation cannot reasonably be interpreted as authorization by the Union of its members' conduct. [7]

As Charging Parties also note, a party may be held liable for actions of non-agents if the party ratifies those actions after the fact. Under common law principles of agency, ratification occurs when an act done, or professedly done, on a principal's account is subsequently treated by the principal as authorized. *David v Serges*¸373 Mich 442, 444 (1964). Also see *BE & K Construction Co v NLRB,* 23 F3d 1459 (CA 8, 1994), in which a union was held liable for acts of picket line violence, including rioting, violence, property damage and arson, committed by members of another union local because it ratified this conduct by subsequently soliciting contributions, taking out a substantial loan, and providing other assistance to union members arrested for this conduct. Applying the doctrine of ratification, the National Labor Relations Board (NLRB) has held where an authorized union representative is present on a union-authorized picket line at the time picketing misconduct occurs, or has knowledge of its pickets'

[7] The Union, of course, was responsible for moving the location of its meeting to the FOP hall. However, Charging Parties have not explained how the change in the location of the meeting interfered with their §9 rights.

misconduct, but fails to take steps reasonably calculated to curb further misconduct, the union is responsible for that misconduct. *Teamsters Local 580,* 229 NLRB 993, 994 (1977); *Soft Drink Workers Union Local 812, Intern Brotherhood of Teamsters, AFL-CIO,* 307 NLRB 1267, 1271 (1992). Also see *Dover Corp and United Steelworkers*¸ 211 NLRB 955 (1977); NLRB v *Union Nacional de Trabajadores,* 540 F2d 1, n 7 (CA 1, 1976). Here, however, the alleged interference with Charging Parties' §9 rights took place not on a union picket line, but in the workplace. I find that members of the Union's executive board had no duty to take steps to prevent their fellow employees from joking about or making hostile comments to Charging Parties about their union status, and that their failure to do so, or to specifically disavow these actions, did not constitute ratification by the Union of the alleged harassment.

Charging Parties also assert that the notice the Union posted on its bulletin board on January 4, 2013 to its members was misleading and caused further anger and resentment toward Charging Parties. It is not clear whether Charging Parties allege that the posting of this letter by the Union itself constituted unlawful interference with their §9 rights or whether the letter was evidence of ratification by the Union of its members' actions. The Union's letter to its members was obviously an attempt to respond to the allegations raised by Charging Parties in their charge as well as to explain why contract negotiations were suspended. The letter included inaccurate information about the actions taken by the Commission. That is, although I had issued an order to the Charging Parties to show cause why their allegation that the Union violated PERA by barring them from participating in the election did not violate the Union's duty of fair representation, neither I nor the Commission had issued an opinion on the issue. In addition, while Charging Parties had asserted that the sergeants were supervisors, no ruling had been made on that claim at that point. The letter was also inaccurate to the extent that it implied that the Commission had rejected the claim that "sergeants were not looking out for the best interests of the rest of the Union;" no decision or ruling of any kind had been made to this effect. However, I find that the letter cannot be construed as an attempt by the Union to incite its members to engage in the conduct which Charging Parties allege constituted verbal harassment or as ratification of the conduct which had already taken place. I conclude that the letter did not constitute unlawful interference with Charging Parties' rights by the Union in violation of §10(2)(a)/§10(3)(a)(i). I also conclude that, for the reasons discussed above, the Union cannot be held liable for the alleged verbal harassment of Charging Parties by their fellow employees. Therefore, I conclude, the allegation that the Union violated §10(2)(a)/§10(3)(a)(i) by harassing or failing to stop employees from harassing them because of their exercise of their §9 rights, should be dismissed.

Case No. C13 A-004:

Findings of Fact:

As noted above, the only issues on which evidence was presented at the hearing, and the only issues remaining in the charge against the Employers, is whether the Employers violated §§10(1)(a) and (b) of PERA by permitting sergeants, alleged to be supervisors, to bargain on behalf of and represent nonsupervisory employees in the grievance process.

Sergeants' Supervisory Status

The Kalamazoo County Sheriff's Department is organized into three divisions: jail, law enforcement, and staff services. Road patrol and detective services are subdivisions of the law enforcement division. About half of the Department's employees are in the jail division. Under the Sheriff in the Kalamazoo County Sheriff's Department is a command structure consisting of the Undersheriff, three captains, and six lieutenants. One of the captains has the title of chief deputy. A captain heads each division, and the jail and road patrol divisions each have two lieutenants. The captains and lieutenants are in a bargaining unit represented by a different labor organization.

Directly under the lieutenants are the sergeants, and under them are deputies. New deputies are normally hired to work in the jail, and road patrol positions are normally filled by transfer from the jail. There are six sergeant positions: road patrol sergeant, jail sergeant, traffic sergeant, detective sergeant, evidence sergeant, and laboratory sergeant. Within the jail, there are approximately six shift supervisor sergeant positions, two sergeants assigned to transport, and one sergeant overseeing booking and assignment. As discussed below, road patrol sergeants, jail sergeants and the traffic sergeant have deputies directly reporting to them, while detective sergeants, the evidence sergeant, and the laboratory sergeant do not. At the time of the hearing, there were approximately 220 employees in the Union's bargaining unit, including seventeen sergeants.

The Department is a 24-hour, seven day per week operation. All officers in ranks above sergeant work normal business hours, Monday through Friday, although command officers are available at all times to respond to emergencies and for consultation. In both the jail and road patrol divisions, there is at least one sergeant, or acting sergeant, on duty at all times. This means that on weekends and after normal business hours, the highest ranking officer on duty in the Department is normally a sergeant or acting sergeant.

The record does not indicate when, or how, the Union came to be recognized as the exclusive bargaining agent for this unit. However, there is no dispute that the Employer and Union have a long bargaining history and that the sergeants have been included in this bargaining unit for at least twenty years. The most recent collective bargaining agreement covering this unit covers the period January 1, 2013 through December 31, 2015. Under this agreement, like previous collective bargaining agreements, the starting pay for a sergeant is approximately $7,000 more per year than the starting pay for a deputy, and the top rate for a sergeant is about $12,000 more per year than the top rate for a deputy.

Jail Sergeants

In the jail, two shift sergeants are assigned to each of the three shifts. Because the jail is a seven-day per week operation, there are two or three days every week where only one of the shift sergeants is on duty. On every shift, one shift sergeant is the designated shift commander/shift supervisor. If, due to a shift sergeant's use of leave or the fact that a sergeant position is vacant, neither shift sergeant is available to work on a particular shift, either a

sergeant will be called in on overtime or a deputy will be designated acting sergeant/officer in charge. The deputy receives premium pay for the hours he or she serves as the officer in charge.

The shift sergeants in the jail prepare the monthly work schedule for the deputies on their shift. The work schedule contains the deputies' daily assignments. In the jail, deputies are assigned on each shift to each wing of the jail, to the prisoner receiving area, and to the recreation area. There are also other miscellaneous daily assignments. For deputies assigned to wings, there are written "post orders" setting out the specific tasks that must be performed, and how often, on each shift. Although all deputies perform all the above assignments, some deputies consider some jail assignments more desirable than others. Sergeants also make longer-term special assignments; for example, assignment to the critical incident team in the jail.

The shift commander, or officer in charge, conducts a briefing at the beginning of each shift. The shift commander, or officer in charge, makes reassignments as needed during the course of the shift, including scheduling lunches and breaks. He or she also makes special assignments for the day, for example, assigning a deputy to search a cell for contraband or sending deputies to assist in prisoner transport. The shift commander, or the officer in charge, is responsible for directing and monitoring the work of all of the deputies in the jail during a shift. If two shift sergeants are working the same shift, the one who is not the shift commander normally takes a deputy assignment for the day. However, the shift sergeants spend the majority of their time overall assigning, directing, and monitoring the deputies' work.

In addition to the shift sergeants, there are two transport sergeants and a classification and assignment sergeant in the jail division. The transport sergeants direct the work of and make daily work assignments to the deputies assigned to transport prisoners and handle writs and warrants. The classification and assignment sergeant, in cooperation with the shift sergeants, directs and monitors the work of three classification deputies and approximately 14 civilian booking clerks on all three shifts. The classification and assignment sergeant is also responsible for training the booking clerks and making their work schedule.

All sergeants with direct reports, which includes all the sergeants in the jail division, approve leave requests for floating holidays, personal time, compensatory time, funeral leave, and sick leave for medical appointments. Unit employees select vacation dates based on seniority at the twice-per-year shift bid under the collective bargaining agreement. However any vacation request submitted after the shift bid date is subject to the sergeants' approval on the same basis as requests to use the other types of leave listed above. The shift sergeants have the authority to deny a request to use these types of leave if granting the request would leave the jail below the Department's minimum staffing guidelines, or if, in opinion of the sergeant, circumstances require staffing above the minimum. Jail sergeants also have the discretion to grant a leave request and allow a shift to operate below the Department's minimum staffing guidelines, although not below the minimum staffing levels mandated by the State of Michigan. Alternatively, a jail sergeant can grant the leave request and authorize another deputy to work overtime. Jail sergeants also make the decision whether to authorize overtime, or allow the shift to operate below the Department's minimum staffing guidelines, if a deputy calls in sick at the last minute. Sergeants have full authority to approve or order overtime, although they are responsible for staying within their monthly overtime budget. The order in which deputies are

offered the opportunity to work overtime, or forced to work overtime if this is necessary, is governed by the collective bargaining agreement.

The Department's leave request form requires both sergeants and lieutenants to sign off on leave requests. A lieutenant need not approve the leave request before the employee takes the time off and, once leave is approved by a sergeant, an employee would not be penalized for taking the time off. However, lieutenants have on occasion overruled a sergeant's leave approval by informing an employee after-the-fact that he would have to use a different type of leave to cover his absence.

In March 2014, with the implementation of a new County timekeeping system, sergeants were given the responsibility of approving/certifying the time reports of deputies and civilian employees before they are processed by the payroll system.

Regular shift assignments, i.e., assignment to first, second or third shift, are made by seniority bid. Decisions regarding transfers from one division to another – for example, from the jail to the road patrol, are made by the command staff. Sergeants have no direct role in these decisions. Deputies in the jail and in road patrol frequently request to switch shifts with another deputy for personal reasons. These switches must be approved in advance by either a sergeant or a lieutenant.

In the jail, the captain holds monthly staff meetings with the lieutenants and the sergeants. The captain also holds a separate monthly meeting with only the lieutenants.

The jail sergeants and the road patrol sergeants prepare written performance evaluations for their direct reports on a semiannual basis. In the jail, the two shift sergeants assigned to each shift jointly evaluate each deputy assigned to their shift. The performance evaluation is done on a form prepared by the Department. The evaluator gives the employee a separate score for each performance criterion and adds comments on the employee's performance for each criterion. The sergeant or sergeants are required to meet with the employee to go over the evaluation before submitting it. The form also requires a signature by the "evaluator's supervisor," or, in the case of an evaluation prepared by a sergeant, a lieutenant. The record indicates that a lieutenant determines how much input he or she will have into an evaluation done by a sergeant. At the time of the hearing, the jail division lieutenant did not typically look at the sergeants' evaluations before the sergeants discussed them with employees, while the lieutenant in the road patrol division routinely met with the road patrol sergeants to review the evaluations they had prepared before the sergeants met to discuss them with their direct reports. After the sergeant submits his or her evaluations, they go up through the chain of command. Officers of higher rank check evaluations for completeness and have the right to alter a written evaluation done by a sergeant, but would not do so without discussing the change with the sergeant.

Written performance evaluations have no direct impact on pay, but are part of the promotional process. Under the collective bargaining agreement, one of the factors to be considered in a promotional decision is the officer's "service rating," which is derived from the officer's evaluations, history of discipline, and receipt of letters of commendation. The record

does not indicate whether performance evaluations are considered by command officers in considering whether to grant transfer requests.

The first step within the Department for dealing with disciplinary/performance issues is a written counseling statement. A counseling statement is given to the employee, but not placed in his or her personnel file. A counseling statement is not considered formal discipline for purposes of the disciplinary procedure. The next step is a verbal reprimand in writing, or verbal reprimand/written warning, which is placed in the employee's file. More serious than a verbal reprimand/written warning is a written reprimand. The departmental description for the sergeant's position does not mention disciplinary authority. However, all witnesses uniformly testified that at the time of the hearing, all sergeants, including those without direct reports had the authority to issue counseling statements, verbal reprimands/written warnings, and written reprimands. Sergeants also have the authority to send an employee home with pay, pending an internal investigation, although a sergeant would not usually take this step without first informing a command officer.

For offenses that could potentially lead to more serious discipline, and for complaints against officers made by jail inmates or citizens, the Department conducts an internal investigation. Sergeants can initiate these investigations, as can any officer of a higher rank. Regardless of who initiates the internal investigation, sergeants are usually assigned to take witness statements and draft the investigation report. The investigation report also usually includes a recommendation as to whether departmental rules were broken and discipline should be imposed, but not a recommendation as to the level of discipline. Depending on the nature and seriousness of the offense, the internal investigation, including the interviewing of the employee and/or witnesses, may be conducted by a command officer rather than a sergeant. Deputies are never assigned to do internal investigations. An investigation report is sent up through the chain of command for review. The report is eventually given to the Undersheriff and/or the Sheriff, who make the final decision as to whether discipline should be assessed and, if so, what level is appropriate. All discipline above the level of a written reprimand is issued by the Undersheriff and/or the Sheriff.

Performance improvement plans are typically used during the training phase to address a new officer's deficiency in one area. However, performance improvement plans may also be used for more experienced officers with performance problems. With a new officer, the field training officer, who is a deputy, and the field training sergeant together develop a performance improvement plan. For experienced officers, the decision to use a performance improvement plan as a disciplinary tool may be made by either a sergeant or a command officer. The department has a format for performance improvement plans that requires that the drafter identify areas of needed improvement, reason for the plan, duration the plan will remain in effect, and the goals and specific expectations of the plan. A sergeant has the authority to draft and issue a performance improvement plan on his or her own, although he or she may consult with a command officer at any stage in the process. The sergeant or command officer who issues the plan is also responsible for monitoring compliance with the plan, meeting with the employee at regular intervals to discuss progress, and documenting whether the plan's requirements have been met.

Grievances filed pursuant to the grievance procedure in the collective bargaining are filed with a command officer. Sergeants do not represent the Employers at any step in the grievance procedure.

Candidates for deputy and civilian positions are interviewed by panels that typically include lieutenants and sergeants, but may also include deputies and civilian employees. The interview panel prepares a report that includes detailed comments from each interviewer on each candidate, including a recommendation as to whether the candidate should be hired. Decisions as to which candidates to hire are made by command staff based in part on the interview panel reports.

Road Patrol Sergeants

Two road patrol sergeants, and eight or nine deputies, are assigned to each shift. As in the jail, if more than one road patrol sergeant is working a particular shift, one is designated the shift supervisor. If no sergeant is working the shift, a deputy is designated officer in charge. The monthly work schedule for the road patrol is prepared by a lieutenant, using a software program. The work schedule for each shift – meaning which deputies will have which off days – is established by the sergeant and lieutenant together. However, road patrol sergeants assign work to deputies on a daily basis, including deciding which deputies will patrol in which areas during a particular shift, and making special assignments, such as assigning extra officers to traffic patrol. The Department has contracts to provide police protection to four townships in the County; the road patrol sergeant may have to reassign a deputy to patrol in one of these townships for the shift.

Road patrol sergeants have the same authority and responsibilities with respect to leave requests and overtime as the jail sergeants, including the authority to allow a shift to operate with fewer than the number of deputies recommended by the guidelines, to call in a deputy on overtime, or deny a leave request because the sergeant believes that granting the request would result in insufficient staffing. Although more than one road patrol officer is scheduled to work at all times, sometimes a shift operates with only a road patrol sergeant on duty. Road patrol deputies are also responsible for approving the time of their direct report deputies under the County's time reporting system. Road patrol sergeants, like jail sergeants, are responsible for monitoring the work of the deputies assigned to their shift. Road patrol sergeants also take and respond to complaints from citizens. However, road patrol sergeants, even shift supervisors, respond to crime scenes as back up officers and answer calls as first responders. Unlike the jail sergeants, road patrol sergeants spend most of their time on road patrol duties also performed by deputies rather than on duties exclusive to sergeants.

The road patrol sergeants have the same responsibility for preparing performance evaluations for their direct reports as the jail sergeants, except that, as noted above, a lieutenant reviews the evaluations before the sergeants meet with the deputies. Road patrol sergeants have the same authority to discipline as the jail sergeants, including the authority to issue written warnings/verbal reprimands and written reprimands. As noted above, road patrol sergeants receive complaints from citizens, including complaints about deputies. Another deputy or staff member may also bring something about a deputy's behavior to the road patrol sergeant's

attention. In the latter case, sometimes the road patrol sergeant concludes that he or she can handle the matter simply by talking to the deputy or giving the deputy a counseling statement, but he or she has the authority to issue formal discipline. As in the jail, an internal investigation is conducted for matters potentially involving discipline above the level of a written reprimand. For a citizen complaint, even one involving a minor matter, the road patrol sergeant generally initiates an investigation and then brings the matter to a lieutenant's attention. A file is opened on the complaint. A lieutenant, or captain, may conduct the investigation or may assign it to the road patrol sergeant to prepare an investigation report.

Detective, Evidence, Laboratory and Traffic Sergeants

Detective sergeants are in the law enforcement division. They investigate criminal complaints. Usually these are felonies, but the detectives also investigate some misdemeanors. One of the detective sergeants is paid more than the others because he is a qualified polygraph examiner. Unlike the patrol and jail sergeants, the detective sergeants do not have any direct reports and do not prepare performance evaluations. Detective sergeants come to serious crime scenes after the crime has been reported by road patrol officers. When the detectives arrive at the scene, they take over responsibility for investigating the crime, unless the crime is serious enough that a command officer also comes to the scene. The detective sergeants direct the work of road patrol deputies at crime scenes to ensure that the scene is handled properly. As sergeants, the detectives have both the authority to issue orders to any employee of lower rank and the authority to discipline deputies who disobey their orders, up to and including issuing a written reprimand. The record does not indicate whether a detective sergeant has ever issued formal discipline to a deputy working under the detective sergeant's direction at a crime scene. Four of the detective sergeants have previous experience working as sergeants in the jail and in road patrol and work overtime to fill in for road patrol and jail sergeants when needed.

The laboratory sergeant works with a lieutenant and a civilian latent print examiner in the crime lab. These positions are in the staff services division. The laboratory is operated jointly by the County and the City of Kalamazoo, and there are also employees of the City working there. The laboratory sergeant position has qualifications not possessed by other sergeants and has a higher pay grade. The latent print examiner, a civilian position, is formally under the laboratory sergeant, although the three laboratory employees work as a team with separate duties. The laboratory lieutenant, not the laboratory sergeant, prepares the performance evaluation for the latent print examiner. Evidence technicians, road patrol deputies with specialized training, collect evidence at crime scenes. At higher level crime scenes, the laboratory sergeant, the laboratory lieutenant, or both, assigns tasks to, and directs and supervises the work of, the evidence technicians. The evidence technicians also regularly call the laboratory sergeant with questions from other crime scenes about how a particular item of evidence should be processed. The laboratory sergeant does not approve leave or do performance evaluations for the evidence technicians, who are assigned regular road patrol duties when not needed to collect evidence. However, the laboratory sergeant has the same authority to give orders and issue discipline to employees of lower rank, including the evidence technicians, as that possessed by other sergeants. The laboratory sergeant testified that he has never had an evidence technician disobey his order. However, on one occasion when he was dissatisfied with an evidence technician's

performance, he brought the situation to the attention of a road patrol lieutenant, who agreed to deal with it. In addition to his responsibilities at crime scenes and in the laboratory, the laboratory sergeant regularly testifies in court as an expert witness.

The evidence sergeant, who is part of the staff services division, directs the Department's evidence storage function. He maintains the key to the evidence storage room and is charged with making sure no one enters without authorization. He is also responsible for making sure evidence is disposed of properly and on schedule. The evidence sergeant is also in charge of ordering uniforms and equipment. Like the detective sergeants, the evidence sergeant does not have any direct reports and is not responsible for preparing performance evaluations or approving leave requests. However, everyone in the department, including the command officers, must follow the rules the evidence sergeant establishes for putting evidence into storage or retrieving it. As a sergeant, the evidence sergeant has the authority to discipline a deputy who disobeys his orders or fails to follow the rules established by him for handling evidence, including issuing a written reprimand. The record does not indicate that the evidence sergeant has ever issued formal discipline but he does, on occasion, issue counseling statements to deputies who fail to follow his evidence rules. The evidence sergeant also sometimes supervises the collection of evidence at a crime scene although this is not a regular responsibility.

The traffic sergeant, who is in the law enforcement division, administers a traffic safety grant issued to the department. He has two direct reports, two road patrol deputies whose work is funded by the grant and who respond to traffic accidents and do traffic enforcement. The traffic sergeant reviews all traffic accident reports, and investigates or reconstructs all fatal and serious injury accidents. He answers phone calls about traffic from the public and sets up directed patrols for problem areas. He also oversees the maintenance and repair of Department vehicles. The traffic sergeant works the day shift, while the two road patrol deputies assigned to traffic work other shifts. As a result, these deputies are also under the supervision of the road patrol sergeants assigned to their shifts. Both the traffic sergeant and the road patrol sergeants have the authority to discipline these two road patrol deputies up to and including the level of a written reprimand. The traffic sergeant, with input from the road patrol sergeant, prepares performance evaluations for these road patrol deputies. These evaluations are reviewed by the traffic sergeant's lieutenant before the sergeant discusses them with the deputies, and the sergeant has changed ratings at the suggestion of the lieutenant. The traffic sergeant sometimes works overtime as a road patrol sergeant.

Sergeants' Involvement in Collective Bargaining and Grievance Processing

There is no dispute that sergeants, upon being elected by the Union's membership to serve on the Union's executive board, sit at the bargaining table and represent employees in disciplinary and grievance hearings. Grievances are sometimes filed by employees over discipline issued by a sergeant. If the sergeant who issued the discipline is also the Union representative who would normally handle the grievance, the Union's policy is for that sergeant to be replaced by another Union representative. There was testimony, however, that sergeants have represented deputies in grievances challenging discipline issued by that same sergeant. Charging Party Schreiner also testified that deputies, particularly deputies in the jail division who want to transfer to the road patrol, are inhibited from challenging decisions made by the Union's

executive board because their sergeants sit on the board and they fear a negative impact on their career.

Discussion and Conclusions of Law:

Sergeants' Supervisory Status

Section 2(11) of the National Labor Relations Act (NLRA), 29 USC §150 et seq, defines a "supervisor" as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Neither PERA nor the Labor Mediation Act (LMA), MCL 423.1 et seq, defines a "supervisor." In *East Detroit Sch Dist*, 1966 MERC Lab Op 60, the Commission adopted the NLRA's definition. To qualify as a supervisor under PERA, an individual's responsibility to exercise authority with respect to the functions set forth above must involve the use of independent judgment, including effective authority in personnel matters, with the power to evaluate employees and recommend discipline. *City of Warren*, 26 MPER 38 (2013); *City of Grand Rapids*, 19 MPER 69 (2006). Effective authority in personnel matters means that the employee's superiors generally accept his or her recommendation without an independent investigation or independent consideration. *Bronson Methodist Hospital* 1973 MERC Lab Op 946, 951-952; *Village of Paw Paw*, 2000 MERC Lab Op 370, 373.

An individual is not a supervisor under PERA if his or her authority is limited to directing the daily work of other employees and/or making work assignments of a routine nature. *Huron Co Medical Care Facility,* 1998 MERC Lab Op 137; *City of Detroit*, 1996 MERC Lab Op 285; *Detroit Dept of Parks and Recreation*, 1966 MERC Lab Op 661. An employee who is "in charge of" a group of employees may be found not to be a supervisor if he or she has no authority to discipline or effectively recommend discipline. *Michigan Cmty Services, Inc*, 1994 MERC Lab Op 1055. The authority to discipline or to effectively recommend discipline is often the most important indicator of supervisory authority under PERA. *City of Detroit*, 1996 MERC Lab Op 282, 285-286.

It is the delegation of supervisory authority, rather than the exercise of this authority, which is indicative of supervisory status. *Village of Lawrence*, 1997 MERC Lab Op 319. That is, as long as his authority is real and not theoretical, the fact that the employee has had little or no occasion to exercise that authority is not determinative of his or her supervisory status. *Bloomfield Hills Sch District*, 2000 MERC Lab Op 363, 365; *MEA v Clare-Gladwin ISD*, 153 Mich App 792, 797 (1986). For this reason, the Commission gives considerable weight to an employer's testimony that it has or has not delegated supervisory authority to a position, although an employer's testimony is not determinative if the facts establish otherwise. *Grand Valley State College*, 1982 MERC Lab Op 469, *City of Birmingham*, 1980 MERC Lab Op 175;

Livonia Pub Schs, 1991 MERC Lab Op 517, 519. See also *Kalkaska Co and Kalkaska Co Sheriff*, 1994 MERC Lab Op 693 and *City of Grand Rapids (Police Dept)*, 17 MPER 56 (2004) *supra*, in which Commission dismissed petitions seeking to remove police sergeants from nonsupervisory units, concluding, with the sergeants' employers, that the sergeants were not supervisors.

In law enforcement organizations, the determination of supervisory status is complicated by the fact that in these organizations each rank typically exercises authority over employees in lower ranks. *Berrien Co and Berrien Co Sheriff*, 1999 MERC Lab Op 177. However, there is no per se rule regarding supervisory status for sergeants or public safety employees of any rank. *Oakland Co Sheriff*, 1980 MERC Lab Op 1123, 1131; *City of Mt Pleasant (Police Dept)*, 1996 MERC Lab Op 425, 429. Rather, each case is decided on its own particular facts. The Commission has repeatedly been asked to determine whether sergeants in a particular organization are supervisors, and has found some to be supervisors and others nonsupervisory "leaders." For example, the Commission found sergeants to be supervisors in *City of Mt Pleasant, supra; Village of Blissfield*, 1988 MERC Lab Op 528; *Oakland Co and Sheriff, supra; Huron Co Bd of Comm*, 1995 MERC Lab Op 505; *Montcalm Co and Montcalm Co Sheriff*, 1997 MERC Lab Op 157, aff'd 235 Mich App 580 (1999); *City of Clio*, 1994 MERC Lab Op 39; and *City of Midland (Police Dept)*, 1993 MERC Lab Op 601. It found sergeants not to be supervisors in *Berrien Co, supra; Kalkaska Co and Kalkaska Co Sheriff, supra; City of Grand Rapids (Police Dept), supra;* and *Delta Co*, 1996 MERC Lab Op 552.

As discussed above, an individual with the authority to discipline is a supervisor under the Commission's definition and the authority to issue even lower level discipline normally means that an individual is a supervisor. In *City of Grand Rapids (Police Department), supra*, sergeants in a police department who had the authority to issue counseling memos that were placed in employees' personnel files were found not be supervisors. However, the Commission emphasized that these memos were not considered formal discipline. Here, sergeants may issue written counseling memos which are neither placed in employees' personnel files nor considered formal discipline. However, the record establishes that all sergeants also have the authority to issue formal discipline in the form of a verbal reprimand in written form (verbal reprimand/written warnings). Alternatively, the sergeant, at his or her discretion, may issue a written reprimand, which is considered more serious discipline. In addition, a sergeant has the authority to place his or her direct report on a performance improvement plan, another form of discipline. Although discipline at this level does not have a direct effect on employees' pay or other terms and conditions of employment, the record indicates that an employee's disciplinary record is a factor considered by the command staff in making promotions.

Not all sergeants in the Department have exercised their authority to issue formal discipline. The record indicates that all sergeants, however, are responsible in some way for monitoring the conduct/performance of deputies and/or civilian employees. It also establishes that they have discretion to decide whether to go beyond merely discussing the problem with the employee and instead issue formal discipline. The personal preferences of the sergeant, as well as his or her relationship to the employee and the circumstances all dictate whether the sergeant will issue formal discipline. However, it is the delegation of the authority to discipline, and not its exercise, that determines supervisory status. I conclude that the Employers have delegated to

all employees with the rank of sergeant the authority to discipline employees up to and including the level of a written reprimand.

With respect to discipline above the level of a written reprimand, the decision to discipline, and what level of discipline is appropriate, is made by the Sheriff and/or Undersheriff. Although sergeants assigned to conduct internal investigations of potential employee misconduct may make recommendations as to whether the employee has violated a departmental rule, there is no evidence that the Sheriff or Undersheriff effectively relies on this recommendation. I note, however, that the sergeant, or lieutenant as the case may be, who conducts the investigation interviews the witnesses and prepares a statement of pertinent facts. There is no indication that deputies or nonsworn unit members are ever assigned to conduct internal investigations.

There are other facts, though less significant, that support a conclusion that the Employers have delegated supervisory authority to the sergeants. Sergeants who have direct reports, including jail sergeants, road sergeants, and the traffic sergeant, prepare written performance evaluations for their direct reports. A sergeant's lieutenant decides whether to review evaluations prepared by his or her sergeants before they are submitted. In *City of Grand Rapids (Police Dept), supra,* the Commission held that sergeants' responsibility for preparing written performance evaluations did not qualify them as supervisors. In that case, however, the sergeants' lieutenants also independently evaluated employees, a fact that is not present here.

Sergeants do not make promotion or transfer decisions or effectively recommend who will be promoted or transferred. However, decisions to promote are based in part on a "service rating," which in turn is based on performance evaluations and disciplinary history.

Another factor indicating that the Employers have delegated supervisory authority to the sergeants is that for a substantial percentage of the week – outside of normal working hours, Monday through Friday – sergeants are the highest ranking employees on duty. While command officers are available to respond to emergencies and for consultation, sergeants have the authority to take immediate action when required, including sending an employee home in the middle of a shift with pay pending further investigation of his or her misconduct. Sergeants also begin investigating citizen complaints about officers made on their shifts without first notifying a command officer.

The authority to grant time off and approve leave is not necessarily an indication of supervisory status, since these are often routine functions. Here, however, the jail and road patrol sergeants also have the authority to decide to staff a shift either above or below the Department's staffing guidelines. The record indicates that jail and road patrol sergeants have the authority to deny deputies' leave requests if the sergeants determine that granting these requests would bring staffing below the level required for that day. They also have the discretion, in that situation, to grant the request and instead authorize overtime. I find that the authority delegated to the sergeants with direct reports to approve or deny leave requests is a further indication of their supervisory status.

All the sergeants in this case, including the sergeants who do not have direct reports, direct the work of, and assign work to, deputies in the bargaining unit. According to the

Commission's definition, an individual who uses independent judgment in the exercise of this authority is a supervisor, while individuals whose authority is limited to the routine direction or assignment of daily work are not supervisors. However, the Commission has held that an individual in charge of a particular function who determines how the work will be completed, decides which employees will do it, and ensures that it is completed properly is not a supervisor unless the employee has an effective role in discipline and personnel matters. *Michigan Cmty Services, Inc*, at 1060; *City of Grand Rapids.* Here, sergeants have the authority to discipline and also have a significant role in other types of personnel decisions. Their supervisory authority, therefore, is clearly not limited to the routine direction of or assignment of work.

I conclude, for the reasons set out above, that the sergeants in this case, including the sergeants that do not have direct reports, are supervisors as the Commission defines that term.

Unlawful Interference in Violation of §§10(1)(a) and (b)

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with the exercise of its employees' rights under §9 of PERA. Section 10(1)(b) of PERA makes it unlawful for a public employer to "initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization." Section 10(1)(b) was patterned on §8(a)(2) of the NLRA, which makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

Supervisors are excluded from the definition of the term "employee" under §2(3) of the NLRA, and, as such excluded from collective bargaining under that Act. In addition, supervisors are normally held to be agents of the employer for purposes of determining unfair labor practices committed by employers under the NLRA. The National Labor Relations Board (NLRB or the Board) has long held that an employer interferes with the administration of a labor organization, and with the rights of its employees under §7 of the NLRA, by permitting even low-level supervisors to collectively bargain on behalf of the employer's employees and/or represent employees in the adjustment of grievances. See *Nassau & Suffolk Contractors Assn*., 118 NLRB 174 (1957). *In E. E. E. Co, Inc*, 171 NLRB 982 (1968), the Board held that the mingling of such supervisory and representative functions denies employees the right to be represented in collective bargaining matters by individuals who have a single-minded loyalty to their interests. In *Postal Services*, 280 NLRB 685, 690 (1986), the Board held that an employer violated §8(a)(2) of the NLRA by permitting supervisors to serve as shop stewards and union officers and, as such to be directly involved in negotiating local collective bargaining agreements and in representing employees in the grievance procedure. Citing *St Louis Labor Health Institute*, 230 NLRB 180, 182 fn. 9 (1979), the Board stated in *Postal Services* that in executing the collective bargaining functions of collective bargaining and grievance representation, "union representatives must be free from those subtle pressures which tend to interfere with [the] obligation to promote and protect the interest of employees they are representing."

Supervisors are not excluded from the definition of a "public employee" contained in §1 of PERA. However, §13 of PERA, which incorporates by reference §9e of the LMA, prohibits the Commission from including individuals holding "executive or supervisory positions" in a

unit of "employees of 1 employer employed in one plant or business enterprise." In 1968, the Commission held that supervisors have the right under PERA to organize and engage in collective bargaining, but that §13 prohibits the inclusion of supervisors in the same unit with nonsupervisory employees of the same employer. *Hillsdale Cmty Schs,* 1968 MERC Lab Op 859, aff'd 24 Mich App 36 (1970); *Sch Dist of City of Dearborn v Labor Mediation Bd*, 22 Mich App 222, 228, (1970).

In *Hazel Park Sch Dist,* 1966 MERC Lab Op 233, a trial examiner for the Labor Mediation Board, the Commission's predecessor, cited NLRB precedent in holding that a school district violated §§10(1)(a) and (b) of PERA by permitting executives and supervisors – school principals, assistant principals and department heads – to hold office in the association representing nonsupervisory teaching employees. The trial examiner held, in a decision adopted by the Mediation Board when no exceptions were filed, that "the holding of union office by supervisors and executives destroys the insulation which the Act requires between the teachers' jobs and their organizational rights, and their rights to engage in activities for mutual aid and protection" citing *Local Union 636 Plumbers v NLRB,* 287 F2d 354 (CA DC 1961) and *International Union of Machinists v NLRB,* 311 US 72 (1940).

In *Livonia Pub Schs*, 1967 MERC Lab Op 780, the Labor Mediation Board concluded that a school district violated §§10(1)(a) and (b) of PERA by allowing head custodians, a position which the Board found to be supervisory, to actively participate in the internal affairs of a local union representing nonsupervisory employees of the employer, including serving as the local's president, vice-president, and steward and serving on the local's negotiating committee. The Board noted that in *School Board of the City of Grand Rapids,* 1966 MERC Lab Op 282, it had found that supervisors could be members of a labor organization provided that they did not vote in their elections, hold office, attend internal business and/or labor relations meetings or engage in any other activity on behalf of such organization. In subsequent decisions, the Mediation Board held that the same union could lawfully represent both supervisory and nonsupervisory employees of the same employer as long as the supervisors and nonsupervisors were in separate units and the union maintained separate governance structures. *City of Ann Arbor*, 1970 MERC Lab Op 440; *Benzie Co Medical Care Facility*, 1969 MERC Lab Op 517.

In *Michigan State University,* 1984 MERC Lab Op 592, the employer had recognized and bargained with a labor organization for a unit of administrative and professional employees. This unit included, as all parties acknowledged, positions which supervised other positions within the unit. Another labor organization seeking to represent some of the employees in this unit filed an unfair labor practice charge alleging that the employer had violated §§10(1)(a) and (b) of PERA by engaging in collective bargaining with supervisors on behalf of the nonsupervisors in an illegal unit. The record established that the unit was comprised largely of nonsupervisory employees, but that supervisors, both at the time of the hearing and in the past, had held union offices that involved them directly in the collective bargaining process as well as the settlement of grievances for nonsupervisory employees. However, the evidence also indicated that that the union elected officers, collected dues, held membership meetings, negotiated and settled grievances independent of any actual influence by the employer. Based on this evidence, both the ALJ and the Commission declined to find unlawful assistance to or domination of the labor organization by the employer. However, both the ALJ and the Commission concluded that the

employer had unlawfully interfered with the §9 rights of employees and with the administration of the labor organization under §10(1)(b) by permitting its supervisors to take an active role in the representation of its nonsupervisory employees.

In *Michigan State University,* as noted above, all parties, including the employer, conceded that the unit as it existed included both nonsupervisory positions and positions which supervised positions in this unit. This was also the case in *Macomb Co*¸ 1997 MERC Lab Op 233 in which it was alleged that an employer violated §§10(1)(a) and (b) of PERA by recognizing and bargaining with the intervenor union, over a long period of time, for three units which each included both nonsupervisory employees and their supervisors. There was also no dispute in *Macomb Co* that supervisors had held positions as union officers which involved negotiating contracts for their subordinates. In the most recent contract negotiations, the negotiating team for one of the units had been dominated by supervisors. The ALJ held in *Macomb* that the employer had a duty to insure that supervisors had a separate bargaining unit and that they did not become involved in the collective bargaining process for nonsupervisory employees. He concluded that the employer had violated §§10(1)(a) and (b) of PERA by failing to do so. On exception, the Commission agreed.

The cases discussed above arose as a result of the filing of unfair labor practice charges. The issue of supervisors included in the same bargaining unit as their alleged subordinates has been addressed much more frequently in representation cases. The Commission has held that because §13 prohibits supervisors from being included in the same unit with their subordinates, it will clarify units to remove a supervisory position from a nonsupervisory unit, or nonsupervisory positions from a unit which includes supervisors, despite a bargaining history of including them in the same unit. See *Township of Clinton,* 1981 MERC Lab Op 613 (unit clarification appropriate to remove nonsupervisory corporals from supervisory unit in police department and place them in nonsupervisory unit); *City of Mt. Pleasant, supra* (sergeants found to be supervisors and unit clarified to remove them from public safety department bargaining unit); *City of Detroit, Dept of Pub Works,* 1999 MERC Lab Op 283 (unit clarification appropriate to remove subforemen from nonsupervisory unit of mechanics and place them in a supervisory unit); *Ogemaw Co and Ogemaw Co Sheriff,* 1997 MERC Lab Op 58 (employer's unit clarification petition to remove jail administrator from nonsupervisory unit granted based on the position's supervisory status, despite long history of including the position in the unit.) The Commission has stated that it will not disturb an existing unit to remove "borderline" supervisors where the parties have a longstanding agreement to include them in a unit that includes nonsupervisors. *Saginaw Co Probate Court, Juvenile Div,* 1983 MERC Lab Op 954, 959. See also *Kalkaska Co and Sheriff,* supra, (longstanding agreement of the parties as to the unit placement of a position is relevant, particularly in the case of borderline or marginal supervisors.) However, to the best of my knowledge, the Commission has never defined a "borderline" supervisor or explained how a "borderline" supervisor differs from an employee who simply lacks effective supervisory authority.

Charging Parties allege that the Employers unlawfully assisted and interfered with the internal affairs of the Union, in violation of §§10(1)(a) and (b) of PERA, by permitting the sergeants to bargain on behalf of nonsupervisors and otherwise take an active role in the administration of the Union. Charging Parties ask that the Employers be ordered to cease and

desist from any further bargaining with the Union until sergeants have been removed from the unit and that Charging Parties be reimbursed for their costs and attorneys' fees. The Employers agree that the sergeants are supervisors and that they should be removed from the Union's bargaining unit. That is, while not explicitly admitting that they violated the Act, the Employers agree with Charging Parties that the sergeants should not continue to be included in the same unit with deputies and other nonsupervisory employees. It is the Union that asserts that the Employers committed no violation of PERA. It argues that the sergeants are not supervisors, or are no more than "borderline supervisors," and that the existing unit should not be disturbed.

As discussed above, §13 prohibits the inclusion of supervisors in bargaining units of nonsupervisory employees. For that reason, when an employer files a petition to clarify an existing nonsupervisory bargaining unit by removing supervisory positions, the Commission will grant the petition if it determines that the positions are, in fact, supervisory. In addition, the Commission, like the NLRB, has held that an employer unlawfully interferes with the §9 rights of its employees, and the administration of their labor organization, when it permits its supervisors to engage in collective bargaining on behalf of nonsupervisory employees or represent them in the grievance process. I have concluded in this case that sergeants employed by the Employers are supervisors as the Commission defines that term. I also conclude that by permitting sergeants to bargain on behalf of nonsupervisors and represent nonsupervisors in grievances, the Employers interfered with the rights of their employees under §9 of PERA in violation of §10(1)(a) of PERA and interfered with the administration of the employees' labor organization in violation of §10(1)(b) of PERA.

Charging Parties do not allege that the Union was unlawfully assisted or dominated by the Employers. It also has not requested that the Employers be ordered to withdraw recognition from the Union until it is recertified as the bargaining agent for any unit, cease giving effect to its collective bargaining agreement, or refund agency shop fees collected under this agreement, remedies that were ordered in Michigan *State University* and/or *Macomb Co.* I conclude that the appropriate remedy for the Employers' unfair labor practice in this case is the remedy requested by the Charging Parties. I recommend, therefore, that the Employers be ordered to cease and desist from recognizing or bargaining with the Union until an agreement is made with the Union to remove the sergeants from the Union's bargaining unit. After the sergeants are removed from the bargaining unit, the Union, after setting up a separate governance structure, may seek recognition from the Employers for a separate unit of sergeants either through the filing of a petition for election or through voluntary recognition, or the sergeants may seek representation from another labor organization.

In *Goolsby v City of Detroit*, 211 Mich App 214, 224-225, (1995), the Court of Appeals held that the Commission was not authorized to award attorney fees because, under Michigan law, attorney fees are not recoverable unless authorized by statute, court rule, or a recognized common-law exception and PERA does not contain any specific language authorizing the award of attorney fees. Charging Parties' request to be reimbursed for their costs and attorneys' fees is, therefore, denied.

In sum, in accord with the facts and conclusions of law set forth above, I conclude that the Union did not violate §10(2)(a) of PERA as alleged in the charge in Case No. CU12 J-049. I

conclude, as set out in the findings of fact and conclusions of law above, that the Employers did interfere with the rights of their employees under §9 of PERA in violation of §10(1)(a) of PERA and interfered with the administration of their employees' labor organization in violation of §10(1)(b) of PERA. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondents Kalamazoo County and Kalamazoo County Sheriff, their officers and agents, are hereby ordered to:

A. Cease and desist from:

1.Coercing, restraining and interfering with the rights of their employees under §9 of PERA, and interfering with the administration of their labor organization, the Kalamazoo County Sheriff's Deputies Association, by permitting supervisory employees to represent the interests of nonsupervisory employees, bargain on their behalf, and represent them in the adjustment of grievances;

2. Recognizing the Kalamazoo County Sheriff's Deputies Association as the representative for a bargaining unit that includes both nonsupervisory employees and sergeants who are their supervisors;

B. Take the following affirmative action to effectuate the policies of the Act:

1. Withdraw or withhold recognition from the Kalamazoo County Sheriff's Deputies Association until an agreement is reached with it to remove sergeants from the existing unit of nonsupervisory employees represented by this labor organization. No employee of the Kalamazoo County Sheriff's Department shall suffer a loss of wages or benefits as a result of this order;

2. Post the attached notice to employees in conspicuous places on the Employers' premises, including all places were notices to employees are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 19, 2015

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND **KALAMAZOO COUNTY AND THE KALAMAZOO COUNTY SHERIFF** TO HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT coerce, restrain and interfere with the rights of our employees under §9 of PERA and interfere with the administration of their labor organization, the Kalamazoo County Sheriff's Deputies Association, by permitting supervisory employees to represent the interest of nonsupervisory employees, bargain on their behalf, and represent them in the adjustment of grievances;

WE WILL NOT recognize the Kalamazoo County Sheriff's Deputies Association as the representative for a bargaining unit that includes both nonsupervisory employees and sergeants who are their supervisors;

WE WILL withdraw or withhold recognition from the Kalamazoo County Sheriff's Deputies Association until an agreement is reached with it to remove sergeants from the existing unit of nonsupervisory employees represented by this labor organization. No employee of the Kalamazoo County Sheriff's Department shall suffer a loss of wages or benefits as a result of this action.

KALAMAZOO COUNTY **KALAMAZOO COUNTY SHERIFF**

By: _____ By: _____

Title: _____ Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case Nos. C12 J-048/12-001760-MERC/ C13 A-004/13-00011-MERC