STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COUNTY,
Public Employer-Respondent,

-and- MERC Case No. C15 J-142

AFSCME LOCAL 3052,
Labor Organization-Charging Party,

-and-

NANCY HEINE,
An Individual Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Andrew A. Cascini and Keith E. Eastland, for Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr., for Charging Parties

DECISION AND ORDER

On April 2, 2018, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: June 18, 2018

[1] MAHS Hearing Docket No. 15-058184

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WASHTENAW COUNTY, Case No. C15 J-142
Respondent-Public Employer, Docket No. 15-058184-MERC

-and-

AFSCME LOCAL 3052,
Charging Party-Labor Organization,

-and-

NANCY HEINE,
An Individual Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Andrew A. Cascini and Keith E. Eastland, for the Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr., for Charging Parties

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On October 26, 2015, the above captioned unfair labor practice charge was filed with the Michigan Employment Relations Commission (Commission) against Washtenaw County. 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 assigned to Travis Calderwood, Administrative Law Judge of the Michigan Administrative Hearing System, on behalf of the Commission. Based upon the entire record, including the transcripts of hearing, exhibits and post hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

Unfair Labor Practice Charge(s) and Procedural Background:

On October 26, 2015, Charging Party Heine, the President of AFSCME Local 3052 (Union), filed the initial unfair labor practice charge in her own name alleging that the County violated Sections 10(1)(a) and (c) of PERA. More specifically, Heine's charge alleges that on or about April 28, 2015, the County coerced Union members to "send a letter supporting the Executive Director of the County when Ms. Heine had already sent a letter not supporting the Executive Director."
Furthermore, Heine claims that on or about August 24, 2015, the County provided notice that Heine's position was to be "eliminated" and that following a grievance filed by Heine the elimination was "rescinded on or about September 16, 2015." Lastly, Heine claims that the County "had stripped her of her managerial duties because of her Union activity" and gave those duties to employees outside the

Union.

On November 5, 2015, Respondent filed an Answer and Affirmative Defenses.

On December 5, 2015, Respondent filed a Motion for More Definite Statement pursuant to Commission Rule 423.162.

On December 15, 2015, Charging Party Heine provided her response to Respondent's motion asserting that said motion is simply an attempt "to engage in free discovery, which is not part of the [Commission] process."

On December 17, 2015, by interim order, I granted Respondent's motion seeking a more definite statement.

On January 11, 2016, Charging Party Heine, again in her own name, filed a First Amended Charge, wherein she identified fifteen (15) specific members of the Union she claims were coerced into sending a letter supporting the "Executive Director" of the County. Charging Party also identified with specificity the duties she claims were removed from her position in retaliation for her engaging in protected activity. Charging Party's other allegations remained unchanged.

On January 15, 2016, Respondent provided notice that it would not be opposing the admission of the First Amended Charge.

On January 28, 2016, I received Respondent's Motion for Summary Disposition, brought under Commission Rule 165(2)(b), (d) and (f), along with a brief in support thereof and accompanying exhibits. Respondent argued that it was entitled to summary disposition because: (1) Charging Party Heine, as an individual, lacks standing to assert interference claims on behalf of the fifteen named unit members identified in the first amended charge; (2) Charging Party, as an individual, has no standing to challenge the Employer's assignment of duties and, the preceding notwithstanding, the actions of the Employer were "covered by" the contract; (3) Charging Party Heine cannot establish a *prima facie* case of unlawful discrimination in relation to her layoff because she was never actually laid off and therefore suffered no adverse employment actions; and finally (4) Charging Party Heine cannot establish a *prima facie* case of unlawful discrimination in relation to the alleged stripping of duties because she has suffered no adverse employment actions and because she has not pled anti-union animus.

Following review of Respondent's Motion for Summary Disposition, I sent an email to the parties indicating my intention to issue an Order to Show Cause. Counsel for Charging Party Heine requested that I refrain from doing so because he intended to file a second amended charge that might have bearing on Respondent's motion.

Charging Party Heine filed her proposed Second Amended Charge by facsimile on February 11, 2016.

That filing sought to add AFSCME Local 3052 as a charging party but did not address Respondent's claims that Charging Party Heine had failed to establish a *prima facie* case of discrimination and/or retaliation regarding either the notice of termination or removal of job duties. That proposed charge also identified two other bargaining unit positions that were either laid off or transferred, which the Union claimed was done to erode the bargaining unit. Lastly, the proposed charge added a claim under Section 10(1)(e) of the Act claiming that the County had unlawfully transferred work from Heine and the other two unit positions identified above to "non-union employees without bargaining."

On February 26, 2016, Respondent filed its written objection to Charging Party's proposed Second Amended Charge. Respondent argued that the addition of the Union as a Charging Party was futile as it relates to the allegation that the County refused to bargain over the removal of job duties from the bargaining unit because the contract between the County and Union covers the subject. Respondent also made timeliness claims which included its argument that PERA's strict six-month statute of limitations bars the Union from making its own claim regarding the alleged coercion of the fifteen individuals identified in the First Amended Charge.

On March 3, 2016, I directed Charging Party to file a position statement, with legal authority in support thereof, responding to Respondent's written objections to the proposed Second Amended Charge. Charging Party was also directed to respond to Respondent's January 28, 2016, motion seeking dismissal of the charges. Charging Party filed her position statement and response on March 25, 2016. As part of the position statement, Charging Party Heine would later clarify, in a Position Statement, filed on March 25, 2016, that she was not seeking to assert a cause of action with respect to these fifteen individuals but rather was claiming that the County's actions were intended to interfere with her own protected activity.

On April 8, 2016, my office received a reply brief filed by Respondent responding to Charging Party's March 25, 2016, position statement and response to the motion to dismiss. That same day Charging Party filed a motion seeking to strike Respondent's reply brief. On April 13, 2016, Respondent filed a response to the motion to strike.

On May 5, 2016, I issued an Interim Order in which I granted Charging Party's motion to strike Respondent's April 8, 2016, response; denied Respondent's Motion for Summary Disposition; and, granted Charging Party's request to amend her charge for a second time, including the addition of AFSCME Local 3052 as a Charging Party. The matter was then set for hearing.

The parties appeared before the undersigned for hearing on June 10, June 27, and June 28, 2016.

During the hearing on June 28, 2016, Respondent attempted to introduce several documents into the record in support of an argument that collateral estoppel should apply to the present proceedings. Those documents related to a prior case between the parties, Case No. C08 H-165. I indicated during the hearing that I would consider and rule on Respondent's request in writing prior to our next hearing date scheduled for August 24, 2016.

In an interim order dated August 12, 2016, and incorporated by reference herein, I concluded that the elements necessary for collateral estoppel to attach were not satisfied. Furthermore, I concluded that the documents themselves were not relevant to the present proceeding and ruled that they would not be admitted into evidence.

The parties again appeared before the undersigned on August 24 and August 25, 2016. At the close of the hearing on August 25, 2016, the matter was continued to September 26, 2016.

A telephone pre-hearing conference was held on September 20, 2016, at the request of Charging Parties. During that call, the parties discussed a possible settlement. A follow up pre-hearing conference call occurred the following afternoon, September 21, 2016, in which it became clear that the parties were not close to settlement. A verbal request was made by Charging Parties' counsel during that call to adjourn the September 26, 2016; Respondent opposed the adjournment. I denied the request.

The parties appeared before the undersigned on September 26, 2016, where considerable time was spent prior to going on the record in further settlement discussions. Again, it became clear to the undersigned that the parties were resolute in their positions and that further settlement discussions were futile. As such, I ordered the parties to go on the record and resume the hearing continued from August 25, 2016. Upon the conclusion of that day's testimony the matter was continued to the following morning.[2]

Findings of Fact:

The County and the Union are both signatories to a collective bargaining agreement effective March 21, 2013, through December 31, 2017. Article 56 of that Contract, entitled "Management Rights and Responsibilities" states:

> The Employer reserves and retains, solely and exclusively, all rights to manage and direct its work force, except as expressly abridged by the provisions of this Agreement, including by way of illustration, but not limitation, the determination of policies, operations, assignments, schedules, layoffs, etc., for the orderly and efficient operation of the County.

Article 12, "Layoffs", defines that term, in subsection (a), as "a reduction in the work force due to reasons of lack of work, lack of funds or elimination of a position."

Washtenaw Community Health Organization Transition

In 2000 Respondent and the University of Michigan jointly created the Washtenaw Community Health Organization (WCHO) to serve as a Community Mental Health Service Program (CMHSP) under Chapter 2 of the State's Mental Health Code, Public Act 258 of 1974, and as Prepaid Inpatient Health Plan (PIHP) pursuant to federal regulations governing the Centers for Medicare and Medicaid Services (CMMS).[3] At that time Michigan law allowed an entity to hold both the CMHSP and a PIHP designation. In that role the WCHO was able to receive and disburse funds from both state and federal sources in order to provide mental health services directly, or indirectly through contracting agencies, to its constituents. In Washtenaw County the WCHO contracted with the County's Community Support & Treatment Services department (CSTS).

[2] Early in the morning on September 27, 2016, Charging Parties' counsel sent an email to both myself and opposing counsel indicating that his automobile had been vandalized sometime during the prior night or morning and that he would not be at the hearing at 9:00 am because he was waiting for a tow-truck. After conferring with MAHS Administrative Law Manager Colleen Mamelka, I sent Charging Parties' counsel an email, at approximately 9:00 am and instructed him to provide a picture of the vandalized car and further that I expected him to be present and ready to proceed at 10:15 am. Throughout the rest of the morning I spoke with Charging Parties' counsel several more times. It soon became clear that, though physically able to appear at the hearing and being in a very close proximity to the hearing's location, Charging Parties' Counsel would not be appearing that day. Accordingly, at 12:59 pm, I went on the record and summarized the morning's events. I indicated that the hearing would be adjourned to 9:00 am on November 1, 2016, and that Charging Parties' counsel would be required to produce a copy of the police report filed in relation to the incident that kept him from appearing for the hearing. Lastly, I indicated that if I had the authority to impose sanctions for attorney's fees and costs on Charging Parties' counsel as a result of his failure to appear that day, I would do so. On November 1, 2016, Charging Parties' counsel appeared and did provide a copy of the police report corroborating his claims regarding his automobile. Charging Parties' counsel was then provided with an opportunity to make a statement, on the record, regarding the incident as well as my earlier comments regarding sanctions and attorney's fees.

[3] The WCHO acted in its capacity as a PIHP for Livingston, Lenawee and Monroe counties in addition to Washtenaw County.

Diane Heidt, who during this period of time transitioned from her position as Respondent's Labor Relations Director to the position of Interim-Deputy County Administrator, testified that the County's position as a parent organization to the WCHO allowed it to benefit monetarily in so far as some of its operating costs in running the CSTS was offset by surplus funds received and held by the WCHO.

Effective January 1, 2014, the State would no longer allow an entity to hold both the CMHSP and PIHP designation. Heidt testified that because of the aforementioned changes, the structure of the WCHO and its relationship to the CSTS would have to change as the status quo would result in duplicative administrative, technology and financial services that the County could not afford. Faced with changes to the WCHO as well as other internal budgeting and structural problems, the County formed a task force in September of 2014 to consider what action needed to be taken with respect to the WCHO. Sometime in the end of December of 2014 the task force concluded that the WCHO should be dissolved and that a new county-wide mental health agency would need to be created, the Community Mental Health department (CMH).

During this time Trish Cortes continued to serve as the Executive Director of CSTS. Sally Amos O'Neal held the position of Director of the CSTS Customer Service Department and then Interim-Director of the WCHO beginning in December of 2014. Amos O'Neal served in that position until the WCHO's eventual dissolution.

In an email on February 12, 2015, Charging Party Heine, as President of Local 3052, sent a letter, dated February 13, 2015, under AFSCME letterhead, to the County's Board of Commissioners indicating various concerns regarding the task force's final report as well as asking questions of how it would be implemented.[4]

According to Heine, her "aim in sending the letter was to give feedback to the County Board of Commissioners who were going to be considering the behavior task force recommendations and final report." Relevant to these proceedings, that letter stated in part:

> It has been common knowledge among CSTS and WCHO staff that the WCHO and CSTS Executive Directors have never gotten along. The organization models the behaviors of the leaders.
>
> ***
>
> What kind of search will be conducted for the new Mental Health Executive Director. [sic] Will it be a true, thorough search. [sic] This position should be filled by someone from outside the County/Agency.

Heine initially testified that during a February Union meeting she notified the Union Executive Board that she would write and send a letter. However, the record indicates that Heine, on February 10, 2015, circulated a draft of the letter to the Union's Executive Board which, except for asking "what kind of search will be conducted for the new Mental Health Executive Director" and whether it would be "thorough," did not contain the above statements regarding the relationship between the WCHO and

[4] Heine has been employed by the County as a Supervisor since 1988 and with the County's mental health services since 1993. She has served as the Union's President since approximately 2003.

CSTS Executive Directors, nor did it suggest that the Mental Health Executive Director should be filled outside of the County/Agency.[5] The body of that email stated:

> Hello. Please see this updated version of the unions [sic] response to the Mental Health Authority proposal. This has not been sent to the Commissioners yet. These are talking points and the actual letter will be sent to the [Commissioners] by the end of the week.

During this same time the County's task force was presenting its findings and recommendation to the governing bodies of the WCHO's two parent organizations, the County Board of Commissioners and the University of Michigan Board of Regents. The Commissioners approved the dissolution in March of 2015 while the Regents did the same in May of 2015. The WCHO's dissolution was to occur no later than September 30, 2015. The County had also set in motion a plan to have the CMH up and running as of October 1, 2015.

On March 30, 2015, Union member Sherry Edwards sent an email to Heine, copied to another Union member, Barb Thacker, which stated:

> I am hearing that there was a letter submitted to the board indicating that Trish Cortez [sic] was not fit to be our director and that it was sent on behalf of the supervisors. This is the first we are hearing of this can we get a copy of it please?

Thacker, in responding to Edwards's email, echoed the same concerns. Heine's response to the two stated:

> Hi. I know nothing about any letter being sent to the BOC about Trish! It certainly didn't come from our local or at least go through me. If you get more details I would like to hear them. I will also try to find out more information and would like to see a copy of the letter as well, if it exists.

Heine, in describing the tone of the emails, stated at the hearing:

> I got two emails from union members indicating that they had a concern with a letter that was sent to the Commissioners, that I was trashing or I was thinking that our executive director should not be in the position.

Neither Thacker or Edwards were called to testify in these proceedings.

On April 28, 2015, between 10 and 15 Union members met after a regularly scheduled County meeting to discuss Heine's letter to the Commissioners. Included at that meeting were Edwards, Thacker, Shannon Whittaker, Deb Own and Britt Paxton, among others.[6] Paxton testified at the hearing that the group decided to write a letter of support for Cortes and that the group "decided what to write." Paxton claimed that she typed the letter CSTS letterhead. That letter stated in part:

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[5] Counsel for Charging Parties objected to the email's admission at hearing, arguing that, despite being sent from County servers, the email and draft letter were nonetheless "privileged" as they were being transmitted from the Union President to the Executive Board. Counsel indicated that he had case law to support his objection but failed to provide it either during hearing or in the post-hearing brief.

[6] Paxton, while a Union member in April of 2015, was employed in a non-union position at the time of the hearing.

> It has come to our attention that a letter was written on behalf of the Supervisor's Union (AFSCME Local 3052) that indicated we did not support the current Executive Director. Unfortunately, we were unaware of this and would like it known that it is not an accurate representation of our thoughts. We, the undersigned, would like to show our support to the present Executive Director and would be honored to have her remain in this position.

The letter was signed by fifteen individual members of Local 3052. Paxton testified credibly that the only persons in attendance during the time that Heine's letter was discussed and the new letter was drafted, were members of Local 3052. Paxton further testified that no one from management suggested or implied that the second letter should be written or that she should sign it.[7]

Sometime in May of 2015 Heine was provided a copy of the April 28, 2015, letter by Winston Johnson, staff representative for AFSCME Council 25. Heine testified that it was after receipt of the letter that she began a "Union Investigation" to "drill down and find out what was going on."

In advance of an upcoming regularly scheduled Union meeting set for May 20, 2015, Heine claimed she sent an email to all Union members in which the April 28, 2015, letter was to be discussed. According to Heine some, but not all, of the fifteen signatories to that letter attended. Heine further claimed that she provided everyone in attendance with a copy of her February 13, 2015, letter. Heine testified that she was told by members present at the meeting that Pippins and two other non-union managers, Liz Spring and Nick Testorelli, knew about the April 28, 2015, meeting and that Testorelli and Pippins, and possibly Spring, were all at the meeting that preceded the writing of the letter.[8]

The next day, May 21, 2015, Heine re-sent to the Union's Executive Board the February 10, 2015, email she had already sent them with the draft version of her letter. In that email, Heine wrote:

> FYI – just to refresh from last night's discussion – here is the notification and the attachment for the letter that was going to be sent to the BOC. To be clear, all of you were sent this as noted below. I received no communication indicating there were any concerns. Let me know if you have any further questions.

Sometime after the Union's May 20, 2015, meeting, Heine claims she attended a meeting, either grievance related, special conference, or a regular labor meeting, in which Judy Kramer, who was acting as Respondent's Interim-Labor Relations Director and/or Heidt, stated that Pippins had admitted to talking to two Union members about Heine's February 28, 2015, letter. Heine further claimed that Kramer and/or Heidt told her that Pippins had been talked to and had been instructed to "refrain from this type of activity." Both Heidt and Kramer denied, credibly, that they ever spoke with Heine about what she claimed.

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[7] Heine attempted to testify at hearing that she had a meeting with Thacker in early May of 2015 during which Thacker confided in her that a non-union Manager, Deb Pippins, had provided Thacker with Heine's February 13, 2015, letter. Heine further claimed that Thacker told her that Pippens told Thacker that Heine was "trashing" Cortes and then asked Thacker what she was going to do about it. Respondent's Counsel objected to the above as hearsay. I sustained the objection and indicated that I would not be giving any weight to the testimony. Nonetheless, Charging Parties' post-hearing brief appears to assert those assertions as fact, without (1) indicating such were already held to be inadmissible hearsay and (2) providing any argument why my ruling at the hearing should be reversed.

[8] Even if I were to ignore the hearsay issues regarding Heine's testimony on this point, I would credit Paxton's testimony as to who was present at the April 28, 2015, meeting. Furthermore, I note that, despite there being several Union members present at the meeting excluding Paxton, Charging Parties did not call any witness to corroborate Heine's claims.

On June 4, 2015, Heine filed a "class action" grievance over the circumstances that caused the April 28, 2015, letter. That grievance mirrored many of the allegations set forth above. Kramer, as the Interim-Labor Relations Director, began to investigate the allegations contained therein and eventually scheduled a "Step 3" meeting. In scheduling that meeting, Kramer invited Heidt, Hiene, Johnson and Thacker, among other union members who had signed the April 28, 2015 letter. However, prior to the meeting, Kramer received an email in which the Union requested the meeting be cancelled.

Approximately in middle of July 2015, while the County was working on dissolving the WCHO and reorganizing its mental health services into the CMH, word came from the State that the County could expect a deficit of $4.7 million dollars. Heidt testified that the additional $4.7 million dollar shortfall was expected even after the County had already cut close to $10 million dollars.

According to Heidt, following the shortfall prediction from the State, the County "immediately regrouped" and the various programs within the CSTS, CSTS Administration and County Administration, met to discuss what could be done. Amos O'Neal, the Interim-Director of the WCHO at that time, participated in those discussions.

Sometime near the end of July, Heidt and other representatives from the various County stakeholders began meeting with its two internal local unions, AFSCME Local 2733 and Local 3052.[9] Representing Local 2733 was President Cheryl Jones and representing Local 3052 was President Heine. Heidt testified that the "[t]he basic message" from these meetings "was to alert the staff of what we were facing and that we were going to do a significant review of the staffing model, [and] the overall service delivery model of mental health."

Eventually the "regrouping" resulted in a recommendation that twenty-three (23) positions be eliminated within the CSTS and another twenty-five (25) vacant positions be moved to a "hold vacant status." Heidt, along with Cortes and Amos O'Neal, testified that the focus on cuts was to eliminate non-clinical positions as opposed to clinical positions. Included within the positions being eliminated were three CSTS Supervisor positions which were held by Heine, Whittaker and Shannon Smith. According to testimony provided by various County persons, and as explained in more detail below, the plan as developed would see the positions that had been reporting to the Local 3052 CSTS Office Supervisors report instead to Clinical Supervisors, also members of Local 3052.

On August 26, 2015, Heine, Whittaker, Smith and Tonya Harwood, another Local 3052 member and a member of the Union's Executive Board, were provided with notices of layoff "pending action by the Washtenaw County Board of Commissioners." Each of the letters provided that the layoffs would become effective September 30, 2015. Heine indicated that she was eligible to bump into another supervisor position within the Environmental Health department, presumably Harwood's position. The letters for Whittaker, Smith and Harwood did not indicate that any of the three was eligible to bump into another position.

Heine testified that on the day that she received the above notice she was in a "group meeting" and that she spoke with Heidt. According to Heine, one concern that she communicated to Heidt was that not all of her direct reports were being laid-off and that somebody still needed to supervise them.

[9] AFSCME Local 2733 is comprised of support staff and are typically supervised by Local 3052 members.

On August 31, 2015, Heine filed a grievance challenging her layoff.[10]

Aside from the comments Heine made to Heidt when Heine received the notice of layoff and the August 31, 2015, grievance, there is no indication that Heine, or anyone with Local 3052, attempted to address the layoffs with anyone involved in making the recommendation. Instead, Heine, after enlisting the support of other prominent labor figures outside of the organization, including but not limited to representative(s) from AFSCME Council 25, Ian Robinson from the Huron Valley Central Labor Council[11], and Bob King the President Emeritus of the UAW, directly lobbied the County's Board of Commissioners to preserve her position. Andrew Labarre, a County Commissioner since 2013, testified that Heine, Robinson and King, asked the Commissioners to keep Heine's position to "ensure continuity that she brings with her experience [as President of Local 3052]." Labarre further testified that given Heine's role as a leader with Local 3052, he thought "there was inherent value in keeping her and her experience aboard."

On September 16, 2015, the County's Commissioners adopted the resolution that laid off twenty-three (23) positions, inclusive of the three CSTS Supervisor positions that had been held by Heine, Smith and Whittaker. Thereafter the Commissioners adopted a second resolution in which they, among other things, adopted a "one-time non-structural allocation of up to $300,000 from the 2015 General Fund Surplus to retain 4.0 full-time equivalent positions." The resolution identified a CSTS Office Supervisor position, Heine's position, as one of the four positions retained. Labarre, during his testimony, could not recall whether he had any conversations with anyone within the County administration regarding Heine's February 13, 2015, letter or the response letter dated April 28, 2015, other than possibly simply acknowledging receipt of the letters.

Amos O'Neal testified that she and Cortes, at some point during the Board of Commissioners meeting on September 16, 2015, were approached by Heidt who asked them what three positions they would want reinstated if they were provided with $200,000 in additional dollars. Amos O'Neal claims she told Heidt that they would want one customer service resource specialist, a Local 2733 position, and two clinical case managers; Cortes corroborated that testimony. As stated above, however, the Commissioners did not approve an additional $200,000 for three positions, but rather approved a substitute resolution for $300,000 for four positions, the three that Amos O'Neal and Cortes had indicated they wanted along with a fourth position for Heine.

After the Board of Commissioners meeting on September 16, 2015, Cortes, who would become the Executive Director of the CMH effective October 1, 2015, delegated to Amos O'Neal, who following the dissolution of the WCHO would move into the position of Director of Customer Service for the CMH, and Heidt, the task of developing assigned duties for Heine to assume now that her position was going to be reinstated. Cortes claimed that she knew the task would be difficult since given the restructuring that had occurred regarding support staff and the reporting structure and that the allocation for Heine's position was done with "one-time dollars" the CMH wouldn't "completely undo everything that we already planned for." On September 30, 2015, Heine met with Shane Ray, the Director of the Office of Recipient Rights, and Brandie Hagaman, a Program Administrator, to discuss her updated duties; Amos O'Neal had since gone on maternity leave and would not return until March of 2016.

[10] While Charging Parties' counsel indicates in its brief that Heine "filed a grievance regarding the layoffs" the actual grievance document does not reference any of the other Local 3052 supervisors that were slated for layoff. Rather, the grievance demanded that "Grievant be made whole in all ways. That Nancy [Heine] continue her work as a Supervisor in CSTS."

[11] The record does not provide much information regarding the Huron Valley Central Labor Council.

CSTS and CMH Reporting Structures

Prior to its reorganization into the CMH, the CSTS had both clinical and non-clinical supervisors, both of which were and still are included within the Local 3052 bargaining unit.[12]
Two of the three CSTS Office Supervisors, Heine and Smith, supervised local 2733 members who held non-clinical positions including, but was not limited to Customer Resource Specialists (CSR). The remaining CSTS Office Supervisor did not have any direct reports within the CSTS structure.[13] Clinical supervisors supervised clinical staff – it is not clear whether any Local 2733 positions are considered clinical positions. A CSTS Office Supervisor could have direct reports at multiple locations within the County's three sites, the Annex, Ellsworth and Towner; Heine supervised CSRs at the Annex and Towner.

Heine, in her role as a CSTS Office Supervisor, directly oversaw approximately nine CSRs, all Local 2733 positions. Her duties in that role included processing of human resources paperwork called personnel action requests (PARs), which documented any change impacting an employee with human resources, i.e., hiring, salary changes, leaves of absence, etc. It appears from the testimony at the hearing that Heine's processing of PARs only related to her direct reports and not to other staff that did not report to her. Heine claimed she would also look at credentialing for clinical staff assigned to her. Additionally, Heine oversaw the purchasing process for her support staff reports; acted as the "point person" for building site issues relative to her work site; maintained a master list of Gas-Card PIN numbers, along with another Local 3052 supervisor, for the CSTS Department; oversaw and accounted for bus tokens, which were provided to consumers; was responsible for maintaining and updating a special monthly report for the call center regarding call data mandated by the state; oversaw the electronic scanning of medical records by her subordinates; and performed other various duties.

As part of the reorganization process contemplated and implemented by the County in early to mid-2015 that culminated with the dissolution of WCHO and the creation of CMH, County representatives testified that the focus was on the retention of clinical staff at the expense of non-clinical staff. Cortes explained the focus as:

> [K]ind of a guiding principle that we went through when we were going through these challenging, you know, decisions that led to the recommendation was that we were going to make sure that we could preserve as much of the funding to services that were directly being provided.
>
> So we first looked at all of administration. And we looked at anything that wasn't direct service. And unfortunately, that wasn't enough and we had to continue to then go into the actual direct service programs and start, you know, going through every single program of, you know, what did we have to do?

While both clinical and non-clinical positions were affected, it is clear that the non-clinical side suffered the majority of the cuts.

[12] Clinical staff were described as those individuals who interact with consumers by directly caring for their needs in a clinical setting. Non-clinical staff provide administrative support, i.e., checking consumers in, making reminder calls, answering phones, scheduling, etc.
[13] Amos O'Neal's further testified, without contradiction, that other members of Local 3052 did not have direct reports yet were still considered "supervisors" and therefore members of the bargaining unit.

Heine's position, along with the other two CSTS Officer Supervisors, were slated for layoff as part of the reorganization's plan which, as described by both Cortes and Heidt, called for supervision of Local 2733 members to be transferred to on-site clinical supervisors.
According to Amos O'Neal, Heine's former direct reports still employed at the CMH were now being supervised by Local 3052 Clinical Supervisors at the Annex and Towner respectively. Amos O'Neal testified that the new reporting structure had been communicated to all CSR employees during a meeting she facilitated on September 15, 2015, and that a document reflecting that change had been provided to the staff at that meeting. On September 28, 2015, Hagaman, having assumed supervision of the Customer Service Department while Amos O'Neal was on maternity leave, sent an email to the clinical supervisors and others, including some Local 2733 members, that included the document from the September 15, 2015, meeting as an attachment.

As stated above, Heine met with Ray and Hagaman on September 30, 2015, to discuss Heine's updated duties, during which Heine was provided a document, created by Amos O'Neal, that stated in part, "[e]ffective October 1, 2015 the following duties will be assigned to CSTS Officer Supervisor, replacing all previous roles and responsibilities." The document then went on to list, by bullet points, several duties Heine was now being assigned. The document did not indicate that Heine would have any direct reports going forward. Heine testified that she became upset and began asking about the duties that she had been previously assigned, supervision of CSRs, etc., and claims she was told that Amos O'Neal would directly supervise the support staff following her return from maternity leave. Heine claimed that when she asked about PARs, she was told that Nick Testorelli, in Human Resources and a non-union employee, would be handling them. As to the actual duties being assigned to Heine, she claimed that, aside from one bullet point indicating that she would chair a Safety Committee, the remaining duties were all duties that she had supervised others in doing. Hagaman claims that at no time during the meeting did Heine indicate that the Union wanted to bargain over the new duties. To her part, Heine claims that she told Ray and Hagaman that she "wanted to discuss" the changes and further that she asked whether "Heidt/HR" were aware of her new responsibilities; Heidt had earlier been provided a copy by Amos O'Neal.[14] The preceding notwithstanding, Heine did state that she would be filing a grievance.

Amos O'Neal testified that she created the list of duties by referencing the CSTS Office Supervisor job description in effect prior to the reorganization and by selecting duties that would not conflict with the CMH's new reporting structure of having clinical supervisors overseeing support staff, which "could be handled in [Heine's] temporary one-year assignment" consistent with the non-structural funding for this position. It's important to note that Amos O'Neal claimed during her testimony that she first saw Heine's February 13, 2015, letter during these proceedings.

Heine, true to her word, filed a grievance on October 1, 2015, over her new job duties. The grievance stated in part:

> Ms. Heine received from Acting Customer Service Directors Shane Ray and Brandie Hagaman new CSTS Office Supervisor assignments/duties. (Copy attached.) Violation of the following: Article I - Recognition, Article 37 - Reorganization, consolidation or change of job content, ULP - Removal of Bargaining Unit Work from the Union, Erosion of the Bargaining Unit and any and all other articles that may apply. Ms. Heine is being

[14]Heidt claims that she was provided a copy of the duties from Amos O'Neal but did not have any role in actually creating such.

harassed/retaliated against by departmental managers/directors due to her union activities in her capacity as Local 3052 President.

UNION DEMAND: That Ms. Heine be made whole in all ways and be returned to her position of CSTS Officer Supervisor with her job duties, including the return of her direct reports and the return of job assignments that have been removed from the bargaining unit. Cease and desist from all further retaliation and harassment.

At the hearing Charging Parties introduced several documents for the purpose of showing direct supervision of the CSRs was being performed by non-union employees as opposed to Local 3052 clinical supervisors. Examples included incidents where Amos O'Neal approved a time off request made by Jones without input from her Local 3052 clinical supervisor, as well as another incident where Jones requested comp time from Amos O'Neal and not her clinical supervisor.

With respect to the other duties Heine claims she had prior to October 1, 2015, aside from direct supervision as addressed above, extensive testimony was provided by several witnesses regarding each parties' view of who did the work prior and post October 1, 2015, as well as whether other individuals outside of the bargaining unit did the work thereby rendering it not exclusive to Local 3052. Each duty will be dealt with below.

1. Preparing and Maintaining Personnel/Employment Paperwork for Staff, Students, Volunteers and Contractual Staff

Heine claims that she was in charge of completing the PARs for her direct subordinate staff prior to October 1, 2015, and that non-union manager Testorelli now handles that. Amos O'Neal testified that while Heine and the Local 3052 CSTS Office Supervisors would have done a portion of that work, others within the organization, including Testorelli, would also have done the same work. Heidt testified similarly and expanded the number of individuals that would have processed PARs to other departments throughout the County. The record, as presented, does not establish that this work was exclusive to Local 3052.

2. Acting as Liaison with Human Resources Regarding Personnel Files, Preparing Personnel Transactions and Assisting in Coordination of Leaves

Heine, in describing this duty, admitted that it was very similar to what she did with PARs. Expanding on it, Heine essentially described how she would keep personnel files with paperwork for leaves of absences, FMLA, etc. Heine claimed that she was told at the September 30, 2015, meeting that Testorelli would now handle that task. Amos O'Neal admitted that Heine would have done this for 10 or 15 staff members – presumably her direct reports. Amos O'Neal went on to state that Heine could have been doing this daily, weekly, or monthly, "depend[ing] on the circumstances." Heidt testified that Testorelli had been acting as her liaison "within mental health for all personnel-related matters and transactions" for two going on three years. The record, as presented, does not establish that this work was exclusive to Local 3052.

3. Maintaining or Overseeing Credentialing Files for Clinical Staff as Assigned

According to Heine, this duty entailed confirming certain clinical staff credentials with the State's Department of Licensing and Regulatory Affairs website. Heine admitted that this was an "HR-type" responsibility and that, again, Testorelli would be taking this over. Both Amos O'Neal and Heidt testified that Testorelli had already been overseeing the credentialing of clinical staff. Amos O'Neal, while confirming that Heine, along with the other CSTS Supervisors would have "had a hand" with respect to credentialing, also identified at least one other non-union individual, in addition to Testorelli, who also had had a role in credentialing. Amos O'Neal claimed that while Heine might have played some role in credentialing, it was not a daily duty as none of Heine's direct reports were clinical staff. The record, as presented, does not establish that this work was exclusive to Local 3052.

4. Conferring with Auditors and other County Employees to Locate Necessary Documents, Updating or Correcting Records

It is not clear from Heine's testimony what this duty entailed. Heine did claim that she was told at the September 30, 2015, meeting that Testorelli would be assuming this duty as well. Both Amos O'Neal and Heidt testified that many members of the organization that were not members of Local 3052 would work with outside auditors. The record, as presented, does not establish that this work was exclusive to Local 3052.

5. Maintaining Administrative Files

Similar to the preceding duty, Heine, while not identifying with any specificity what this duty entailed, claimed that she was told Testorelli would now handle this task. Similarly, neither Amos O'Neal or Heidt testified to it in any substantive nature. The record, as presented, does not establish that this work was exclusive to Local 3052.

6. Overseeing Purchasing Process at a Program Level

Heine claimed that prior to October 1, 2015, her staff was responsible for supply ordering and that she oversaw it. Heine further claimed that within in her new duties she was now responsible for supply ordering and that the oversight went to Seth Dominique, a non-union finance employee. Both Amos O'Neal and Heidt testified that overseeing purchasing process, as it relates to supply ordering, was a function that non-union employees would have been involved in. Amos O'Neal clarified that while Heine may have had a "piece of that" it would not have been a "day-to-day" duty. The record, as presented, does not establish that this work was exclusive to Local 3052.

7. Reviewing Budget Reports, Maintaining Appropriate Back Up Information Overseeing Petty Cash, Monitoring Contracts and Expenditures, and Providing Input into Budget Development as Requested

Heine claimed that she had responsibility for certain budget line items related to supplies and had to make sure "we didn't go over budget." Heine admitted that oversight of petty cash had been removed sometime prior to the October 1, 2015, meeting.

According to Heine, this responsibility was given to Nicole Phelps, a non-union finance manager. Amos O'Neal and Heidt both testified that this duty was performed by various non-union employees. Amos O'Neal further claimed that she had never received a budget report from Heine, or any of the CSTS Office Supervisors. Amos O'Neal also claimed that oversight of petty cash had been relocated to the Finance Department since at least 2014. The record, as presented, does not establish that this work was exclusive to Local 3052.

8. Building Sites Issues Including Phones and Other Related Maintenance Problems

Heine testified that prior to October 1, 2015, she was the "go-to person" for building issues, i.e., burnt out lights, stuck doors, etc. Heine further claimed that when she asked about that at the September 30, 2015, meeting, she was told not to worry about it. Amos O'Neal testified that all staff had the ability to call and/or email a "help desk" to address building issues. She did elaborate that often such a request would "go through your command" such that a subordinate would report the issue to a supervisor. Both Amos O'Neal and Heidt identified two non-union employees who also handled such issues. The record, as presented, does not establish that this work was exclusive to Local 3052.

9. Gas-Card PIN Administration

Heine testified that she had been responsible for keeping a master log of CSTS employees' assignment of gas pin numbers that employees would use when filling up County vehicles. Additionally, Heine claimed she would be the one to request gas pin numbers for new hire employees. Amos O'Neal, while not identifying any particular person, did claim that this work would also be done by the Finance Department. The record, as presented, does not establish that this work was exclusive to Local 3052.

10. Vehicle/Car Maintenance Policy and Monitoring

Heine testified that she was responsible for vehicle maintenance issues with County cars at one of the sites. Here again Heine claimed that when she asked about that at the September 30, 2015, meeting, she was told not to worry about it. Amos O'Neal testified that a "variety of staff" handled this, including CSTS Supervisors, vocational staff and clinical staff. The record, as presented, does not establish that this work was exclusive to Local 3052.

11. Tokens [Bus] Reconciliation/Replacement Oversight

Heine testified that prior to October 1, 2015, she had been in charge of picking up bus tokens from the Ann Arbor Transportation Authority to be distributed to the three sites for use by the consumers. Additionally, per Heine's testimony, she monitored and reconciled the tokens at both the Towner and Downtown sites. Amos O'Neal claimed that the support staff, Local 2733 members, would be responsible for the daily reconciliations at each site. Amos O'Neal also testified that each site would have one designated individual who would reconcile the tokens at the end of the month and submit that to the Finance Department. The record, as presented, does not establish that this work was exclusive to Local 3052.

12. Telephone Logs/Reports/Monitoring of Calls

According to Heine, the CSTS was required to have calls answered by its central call center within a certain number of rings and then have those calls passed off to the "triage department." Heine claimed that it was her responsibility for "getting the data together and getting the logs from our phone provider." According to Heine, she was told that the call center "was going away" and that the triage department would be assuming its role. Lastly, Heine claimed that Amy Hawes, a non-union employee and the individual who had trained Heine on how to run the reports, would now be responsible for such. Amos O'Neal confirmed that the call center had been relocated to within the triage department and that

Hawes had been in charge of maintaining those reports and continued to do so. The record, as presented, does not establish that this work was exclusive to Local 3052.

13. Direct Supervision of Support Staff Within [Three] Sites

The record establishes, as described in more detail above, that supervision of support staff was transferred from Heine to other members of Local 3052.

14. Oversight of Records Requests

Heine testified that prior to October 1, 2015, she had supervised support staff who would handle and respond to requests for various records. According to Heine beginning on October 1, 2015, she assumed the role that her support staff used to fill and that Ray and/or Hagaman now oversaw her in that role. Amos O'Neal conceded that prior to October 1, 2015, CSRs within Local 2733 would handle record requests. Moreover, Amos O'Neal, in describing the CSTS Office Supervisors as "working supervisors" claimed that the CSTS supervisors would have helped with the requests. Amos O'Neal further explained that with the reorganization of the CSTS to the CMH, record requests were taken from CSRs and placed with Heine. The record, as presented, does not establish that this work was exclusive to Local 3052. Furthermore, whether this duty was exclusive to Local 3052 is immaterial as the record establishes, as described in more detail above, that supervision of support staff was transferred from Heine to other members of Local 3052.

15. Timesheets Approval of Subordinate Staff

Here, Heine simply testified that she had been responsible for approving timesheets for her subordinate staff. Heine claims she was told that Hagaman would be now be doing that. Amos O'Neal testified that the responsibility for timesheet approval fell to an employee's direct supervisor. As the record establishes, as described in more detail above, supervision of support staff was transferred from Heine to other members of Local 3052.

16. Approving Time Off Requests for Subordinate Staff

Similar to the approval of timesheets, Heine testified that she had been responsible for approving time off requests for her subordinate staff but that she was told that Hagaman would be handling such. Amos O'Neal testified that with the transition to the CMH there was a desire for "cross-training and coverage across our three sites" and that a "shared calendar" was created where leave requests coverage could be captured.

The preceding notwithstanding, Amos O'Neal claimed that prior to October 1, 2015, non-union employees, including herself, could approve time off requests. The record, as presented, does not establish that this work was exclusive to Local 3052. Furthermore, whether this duty was exclusive to Local 3052 is immaterial as the record establishes, as described in more detail above, that supervision of support staff was transferred from Heine to other members of Local 3052.

17. Subordinate Staff Duties and Assignments

When asked specifically about this responsibility Heine testified that this was the "day-to-day operations" of duties and assignments. She further testified that she was told Hagaman would be now doing such. Amos O'Neal testified that given the CSTS and the CMH model, staff assignments and duties in the Customer Service Department would come from the top down beginning with her and that

communicating such to support staff could come from any number of individuals, Local 3052 members and non-members alike. The record, as presented, does not establish that this work was exclusive to Local 3052. Furthermore, whether this duty was exclusive to Local 3052 is immaterial as the record establishes, as described in more detail above, that supervision of support staff was transferred from Heine to other members of Local 3052.

18. Interviewing for Support Staff Positions/Hiring for Support Staff Positions

Heine testified that prior to October 1, 2015, she had been responsible for interviewing and hiring her direct reports and that she was told that Amos O'Neal and Hagaman were now responsible for such. Amos O'Neal testified that both pre and post October 1, 2015, the interviewing and selection of support staff was done through a "team." Amos O'Neal claimed that while CSTS Office Supervisors would be involved in the process, other non-union employees, including herself, Testorelli, and others would also be involved. The record, as presented, does not establish that this work was exclusive to Local 3052.

19. Counseling/Discipline of Subordinate Staff

According to Heine, prior to October 1, 2015, she had been responsible for counseling and disciplining support staff. Heine claimed that this function too would now be handled by Amos O'Neal and Hagaman. Amos O'Neal agreed that it was encouraged for staff to be counseled and/or disciplined by their direct supervisor. However, Amos O'Neal also stated that there would be times where that process would not be followed and that she had at times issued discipline alongside Heine. The record, as presented, does not establish that this work was exclusive to Local 3052. Furthermore, whether this duty was exclusive to Local 3052 is immaterial as the record establishes, as described in more detail above, that supervision of support staff was transferred from Heine to other members of Local 3052.

20. Oversight of [Scanning] Function

Heine testified that the CSTS had moved from paper records to electronics records and had begun the process of scanning paper documents. According to Heine she was responsible for overseeing the support staff that were actually scanning documents. Amos O'Neal testified that she would have been involved in the oversight. The record, as presented, does not establish that this work was exclusive to Local 3052.

Furthermore, whether this duty was exclusive to Local 3052 is immaterial as the record establishes, as described in more detail above, that supervision of support staff was transferred from Heine to other members of Local 3052.

21. Invoicing/Bill Processing/Coding

Heine claimed that prior to October 1, 2015, she was responsible for "coding" certain invoices and bills, i.e., water service bills, supplies, paper, etc., and that now that duty had gone to the Finance Department. Regarding this duty, Amos O'Neal testified that this would have been part of the duties of the Finance Department as well as Heine. The record, as presented, does not establish that this work was exclusive to Local 3052.

Pat Cowan

According to Heine, beginning in late March or early April 2015, Pat Cowan, her direct supervisor at that time, began micro-managing, observing more often and being more critical of Heine's

work. In one particular instance, Heine described how she went to Cowan because of numerous errors in staff timesheets. According to Heine, Cowan instructed her to finalize the timesheets and not to correct any errors. Heine claimed that prior to February of 2015, Cowan never had any issues if Heine were to question her subordinates' timesheets.

In mid-July 2015, Heine was issued a counseling memo from Cowan in which the manager claimed Heine had failed on three instances to follow her directives regarding timesheets. Heine, in describing the meeting at which Cowan presented the memo, claimed that Cowan was tense, curt, short and agitated and spoke with raised volume. Henie claimed that sometime in August of 2015, Cowan had her revert to reviewing the timesheets for errors again before finalizing them but did not rescind the counseling memo.

Heine claimed Cowan also had an issue with how she handled records requests and that Cowan would use a punitive tone with Heine when discussing issues with this. In another situation, Heine described how Cowan created spreadsheets for tracking bus tokens following a policy change on how they would be given out. Heine claimed Cowan issued a directive that the tokens had to be counted both at the start and end of each day and that the logs clearly account for them. Heine described Cowan's communications as tense, curt, short as well as dictatorial and with raised volume.

Heine claimed that during the summer of 2015 she submitted a time off request for multiple consecutive days. According to Heine, Cowan denied her request as to one day because one of the other CSTS Supervisors was already off that day and then required her to redo her request such that she would request each date off separately; Heine claimed she never had to do this before.

On July 20, 2015, after Heine and Cowan met and Cowan issued the counselling memo, Heine sent an email to Kramer in which she complained of Ms. Cowan's behavior as well comments made during the meeting. Heine testified that her interactions with Cowan had caused her to suffer from physical problems, including headaches, an upset stomach, and having to leave work due to feeling ill.

Discussions and Conclusions of Law:

Charging Parties' allegations of unlawful conduct by the Respondent in violation of PERA are quite expansive, alleging violations of Section 10(1)(a), 10(1)(c), and 10(1)(e), through a myriad of different theories and angles. Specifically, Charging Parties summarize their allegations in their post hearing brief as:

> For [Charging Party] Heine, the violations include: retaliating against Ms. Heine for her Union activity by interfering, restraining, and coercing her to refrain from Union activity and discriminating against her in regard to the terms and conditions of her employment to discourage her Union activity. [Charging Party] AFSCME alleges that Respondent violated Section 10(1)(a, c, e) of PERA by removing work from AFSCME, eroding the Bargaining Unit, permanently laying off an Office Support Supervisor, permanently transferring another, and transferring Ms. Heine's supervisory duties to non-union employees without bargaining over or even informing AFSCME of these changes.

Section 10(1)(e)

Aside from the above mention of the other CSTS Officer Supervisors who were affected by Respondent's transition from CSTS to CMH, the overall majority of time spent in developing the record

and post-hearing brief were focused on Heine and the transfer of her job duties – neither Nicole Smith or Shannon Whitaker, the two other CSTS Office Supervisors who were slated for layoff along with Heine, testified during these proceedings.[15] As such, my consideration of Charging Parties' Section 10(1)(e) claim must, out of a necessity precipitated by Charging Parties' neglect of Smith and Whitaker, both at the hearing and in its post-hearing brief, only focus on Heine's position.

The Union's claim under Section 10(1)(e) proceeds along two similar but distinct paths. The Union claims that the alleged transfer of Heine's duties to others outside of its bargaining unit was a mandatory subject of bargaining and that the County's unilateral action amounted to a violation of a public employer's duty to bargain. The Union also argues that to the extent that the County's actions were part of a legitimate reorganization, a right which the Union concedes in its post-hearing brief, the removal of Heine's duties and alleged transfer of those duties to non-unit employees nonetheless could not have been done without bargaining.

1. Transfer of Duties

In general terms, Section 15 of PERA bestows upon public employers the duty to bargain in good faith over wages, hours, and other terms and conditions of employment. The items subject to this obligation are "mandatory subjects of bargaining." *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). Our Supreme Court recognized in *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168 (1989), that, in certain contexts, an employer's "duty to bargain extends to a public employer's diversion of unit work to nonunit employees."

To this point, the Commission has held that an employer has a duty to bargain over the transfer of work performed by a bargaining unit position or positions only when certain conditions are met. One such longstanding condition is the "exclusivity rule" which requires that a charging party, pursuing a charge premised on the unlawful removal of bargaining unit work, must first establish that the work at issue has been exclusively performed by members of its bargaining unit. *City of Southfield* at 185; *Kent County Sheriff*, 1996 MERC Lab Op 294.

Charging Parties argues that whether the work performed by Heine was exclusive to Local 3052 is irrelevant in the current dispute. To that point, the Union cites to *Interurban Transit Partnership v Amalgamated Transit Union, Local 836*, unpublished opinion per curiam of the Court of Appeals issued March 9, 2006 (Docket No. 256796) and claims that that the Commission's exclusivity rule should not relieve the County from its obligation to bargain in the instant case. There, at slip op p3, the Court wrote:

> The "exclusivity rule" states that the transfer of union work to non-unit members is not a mandatory subject of bargaining unless unit members exclusively performed the work before it was diverted. *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 176, 179; 445 NW2d 98 (1989). We have found no authority to extend the exclusivity rule beyond disputes over work claimed to be exclusive to one of at least two bargaining units. Id. at 176. Respondent claims *Detroit Dep't of Transportation v Amalgamated Transit Union, Local 26*, 11 MPER 29084 (1998), is controlling. We disagree. In *Detroit Dep't of Transportation*, non-unit labor performed certain work for several years when the respondent employer began to consider transferring that work to the charging party bargaining unit. However, the employer reconsidered and paid a

[15] The record also indicates that, despite Heine being eligible to "bump" into another supervisor position, any and all efforts made by the Union and those individuals it enlisted to help lobby the County's Board of Commissioners to retain the position of CSTS Office Supervisor were for the benefit of Heine, to the exclusion of the other two positions.

> different non-unit company to perform the work. *Id.* at slip op pp 2-3. The MERC panel agreed that since the work had not previously been performed exclusively by the bargaining unit, it was therefore not bargaining unit work, and the employer accordingly had no duty to bargain with the bargaining unit before subcontracting the work to another subcontractor. Id. at 6. Here, non-unit labor never performed evening and weekend service for all individuals before respondent decided to transfer the evening and weekend PASS service performed by charging party members to non-unit labor. Thus, *Detroit Dep't of Transportation*, *supra,* is not controlling.

In *Interurban* the employer chose to "use non-unit employees of an independent contractor to provide the service that members represented by the charging party had previously provided." The Commission, in *Interurban Transit Partnership,* 21 MPER 47 (2008), adopted the Court's reasoning. However, in doing so, the Commission pointed out that, similar to the facts within the Court's unpublished opinion, again there was no evidence that the non-unit labor had performed the work previously. Here, however, there is considerable evidence that members of Local 3052 and non-unit employees were both performing the work Charging Parties claim was exclusive bargaining unit work. Accordingly, I am not persuaded that the Court's rationale or reasoning in *Interurban* is controlling. I find that the proper analysis in this situation begins with the application of the Commission's exclusivity rule.

Charging Parties further argue that the Employer's removal of Heine's CSTS Office Supervisor position removed oversight of Local 2733 members by a Local 3052 member, instead placing the former under the direct supervision of non-union management; this being Heine's principal job duty prior to being laid off. However, the testimony and evidence supporting such, clearly shows that the reporting structure created by the reorganization of the CSTS into the CMH was to transfer the supervision of Local 2733 from one Local 3052 supervisor position to another Local 3052 supervisor position; CSTS Office Supervisor to Clinical Supervisor. While Charging Parties, through Heine and Jones, did introduce testimony of instances where non-unit managers exercised supervisory control of Local 2733 members, those instances, were not only isolated, but were minor and not indicative of a removal of bargaining unit work. Moreover, to the extent that Heine's testimony was in conflict with that of Amos O'Neal, Heidt, and Cortes, who each claimed Local 3052 Clinical Supervisors now supervised Local 2373 members, I find the latter's testimony both more consistent and focused and therefore more credible.

As shown in the above findings of fact, the record does not establish that the work transferred from Heine upon her position's reinstatement effective October 1, 2015, was exclusive to Local 3052. Accordingly, I find that the Respondent did not violate Section 10(1)(e) of the Act when it transferred those duties from Heine effective October 1, 2015.

2. Reorganization and its Effects

Under *Ishpeming Supervisory Employees v City of Ishpeming,* 155 Mich App 501 (1986), it is well established that a public employer does not have a duty to bargain regarding the legitimate departmental re-organization or re-structuring of its operations. There, at 511, the Court stated:

> Once the initial decision [to reorganize] has been made, the union has the ability to protect its members by bargaining regarding the impact of the decision. For instance, if any employees are to lose their jobs because of the reorganization, the union can bargain concerning the specific individuals who are to be laid off.

Such duty to bargain on the part of the employer is conditioned on its receipt of an appropriate request. *Local 586, Service Employees International Union v Union City*, 135 Mich App 553 (1984). While a demand to bargain is not required to take a particular form in order to be effective, the employer must know that a request is being made. *Michigan State University*, 1993 MERC Lab Op 52, 63. Furthermore, a demand to bargain must articulate with some specificity what impact the requestor wishes to bargain. See *City of Grand Rapids*, 22 MPER 70 (2009).

Here, it is clear that the County was suddenly and unexpectedly faced with several issues that were causing it a great financial deficit and required organizational restructuring. The record shows that the decision to restructure, which included the elimination of the three CSTS Office Supervisor positions, was made for purely financial reasons.

While Heine affirmatively stated that she made a demand to bargain during the September 30, 2015, meeting with Hagaman and Ray, when describing what she said, she testified that after she received the new duties:

> I said to Shane Ray and Brandie Hagaman that this was not right, that all of the duties that I was doing prior to October 1st have been taken away from me, and I wanted to discuss this. And I also asked if Diane Heidt/HR was aware of the new job responsibilities. I was told that Diane Heidt had received a copy of the new job responsibilities.

The question remains then whether the above establishes that Charging Parties made a demand to bargain over any specific issue as an impact of the reorganization; I hold that it does not.

Furthermore, while Heine did file a grievance, that grievance was focused on her position and the loss of her duties and her claim that she was "being harassed/retaliated against by departmental managers/directors due to her union activities in her capacity as Local 3052 President." The grievance did mention specific articles of the parties' contract in addition to the harassment and retaliation claims, however it is the opinion of the undersigned that Heine's focus and intent of the grievance was to assert her belief, that she was being targeted, as supported by the omission of the other two Local 3052 supervisors also set to be laid off, and not demand that the Employer bargain over the effects of the County's reorganization of the CSTS into the CMH.

Lastly, even though the Second Amended Charge introduced both a Section 10(1)(e) allegation and the addition of Local 3052 as a Charging Party, the charge does not identify any issue that Local 3052 sought to bargain over as a result of the reorganization. Accordingly, it is my finding that Charging Party failed to establish that it made any bargaining demand that articulated with any semblance of specificity what it wished to bargain.

Section 10(1)(a) and Section 10(1)(c)

Section 10(1)(a) of PERA makes it unlawful for a "public employer or an officer or agent of a public employer" to "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed" by PERA. It is well established that a determination of whether an employer's conduct violates Section 10(1)(a) is not based on either the employer' s motive for the proscribed conduct or the employee' s subjective reactions thereto. *City of Greenville*, 2001 MERC Lab Op 55, 58. While anti-union animus is not a required element to sustain a charge based on a § 10(1)(a) violation, a party must

still demonstrate that the complained of actions by an employer have "objectively" interfered with that party' s exercise of protected concerted activity. *Macomb Academy*, 25 MPER 56 (2012). The test is whether a reasonable employee would interpret the statement as an express or implied threat. *Id.;* See also *Eaton Co Transp Auth*, 21 MPER 35 (2008). In order to determine what actions violate 10(1)(a) of PERA, in so far as they can be seen to restrain or coerce a public employee in the exercise of his or her rights under the Act, it is necessary to consider the actual actions in the context in which they occurred. See *City of Ferndale*, 1998 MERC Lab Op 274, 277; *New Haven Community Schools*, 1990 MERC Lab Op 167, 179. Furthermore, it is the chilling effect of a threat and not its subjective intent which PERA was created to reach. *University of Michigan*, 1990 MERC Lab Op 272.

Beginning with the allegation that the Employer allegedly forced and/or coerced bargaining unit members to author and send the April 28, 2015, letter in response to Heine's February 13, 2015, letter, I find that Charging Parties have failed to establish a violation of PERA.

Here, Charging Parties are not claiming that the Employer coerced bargaining unit members into writing the letter but rather that it was Heine's rights under PERA that were violated. Irrespective of how the allegation is phrased or couched, imperative to a finding that the Employer violated PERA in connection with that April letter requires a finding that the Employer, in some fashion, played a role or had a hand in the letter's creation. The record is devoid of any credible evidence that any members of the County's management team in any way contributed to the letter; rather, the testimony supports the finding that the April letter was a product of an individual grass-roots effort by several members of Local 3052 who were supportive of Cortes and the job she had done as the Director of CSTS. While the question of how those members became aware of Heine's letter remains unsettled, Charging Parties' allegations that someone within the County's management provided it are mere allegations without support in the record. Even if Charging Parties could establish that Heine's original letter was provided to the authors of the second letter by someone in County management, it failed to establish that any action by Respondent suggested or prompted the writing of the April letter.

Moving on to the allegation that Heine was retaliated against as a result of her union activity, in order to establish a *prima facie* case of discrimination under Section 10(1)(c) of the Act, a charging party must show, in addition to an adverse employment action: (1) an employee' s union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee' s protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep' t)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974*); City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983). However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id* at 74; *City of Grand Rapids (Fire Dept), supra*.

There can be no question that Respondent was aware of Heine's union activities, in general, as she was the Union President. However, the impetus for Charging Parties assertions under Section 10(1)(c) clearly begins with Heine's February 2015 letter which could be seen as critical of Cortes. Heine's first claim under Section 10(1)(c) is the treatment she received from Cowan. In that context, while the testimony by Heine portrays an uncomfortable working environment between the two, there remains a complete absence of a connection between the February letter and Cowan's actions, including

the discipline. Moreover, the record is devoid of any direct evidence establishing that Cowan knew of the letter or that Cowan harbored any anti-union animus or hostility toward Heine's protected activity, the letter or otherwise. To infer anti-union animus on the part of Cowan, would be to inappropriately engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*.[16] Accordingly, I find that Charging Parties have failed to establish a *prima facie* case under Section 10(1)(c) with respect to the actions of Cowan, including, but not limited to the July 2015 discipline.

Addressing next the layoff of Heine, and the other two CSTS Office Supervisors, the testimony provided by Amos O'Neal, Heidt, and Cortes clearly shows that the elimination of those positions was a result of the County's legitimate reorganization of the CSTS into the CMH coupled with the financial reality that came from the loss of funding. Similar to the situation with Cowan above, there is no credible link establishing that Heine's protected activity played a role in the County's elimination of her position.

Addressing lastly Heine's claims that her duties were stripped, including the supervision of Local 2733 members, there once again is no evidence or testimony, other than conclusions and speculation on the part of Heine, that Respondent did so in retaliation for her protected activities. Instead, Amos O'Neal, Heidt and Cortes, testified credibly that once the decision was made by the County Commissioners to reinstate Heine's position, duties and responsibilities had to be determined because the organizational structure, i.e., supervision and such, had already been changed as a result of the reorganization. Accordingly, I find that Charging Parties have failed to establish a *prima facie* case under Section 10(1)(c) with respect to Heine's layoff or eventual removal of job duties.

I have considered all other arguments as set forth by the parties and have determined such does not warrant any change in the conclusion. As such, and for the reasons set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Charging Parties Nancy Heine and AFSCME Local 3052 is hereby dismissed in its entirety.[17]

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 2, 2018

[16] Heine testified to Cowan's demeanor, which included a punitive tone and communications that were tense, curt, short as well as dictatorial and with raised volume. None of this establishes that Cowan harbored anti-union animus. See *Warren Consolidated Schools*, 28 MPER 70 (2015).

[17] The Commission, as an administrative agency, does not have the power of a general jurisdiction court to issue a contempt order and does not have the authority to assess fines for punitive purposes. See, e.g., *Wayne Co*, 26 MPER 22 (2012). But for the preceding, I would recommend that the Commission asses and impose sanctions against Charging Parties' counsel for his failure to appear, although capable of doing so on September 27, 2016.