STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF SALINE,
Public Employer-Respondent,

Case No. C14 B-021
-and- Docket No. 14-003338-MERC

CHRISTOPHER BOULTER,
An Individual-Charging Party.
_____/

APPEARANCES:

Clark Hill PLC, by Steven K. Girard and Nicole M. Paterson for the Respondent

Christopher Boulter, Charging Party, appearing for himself

DECISION AND ORDER

On April 16, 2015, Administrative Law Judge (ALJ) Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondent, the City of Saline (Employer), violated § 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, when City of Saline Police Department Chief Larry Hrinik demanded at the outset of a November 27, 2013 investigatory interview that Charging Party's union representative act as a witness only. The ALJ further found, however, that Respondent did not violate § 10(1)(a) of PERA when, at a subsequent meeting, Chief Hrinik offered Charging Party the opportunity to resign from his position as sergeant or be subject to further disciplinary action. The Decision and Recommended Order of the ALJ was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Respondent filed exceptions to the ALJ's Decision and Recommended Order, and a supporting brief on June 10, 2015. Charging Party filed his response to Respondent's exceptions on June 19, 2015.[1]

On exceptions, Respondent argues that the ALJ erred (1) in concluding that Respondent violated Charging Party's Weingarten[2] rights during the November 27, 2013 interview; and (2) by holding that the appropriate remedy is reinstatement of the Charging Party in addition to a cease-and-desist order.

[1] Although Charging Party titled the document "cross exceptions," the document does not take issue with any of the ALJ's findings.
[2] *NLRB v Weingarten, Inc*, 420 US 251 (1975).

In his response to Respondent's exceptions, Charging Party requests that the Commission agree with the ALJ's conclusions of fact and law.

We have reviewed the exceptions filed by Respondent and find that Respondent did not violate Charging Party's *Weingarten* rights during the November 27, 2013 interview.

Factual Summary:

The facts in this case were set forth fully in the ALJ's Decision and Recommended Order and need not be repeated in detail here.

Charging Party Christopher Boulter was initially employed by the City of Saline's Police Department (Department) as a patrol officer and was represented by the Police Officer's Labor Council (POLC) and its affiliate, the Saline Police Officers Association (Officers Union).[3] In June or July of 2013, Charging Party was promoted to sergeant, a position within the bargaining unit represented by the Saline Sergeants Association Police Officers Labor Council (Sergeants Union).[4]

On November 22, 2013, Respondent's Police Chief Hrinik sent an email to Charging Party scheduling an interview to discuss Charging Party's alleged romantic relationship with another Department employee. The email stated:

> I have scheduled an interview for you on Tuesday, November 26, 2013 at 1000 hours to discuss your actions associated with the inappropriate relationship you have with another Police Department employee. The interview will be held in the large conference room at City hall. The charges listed herein can be given to your union steward if you so request. You have the right to request and have your union steward present during this interview. You will be required to answer all questions specifically, narrowly and directly related to the performance of your official duties. Refusal to answer questions in this interview is a violation of department rules and may subject you to further discipline.
>
> Rule Violations/Charges:
> 4:4 Conduct Unbecoming Department Personnel
> 4:12 Unsatisfactory Performance
> 4:54 Duty to Notify
> 4:58 Supervisor

After receiving this email, Charging Party contacted Duane Smith, a POLC labor representative, and asked Smith to accompany him to the November 26, 2013, investigatory

[3] Exhibit 1, entered into the record at the July 8, 2015 hearing before the ALJ is the collective bargaining agreement, which identifies the parties as the City of Saline and the Saline Police Officers Association, Police Officers Labor Council.

[4] Exhibit 2, entered into the record at the July 8, 2015 hearing before the ALJ is the collective bargaining agreement, which identifies the parties as the City of Saline and the Saline Sergeants Association, Police Officers Labor Council.

interview. Smith then requested Chief Hrinik to reschedule the meeting to accommodate Smith's schedule. Chief Hrinik did so, and the meeting was postponed until November 27, 2013. Smith and Charging Party testified that they discussed the interview prior to attending it.

On November 27, 2013, Chief Hrinik, City Manager Todd Campbell, Smith and Charging Party met. At the beginning of the meeting, Chief Hrinik read the following excerpt from the Department's discipline policy:

> Officers may request and will be permitted to have a union steward present during any interviews involving suspected administrative rule violations. The union steward may only act as an observer during such interviews. The employee and the union steward will be allowed to confer before and after the interview.

Although Smith objected to being instructed to act as an observer, the interview continued and Charging Party admitted that he was engaged in a relationship with another department employee. At the conclusion of the interview, both Charging Party and Smith were allowed to make a closing statement.

Smith testified that, notwithstanding the instructions given to him by Chief Hrinik, if Charging Party had asked him a question during the interview, he would have answered it. Smith testified further that if during the interview he felt a caucus or break was necessary, he would have asked for one. According to Smith, he conducted himself at the interview in a manner that was unaffected by Chief Hrinik's instructions regarding his role.

On December 3, 2013, Chief Hrinik informed Charging Party that the investigation into his actions had established that he had violated Department rules. The Chief offered Charging Party the opportunity to resign from the position of sergeant or to remain a sergeant and be subject to discipline. Subsequently, Charging Party resigned from the position of sergeant and assumed the position of patrol officer.

Discussion and Conclusions of Law:

In *NLRB v Weingarten, Inc.*, 420 US 251 (1975), the Supreme Court affirmed the National Labor Relations Board's (NLRB or the Board) holding that an employer violates the rights of an individual employee under the National Labor Relations Act (NLRA), 29 USC 151 - 169, by refusing that employee's request for union representation at an investigatory interview which the employee reasonably believed might result in discipline. In *Weingarten*, the Supreme Court, at 259-260, quoted with approval from the NLRB's brief which stated, "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."

In *Southwestern Bell Telephone Co, v NLRB*, 667 F2d 470, 473-74 (5th Cir 1982), *denying enf*, 251 NLRB 612 (1980), the Fifth Circuit Court of Appeals held that the employer could lawfully insist that the union representative not answer any of the questions put to the

employee by the employer during an investigatory interview. In the latter case, the union representative was allowed to consult with the employee prior to the interview and was permitted at the end of the interview to make additions, suggestions or clarifications that he desired, and the employee was not told that he could not consult with the union representative during the interview.

In *University of Michigan*, 1977 MERC Lab Op 496, the Commission announced that it would apply the *Weingarten* rule to PERA. Subsequent to this, in *City of Oak Park*, 1995 MERC Lab Op 576, a public safety officer and his union representative were called to an investigatory interview with the public safety director to discuss two overtime requests submitted by the employee. When the union representative attempted to participate in the meeting, the public safety director angrily told the union representative to shut up. He also said that the representative was only there as an observer, and he told the employee that if he heeded any advice that the representative gave to him, the employee would be in grave peril. The representative remained silent until after the director had completed his questions and the employee had been dismissed from the meeting. Immediately thereafter, the public safety director and the union representative went into the director's office and discussed the incident which was the subject of the interview. The Commission, relying on the Fifth Circuit's *Southwestern Bell* decision, supra, held that "Respondent had the right during the interview to have its questions answered by the interviewee without interruption by the representative" and found that the officer was given the representation contemplated by *Weingarten*.

In the present case, Respondent provided Charging Party with notice of the purpose of the interview and the alleged rule violations/charges five days prior to the interview. Charging Party was notified of his right to union representation and consulted with Union Representative Smith prior to the interview. Smith testified that he was not limited in any way from discussing the situation with Charging Party prior to the start of the meeting and never felt the need to caucus with Charging Party during the meeting. Smith also noted that, toward the end of the meeting, he requested permission to speak and that he was given permission to speak, at which time he laid out the facts from Charging Party's perspective. Significantly, Union Representative Smith testified that he conducted the interview as he would have done in the absence of Chief Hrinik's directive. The Commission finds that *City of Oak Park* is analogous and controlling. As in *City of Oak Park*, Charging Party was given the representation rights contemplated by *Weingarten*. Accordingly, we find the ALJ erred in concluding that Respondent violated § 10(1)(a) of PERA.

On exceptions, Respondent correctly argues that the ALJ erred in determining that *Chesterfield Township*, 23 MPER 35 (2010) (no exceptions) is controlling. In *Chesterfield Township*, the ALJ determined that an employer violated an employee's Weingarten rights when it prevented a union representative from participating in an investigatory interview in any meaningful way. The ALJ noted that the union representative was told at the beginning of the investigatory interview that he was to remain silent throughout the entire interview and that the union representative was not given the opportunity to discuss the interview at its conclusion. The ALJ further noted that the record did not indicate that the employee or union representative was told about the purpose of the interview or the charges against the employee before the interview began. Therefore, *Chesterfield Township* is clearly distinguishable from the instant

case. Additionally, the Commission adopted the ALJ's decision in *Chesterfield Township* because neither party filed exceptions to the decision. Where the Commission adopts an ALJ's recommended decision and order because no exceptions have been filed, the case is not binding precedent. Consequently, *Chesterfield Township* is "non-binding" on the Commission. For the foregoing reasons, we conclude that the charge should be dismissed.

Respondent also argues that the ALJ erred by holding that the appropriate remedy is reinstatement of the Charging Party in addition to a cease-and-desist order. In view of the above findings that no violation of PERA occurred and that the charge must be dismissed, the Commission finds it unnecessary to rule on Respondent's argument.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. After a careful and thorough review of the record, we find that the ALJ's Decision and Recommended Order is reversed. Charging Party failed to establish that Respondent violated his *Weingarten* rights during the November 27, 2013 investigatory interview. Accordingly, we issue the following order.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: January 19, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF SALINE,
Public Employer-Respondent,

Case No. C14 B-021
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-and-

CHRISTOPHER BOULTER,
An Individual-Charging Party.
_____/

APPEARANCES:

Clark Hill PLC, by Steven K. Girard, for the Respondent-Public Employer

Christopher Boulter, Charging Party, appearing for himself

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, filed on February 27, 2014, was initially assigned to Administrative Law Judge (ALJ), Julia C. Stern, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission). ALJ Stern set this matter for evidentiary hearing on May 16, 2014. On April 10, 2014, the parties were informed that this matter was reassigned to ALJ Travis Calderwood, also of MAHS and acting on behalf of the Commission.

Unfair Labor Practice and Procedural History:

This matter arises out of an unfair labor practice charge filed on February 27, 2014, by Christopher Boulter (Charging Party) against his employer, the City of Saline (City or Respondent). Charging Party, a police officer with the Saline Police Department (Department) claims that the City violated Section 10(1)(a) of PERA during an investigatory interview that took place on November 27, 2013, when the Department Chief, Larry Hrinik, instructed a union representative to remain silent and otherwise prohibited the representative from participating in the interview. Charging Party also alleges that the City again violated Section 10(1)(a) of PERA during another meeting that took place on December 3, 2013, with Chief Hrinik. Charging Party claims that statements made by Chief Hrinik during the December meeting coerced him into resigning from the position of sergeant, thereby denying him the opportunity to "face discipline and then utilize his union [sic] mutual aid and protection as guaranteed under [Section 9(1)(a) of

PERA] to file any grievance and allow arbitration to take place."

The City, in its answer to the charge, also filed on February 27, 2014, denies that Chief Hrinik's conduct in either the November or December meeting violated any right that Boulter had under PERA.

Respondent filed a Motion for Summary Disposition on April 24, 2014, seeking dismissal of that portion of Charging Party's charge involving the December meeting between Charging Party and Chief Hrinik and Charging Party's subsequent resignation on the grounds that Charging Party was not engaged in protected activity when he resigned and, therefore, was not subject to the protections of PERA.

On April 29, 2014, Respondent requested that the May hearing be adjourned to a later date. On May 1, 2014, that request was granted and Charging Party was directed to show cause in writing why the second portion of his charge should not be dismissed without hearing. On May 20, 2014, Charging Party filed his response. On May 29, 2014, following review of Charging Party's response, I informed the parties by email that I did not believe there was any issue of material fact with regard to the second portion of Charging Party's charge and that oral argument on the motion would occur prior to an evidentiary hearing on the remaining allegation. On July 8, 2014, the parties appeared before the undersigned for oral argument on Respondent's motion and to take evidence and provide testimony as to the allegations not addressed by the motion. On August 20, 2014, Charging Party provided notice by email that he would not file a post-hearing brief. On August 21, 2014, Respondent filed its post-hearing brief.

I. Respondent's Motion for Summary Disposition:

Addressing first Respondent's Motion for Summary Disposition, it is the opinion of the undersigned that there exists no issue of genuine material fact and that a decision with regard to the portion of Charging Party's charge addressed therein is proper.

Respondent moves for the issuance of summary disposition with respect to Charging Party's claim that he was threatened or coerced into resigning from his position of sergeant in violation of Section 10(1)(a) of PERA, on the grounds that Charging Party failed to state a claim upon which relief can be granted under PERA. Simply put, Respondent claims that because the decision to resign or face discipline is not concerted or protected activity, there can be no violation of PERA.

Summary disposition should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516 (1993). In reviewing a motion for summary disposition for the above reason, the Court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502 (1993).

Background:

For purposes of Respondent's motion, the following undisputed facts are accepted as true and where disputed are considered in the light most favorable to the nonmoving party. On November 27, 2013, Respondent interviewed Charging Party for purposes of investigating an alleged romantic relationship between Charging Party and a subordinate employee of the Department. At the time of the consensual relationship, Charging Party held the position of sergeant, a supervisory position over other lower ranking employees of the Department and was a member of the Saline Sergeants Association Police Officers Labor Council (Union). At the request of Charging Party, Duane Smith, a representative of the Union, was present for the interview. At the beginning of that interview, Chief Hrinik, advised Smith that he was to act as an observer and not a participant. Smith voiced his disagreement. Despite Smith's objection, the interview continued. During that interview, Charging Party admitted to having a relationship with a subordinate employee within the Department.

Respondent claims in its motion that a romantic relationship between a supervisor and a subordinate violates several rules and regulations, including, but not limited to, Rule 4.4 Conduct Unbecoming Department Personnel; Rule 4.12 Unsatisfactory Performance; Rule 4.54 Duty to Notify Supervisor; and Rule 4.58 Supervisor. Curiously, Respondent did not include copies of the aforementioned rules as part of its motion. However, Charging Party provided the following version of each of the above rules:

> Rule 4.4 Conduct Unbecoming Department Personnel: Personnel shall conduct themselves, at all times, both on and off duty, in such a manner as to reflect most favorable on the department. Conduct unbecoming Department personnel shall include that which brings, or may bring, the Department into disrepute or reflects discredit upon the employee or the department, which impairs the efficient operation of the Department.
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> Rule 4.12 Unsatisfactory Performance:
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> A. Personnel shall maintain sufficient competency to properly perform their duties in a manner that will maintain the highest standards of efficiency in carrying out their duties and the objectives of the Department. Unsatisfactory performance may be demonstrated by a lack of knowledge of law, departmental guidelines; an unwillingness or inability to preform [sic] assigned tasks; the failure to conform to work standards established for the employee's rank, grade, or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention
> B. The following will be considered prima facie evidence of unsatisfactory performance: repeated poor evaluations or a written record of repeated infractions of department guidelines.
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> Rule 4.54 Duty to Notify Supervisor: Upon receiving notice of the existence of

any of the following circumstances, department personnel shall, without delay, notify the Chief.

A. Upon receiving a notice or order to appear for any hearing or proceeding directly related to the performance of official duties.
B. They are the subject of a personal protective order (PPO).
C. They are party to a civil action.
D. They are charged, found guilty by a judge or jury, have entered a guilty plea or a plea of no contest, or are convicted of a criminal violation.
E. They are subject to an order of any court.
F. Any drivers license suspensions, revocations and restrictions.
G. Of notice from a healthcare professional of incapacity or limitations concerning/relative to their ability to perform assigned duties.
H. Any other circumstances or information that might impact their ability to perform assigned duties.
I. Of any threats which they have witnessed, received, or have been told that another person has witnessed or received.

Rule 4.58 Supervisors:

1. The primary responsibility for maintaining and reinforcing officer conformance with the standards of conduct of this department.
2. Supervisors shall familiarize themselves with the officers in their unit and closely observe their general conduct and appearance on a daily basis.
3. Supervisors are required to report any violation of the department's written directives that they either observe or receive information on.

Charging Party claims in his response to the motion, and he appears correct, that none of the above rules explicitly prohibits a romantic relationship between a supervisor and a subordinate.

On December 3, 2013, Charging Party, after the completion of a twelve (12) hour shift, met with Chief Hrinik. The two discussed the previous investigatory interview. Chief Hrinik informed Charging Party that the investigation was complete and offered Charging Party the opportunity to resign from his position as sergeant and return to the position of patrol officer or stay on as sergeant and be subject to further disciplinary action as a result of the investigation interview. On December 4, 2013, Charging Party voluntarily resigned from the position of sergeant.

Discussion and Conclusions of Law:

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of those rights guaranteed to public employees under Section 9 of the Act, including the right to engage in "concerted activities for

the purpose of collective negotiation or bargaining or other mutual aid and protection." While anti-union animus is not a required element to sustain a charge based on a Section 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. *Huron Valley Sch*, 26 MPER 16 (2012); *Macomb Academy*, 25 MPER 56 (2012).

In order to test whether a violation has occurred under Section 10(1)(a) of PERA, it is not the employer's motive for the proscribed conduct or the employee' s subjective reactions to it, but rather, whether the employer's actions tend to interfere with the free exercise of protected employee rights. Section 10(1)(a) does not require proof of anti-union animus. See *Midland Co Rd Comm*, 21 MPER 42 (2008); *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *City of Greenville*, 2001 MERC Lab Op 55; *City of Detroit (Water & Sewerage Dep't)*, 1988 MERC Lab Op 1039; *City of Detroit (Fire Dep't)*, 1982 MERC Lab Op 1220. Both the content of the employer's statement and the surrounding circumstances must be examined. *Michigan State Univ (Police Dep't)*, 26 MPER 36 (2012).

Charging Party claims that he chose to voluntarily resign from the position of sergeant because he was coerced and threatened with the fear of dismissal. Charging Party claims that during the December meeting, Chief Hrinik stated the following:

> Sometimes in a career bad things happen and the outcome can go to two ways. They can either be a bump in the road or can be detrimental and career ending. The decision you made to engage in a relationship with a department employee is one of these events. I wanted to talk to you today to offer you the option of voluntarily turning in your stripes and stepping down as a sergeant. I had to fight hard to get this option. The other parties involved in the interview and decision as to your discipline did not want me to give you this option. If you choose to voluntarily step down this can be a bump in the road. This will not prevent you from being able to put in for a future command position; you will be here 10 more years. I will not be here that long and you may have the opportunity to put in for a position again. If you choose to fight the outcome of the violations it will be a long drawn out process and not be a bump in the road but would be detrimental to your career and possible career ending, no one wins in a fight.[5]

Respondent asserts that Charging Party has failed to state a claim under PERA because his voluntary decision to resign never implicated any right guaranteed to him under Section 9 of the Act because that decision "was neither for the purpose of collective bargaining nor mutual aid and protection." As Respondent argues, the absence of such activity, precludes the establishment of a claim under Section 10(1)(a). Furthermore, Respondent claims, the preceding notwithstanding, that Charging Party has failed to put forth any allegation that the Respondent was acting with anti-union animus. Charging Party himself concedes such and states within his response to the motion that he "is not claiming any anti-union animus or hostility." However, the lack of anti-union animus is irrelevant to the question at hand and as such will not be discussed. See *Huron Valley Sch* and *Macomb Academy*.

[5] Charging Party's recitation of the comments allegedly made by Chief Hrinik on December 3, 2013, is set forth in both the charge as well as his response to Respondent's motion.

It is clear that Charging Party was faced with a daunting decision to make following the December 3, 2013, meeting with Chief Hrinik; whether to resign as a sergeant or to move forward with the discipline process and accept whatever fate that resulted therefrom. That decision however was his and his alone. Charging Party claims, both in his charge and again in his response to Respondent's motion, that he took Chief Hrinik's December 3, 2013, comments to mean that if he did not make the choice to resign and instead chose to face discipline he would ultimately end up losing his job entirely. While Respondent denies having made said comments, those comments, even if true and assumed as such for purposes of this motion, do not state a claim implicating any unlawful interference, restraint, or coercion of Charging Party's rights as guaranteed to him under Section 9 of PERA. Charging Party could have chosen to move forward with the discipline process and such decision may very well have resulted in termination. Such termination, or any discipline that may have occurred, presumably would have been subject to all applicable terms and conditions of the parties' collective bargaining agreement.

I have considered all other arguments of the parties with respect to Respondent's request to dismiss a portion of Charging Party's unfair labor practice and I conclude such does not warrant any change in the result. Accordingly, I find that Charging Party has failed to state a claim under PERA with respect to the December 3, 2013, meeting and recommend that the Commission should issue an order dismissing that portion of the unfair labor practice charge.

II. Remaining Allegations:

The remaining portion of Charging Party's charge alleges that the City violated Section 10(1)(a) of PERA during an investigatory interview that took place on November 27, 2013, when it instructed his union representative to remain silent and otherwise prohibited the representative from participating in the interview. Based upon the evidence presented by the parties, including testimony and exhibits and arguments made by both parties at the hearing and Respondent's post-hearing brief, I make the following findings of fact and conclusions of law.

Findings of Fact:

Charging Party, at all times relevant to this proceeding, was employed by the Saline Police Department (Department). He originally began his employment in the non-supervisory position of patrol officer. That position was contained within the bargaining unit represented by the Police Officer's Labor Council (POLC) and its affiliate, the Saline Police Officers Association (Officers Union). The Officers Union, in addition to patrol officers, also included all other permanent full-time and regular part-time employees of the Department to the exclusion of Department staff members, sergeants, and persons holding private contracts with the City of Saline. Beginning in June of 2013, following a restructuring of the Department's shift schedules from eight (8) hour shifts to twelve (12) hour shifts, the Department began the process of interviewing potential candidates to assume three newly created sergeant positions. Those three newly created positions, along with all other sergeant positions, were contained within the bargaining unit represented by the Saline Sergeants Association Police Officers Labor Council (Sergeants Union). Sometime in June or July of 2013, Charging Party was awarded one of the

available sergeant positions, at which time he left the Officers Union and became a member of the Sergeants Union.

At the time of Charging Party's promotion to sergeant, Charging Party's wife was also employed by the Department, although as a dispatcher. Sometime in November of 2013, Charging Party and his wife approached Chief Hrinik to inform him that they were proceeding with a divorce. As part of that conversation it was revealed that Charging Party was seeing someone else and had been for some time. Following Chief Hrinik's inquiry as to whom Charging Party was seeing, Charging Party admitted that he was seeing another part-time employee in the Department. Chief Hrinik continued to ask questions regarding that relationship. At no time did Charging Party ask for union representation or for the meeting to end.

On November 22, 2013, Chief Hrinik sent an email to Charging Party scheduling an interview for purposes of discussing Charging Party's relationship with another Department employee. The body of that email stated:

> I have scheduled an interview for you on Tuesday, November 26, 2013 at 1000 hours to discuss your actions associated with the inappropriate relationship you have with another Police Department employee. The interview will be held in the large conference room at City hall. The charges listed herein can be given to your union steward if you so request. You have the right to request and have your union steward present during this interview. You will be required to answer all questions specifically, narrowly and directly related to the performance of your official duties. Refusal to answer questions in this interview is a violation of department rules and may be subject you to further discipline.
>
> <u>Rule Violations/Charges:</u>
> 4:4 Conduct Unbecoming Department Personnel
> 4:12 Unsatisfactory Performance
> 4:54 Duty to Notify
> 4:58 Supervisor

Following receipt of the above email, Charging Party, contacted Duane Smith, a labor representative of the Police Officer's Labor Council, requesting that Smith, instead of someone from the Sergeants Union, accompany Charging Party to the November 26, 2013, investigatory interview. Charging Party admitted that he asked Smith to attend and not his own Union's steward because he wanted to keep the matter private. Smith then contacted Chief Hrinik by email requesting that the meeting be rescheduled to accommodate Smith's schedule. By agreement, the meeting was scheduled for and took place on November 27, 2013. Both Smith and Charging Party testified that they discussed the interview prior to it actually taking place.

On November 27, 2013, Chief Hrinik, City Manager Todd Campbell, Smith and Charging Party met. At the onset of the meeting, Chief Hrinik read Charging Party his "Garrity" rights.[6] Chief Hrinik then read the following excerpt from the Department's discipline policy:

> Officers may request and will be permitted to have a union steward present during any interviews involving suspected administrative rule violations. The union steward may only act as an observer during such interviews. The employee and the union steward will be allowed to confer before and after the interview.

Following the reading of the above statement by Chief Hrinik, Smith voiced his disagreement with the directive that he was to act as a witness only and not participate during the interview. However, the meeting continued on as scheduled. Charging Party testified that at several points throughout the interview he had wanted to ask questions of Smith, but refrained from doing so because of Chief Hrinik's comments at the beginning of the meeting. Smith testified that despite the instructions given to him by Chief Hrinik, had Charging Party asked him a question he would have answered it and had he felt that a caucus or break was necessary he would have asked for one. According to the testimony provided by Smith, both on direct by Charging Party and on cross by Respondent's attorney, he, Smith, believed that he conducted himself at the interview in a manner that was unaffected by Chief Hrinik's instruction at the beginning. Among other things, Charging Party did admit during the meeting that he was in fact engaged in a relationship with another department employee not his wife. Following the conclusion of the interview both Charging Party and Smith were allowed to make a closing statement. Both did make a statement.

On December 3, 2013, Chief Hrinik informed Charging Party that the investigation into his actions had established that he had violated Department rules and offered Charging Party the opportunity to resign from the position of sergeant or to remain a sergeant and be subject to discipline.[7] Subsequently, Charging Party resigned from the position of sergeant and assumed the position of patrol officer.

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[6] *Garrity* provides that while an employee is compelled to answer questions during an investigatory interview, any statements obtained from the employee may not be used against them in a subsequent criminal action. *Garrity v State of New Jersey*, 385 US 493 (1967) (individual threatened with discharge from employment for exercising his Fifth Amendment privilege had not waived it by responding to questions rather than invoking his right to remain silent).

[7] Although not testified to at hearing, this fact has been admitted by Respondent on several occasions, both in pleadings and oral argument. Respondent's Answer to the Unfair Labor Practice Charge on Page 8, stated:

> 4. During that [December 3, 2013] meeting, [Chief] Hrinik advised Charging Party that the investigation into his conduct, including the Charging Party's admittance of the inappropriate relationship with a Department employee, violated the Respondent's Department rules and expectations of a Sergeant.
>
> 5. The Respondent offered the Charging Party the opportunity to resign from his position as a Sergeant or stay on as a Sergeant and be subject to discipline. The Respondent did not elaborate on what discipline the Charging Party would face.

Respondent stated in its Motion for Summary Disposition on Page 9:

Discussion and Conclusions of Law:

Charging Party argues that the City violated Section 10(1)(a) of PERA when Chief Hrinik instructed his union representative to act as an observer only during the investigatory interview that took place on November 27, 2013.

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of those rights guaranteed to public employees under Section 9 of the Act, including the right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." While anti-union animus is not a required element to sustain a charge based on a Section 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. *Huron Valley Sch*, 26 MPER 16 (2012); *Macomb Academy*, 25 MPER 56 (2012). Both the content of the employer's statement and the surrounding circumstances must be examined. *Michigan State Univ (Police Dep't)*, 26 MPER 36 (2012).

Under Section 10(1)(a) of PERA, public employees represented by a bargaining agent have the right to union representation at an investigatory interview. *Wayne-Westland Ed Assoc. v Wayne-Westland Schools*, 176 Mich App 361 (1989), lv denied, 433 Mich 910 (1989). The Commission, in adopting the reasoning of *NLRB v Weingarten, Inc*, 420 US 251 (1971), has held that an employee is entitled to union representation at an investigatory interview when the employee reasonably believes that the interview may lead to discipline, and invokes his right by requesting the presence of a union representative. *City of Kalamazoo*, 1996 MERC Lab Op 556; *Charter Twp of Clinton*, 1995 MERC Lab Op 415. The union representative is "expected to play an active advocacy role, not merely serving as a witness, and is entitled to consult privately with the individual employee." *Kent Co*, 21 MPER 61 (2008). One fundamental purpose of having the union representative present is to aid the employee in answering questions asked by the employer and in presenting facts. *City of Oak Park*, 1995 MERC Lab Op 576 (no exceptions).

Respondent asserts that *Weingarten* establishes a balance between an employer's right to conduct its investigation without interference and an employee's right of assistance from the union during such investigation. To that point Respondent provides the following quote from *Weingarten* at 259-260:

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

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9. During the subsequent December 3, 2013, meeting, Chief Hrinik advised the Charging Party that the investigation into his conduct, which included the Charging Party's admission of a romantic relationship with a subordinate employee, confirmed violations of the Respondent's Department rules and expectations of a Sergeant.

10. During the December 3, 2013, meeting, Chief Hrinik offered the Charging Party the opportunity to resign from his position as Sergeant or Stay on as a Sergeant and be subject to further action by the Chief….

Respondent goes on to cite numerous decisions of the National Labor Relations Board (NLRB or Board) that establish the principle that an employer violates an employee's *Weingarten* rights when it requires a union representative to remain silent during an interview. [8] Despite such decisions, Respondent suggests that I should be guided by one decision from the Fifth Circuit Court of Appeals, *Southwestern Bell Telephone Co,* 251 NLRB 612 (1980), enf denied 667 F2d 470 (5th Cir 1980), in which the Court refused to enforce such a decision and order by the Board. There, the Court was presented with the situation where a union representative was told at the beginning of an interview not to say anything and that the employer wanted the employee to answer the questions in his own words. Prior to the interview's conclusion, the union representative was asked if he had any comments or clarifications. Up to that point, the union representative had not attempted to speak during the meeting. The Court, noting that the employee was not told that he could not consult with the union representative during the meeting and that the union representative had been given an opportunity to speak at the end, disagreed with the NLRB's conclusion that the employer had demanded that the union representative be silent throughout the meeting.

Piggy-backing on the above suggestion regarding *Southwestern Bell Telephone Co,* Respondent further urges this ALJ to consider *City of Oak Park,* controlling, claiming the facts of *Oak Park,* are factually analogous to the present issue. There, the Commission was forced to consider whether an employer's instruction to a union representative during an investigatory interview to remain silent and to "shut up" violated Section 10(1)(a) of PERA. The Commission, agreeing with the findings of the ALJ, concluded that if such an instruction was given, it was given out of anger, and was contradicted by the employer's later behavior in which the union representative was later allowed to comment and participate.[9] Respondent, in claiming similarities between *City of Oak Park* and the present cases, points out that in both cases the union representative was allowed to participate following the questioning by the employer.

Respondent, noting Charging Party's reliance on *Chesterfield Township,* 23 MPER 35 (2010) (no exceptions), attempts to distinguish that case from the present matter. In *Chesterfield Township,* the ALJ concluded, following the parties submission of stipulated facts and exhibits in lieu of a hearing, that the employer had violated Section 10(1)(a) of PERA when it specifically informed the union representative that he was to act only as a "witness" at an investigatory interview, forbade the union representative from intervening on any questions, and refused the employee the opportunity to confer with the union representative. In defining the role that a

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[8] Respondent cites to *Southwestern Bell Telephone Co,* 251 NLRB 612 (1980), enf denied 667 F2d 470 (5th Cir 1980); *Texaco, Inc, 252 NLRB 633,* enf'd *NLRB v Texaco, Inc,* 659 F2d 124 (9th Cir 1981); *New Jersey Bell Telephone Co,* 308 NLRB 277 (1992).

[9] The Commission in reaching its decision did consider *Southwestern Bell Telephone Co,* and summarized the Court's holding as such:

> The Court held that the employer could lawfully insist that the union representative not answer any of the questions put to the employee by the employer during the interview, where the union representative was allowed to consult with the employee prior to the interview and was permitted at the end of the interview to make any additions, suggestions, or clarifications he desired, and where the employee was not told that he could not consult with the union representative during the interview.

"witness" is to play, the ALJ stated that the "role of a witness is to observe; it does not include asking the interviewer questions, clarifying facts, or making suggestions." The ALJ went on to dismiss the employer's argument that neither the employee or union representative asked to confer by stating "they had been told explicitly at the beginning of the interview that they had no right to do so." Respondent in its brief states:

> Distinguishable from the facts in *Oak Park*, supra, and the facts of the instant case, the union representative [in *Oak Park*] was not permitted to speak with the employee *before* or *after* the interview. Nor was it clear whether the employee or union were informed of the purpose of the interview. It was clear, however, that the union representative was *wholly denied* any opportunity to make any comments or offer any evidence on behalf of the employees. [Italics in original]

Despite Respondent's lengthy and in-depth treatment of the above cases and decisions, both from the federal and state levels, urging me to conclude that the facts from the instant matter should be controlled by *Southwestern Bell Telephone Co,* and *City of Oak Park,* I conclude such application is not appropriate. Addressing first *Southwestern Bell Telephone Co,* the facts surrounding the present controversy are clearly distinguishable. Foremost, in *Southwestern Bell Telephone Co,* the union representative was not told to be silent or that he was to act as a witness only. On the contrary, the employer merely informed the union representative that it wanted to hear from the employee directly and that it did not want the representative to answer for him. Moving on to *Oak Park,* once again the facts surrounding the present controversy are clearly distinguishable. There the command to remain silent did not occur until the interview had been ongoing for some time and was given in anger taking the form of a command to "shut up" when the representative attempted to speak. The representative was later allowed to participate.

Not only do I decline to follow Respondent's suggestion that *Southwestern Bell Telephone Co,* and *City of Oak Park,* are controlling, I conclude that despite Respondent's objection, *Chesterfield Township,* is in fact analogous to the facts presented in this case. Respondent claims that in *Chesterfield Township*, the union representative was not allowed to talk with the employee either before or after the interview; a claim not supported by the text of the decision. The ALJ wrote in her decision that "[c]harging [p]arty does not assert that [the employee] was denied the opportunity to consult with [the union representative] before, as opposed to during, the interview." Furthermore, there the employer stated the following to the union representative at the beginning of the interview, "your position here is a union rep. You're strictly here as a witness. You're not to intervene on any of the questions." Following that statement the union representative asked whether the employee could confer with him, at which point the employer replied, "[y]ou're here to be a witness." In the instant case, the statement read by Chief Hrinik clearly establishes that Smith was to act as an observer only. Furthermore, testimony provided by all witnesses confirms that the message conveyed by Chief Hrinik to Smith was that he was to observe and not participate.

Accordingly, I find that, like the situation in *Chesterfield Township*, Respondent did in fact violate Section 10(1)(a) of PERA by and through the instructions and directives given by Chief Hrinik at the onset of the November 27, 2013, investigatory interview. My decision to that

effect is unassuaged by testimony provided by Smith that he provided the same level of representation regardless of Chief Hrinik's instruction or by Respondent's argument that neither Smith nor Charging Party attempted to caucus or confer during the interview. That neither Smith nor Charging Party actually tried to go against the directive of Chief Hrinik is not indicative of a lack of coercion because the directive itself was still unlawful. The same rationale applies to Smith's testimony regarding the adequacy of his advocacy; Smith's testimony that he would not have acted differently absent the Chief's instruction is of no importance since the actual coercion of Section 9 rights occurred against Charging Party and not Smith. Charging Party testified that but for the comments made by Chief Hrinik at the onset of the meeting, he would have asked Smith questions during the interview.

While I believe that it is clear that Respondent violated Charging Party's *Weingarten* rights and therefore violated Section 10(1)(a) of PERA, the fact that Charging Party was not disciplined but rather chose to resign, raises questions regarding the appropriate remedy for the violation. Further complicating this matter is my recommendation earlier within this decision that the second portion of the charge be dismissed and Respondent's claim that prior to the hearing I advised the parties that even should I find a violation with respect to the November 27, 2013, interview, reinstatement to the former position was not an available remedy. While I do not specifically recall making that statement, I have no reason to dispute the accuracy of Respondent's claim. Respondent, relying on past Commission decisions discussed more fully below as well as my alleged comments regarding the appropriateness of reinstatement prior to hearing, argues in its brief that the appropriate relief should be limited to a cease-and-desist order. However, even if I made such a statement as alleged by Respondent, I do not believe it precludes a recommendation of reinstatement if the facts advanced at the hearing warrant. Additionally, while I have concluded that the comments made by Chief Hrinik at the December 3, 2013, in which he provided the Charging Party the opportunity to resign his position as opposed to moving forward with the disciplinary process, did not, on their own, state a valid claim under PERA, such a finding, I believe, does not preclude a recommendation that reinstatement is appropriate.

The Commission is bestowed with the extraordinary ability to order make-whole remedies as well as to order a return to the status quo ante in response to varying violations of PERA.[10] With respect to awarding such in cases where an employee's *Weingarten* rights have been violated, there is a divergence of views between the public and private sector. As recognized by the Commission in *Kent County,* the NLRB initially adopted a burden shifting approach with respect to make-whole remedies when an employee is deprived of his *Weingarten* rights to determine whether reinstatement was appropriate.[11] See *Kraft Foods, Inc*, 251 NLRB 598 (1980); *Illinois Bell Telephone Co,* 251 NLRB 932, 934-935 (1980). However, the Board

[10] The term status quo ante is the oft shortened version of status quo ante bellum which is a Latin phrase meaning "the state existing before the war."

[11] Under the Board's initial approach, in order to establish a prima facie case for a make-whole remedy, the general counsel must first show that an employee deprived of *Weingarten* rights was disciplined or discharged based on the conduct that was the subject of the unlawful interview. Following that, the burden would shift to the employer to show that the decision to discipline or discharge the employee was not based on information obtained at the unlawful interview. If the employer met that burden, the Board would limit relief to a cease-and-desist order.

rejected this approach four years later in *Taracorp Inc*, 273 NLRB 221, 222 (1984), when it concluded that it would no longer grant make whole relief for *Weingarten* violations and expressly overruled *Kraft Foods* and its progeny.[12] In *Kent County*, the Commission declined to follow *Taracorp,* instead finding persuasive the make whole remedies as previously ordered by the Board in *Illinois Bell.* Typically, in order for the Commission to issue a make whole order it must be satisfied that the employee's *Weingarten* rights were violated, the employee was discharged or disciplined, and that such discharge or discipline was the result of statements made during the interview where the unlawful violation occurred. See *Kent County; Chesterfield Township; City of Marine City (PD),* 16 MPER 18 (2003).

Charging Party was not discharged nor was he disciplined as a result of the November 27, 2013, interview. Rather he voluntarily resigned when given the choice of resigning or facing discipline; discipline that he reasonably believed could result in termination. Nevertheless, Charging Party asserts that a make whole remedy is appropriate. Based on a constructive discharge theory, I agree. The Court of Appeals, in *LeGalley v Bronson Schools*, 127 Mich App 482 (1983), when considering whether the State's Teacher Tenure Commission correctly found the existence of a "constructive discharge", explained at 486-487:

> The term "constructive discharge" has been used to describe a facially voluntary termination which should legally be considered an involuntary one. A constructive discharge occurs "when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation". [Internal citations omitted]. A constructive discharge involves the employer's deliberate effort to make things difficult for an employee, thus forcing him or her to resign. [Internal citations omitted]. Before a constructive discharge may be found, the trier of fact must be satisfied that working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. [Internal citations omitted].

In, *Delta-Menominee District Health Department*, 1987 MERC Lab Op 964, the Commission affirmed and adopted the recommended decision of the ALJ in which the ALJ cited and applied the test as provided by the Court in *LeGalley.* More recently in *City of Detroit,* 18 MPER 58 (2006) (no exceptions), the ALJ stated:

> To establish a constructive discharge, Charging Parties must demonstrate that (1) the burden on the employee caused, and was intended to cause, a change in working conditions so difficult or unpleasant as to force her to resign, and (2) those burdens were imposed because of the employee's protected concerted activities.

It is clear that the circumstances surrounding Charging Party's resignation do not fit the typical textbook "constructive discharge" scenario, however, because the choice to resign or face

[12] Since *Taracorp*, the Board has not issued make whole remedies except where an employee is disciplined for refusing to participate in the interview after his request for union representation has been denied. See *Barnard College*, 340 NLRB 934 (2003).

discipline was given following an investigation that included Charging Party making admissions and other statements during an interview in which his *Weingarten* rights were violated, it is the conclusion of the undersigned that the recommendation of a cease-and-desist order by itself is not sufficient to fully remedy the unfair labor practice. The preceding notwithstanding, it is also the opinion of the undersigned that a make whole remedy, whereby Charging Party is reinstated, awarded back-pay, seniority, etc., is also not the appropriate remedy since such a recommendation would result in a windfall. As such, the most appropriate remedy under these circumstances is to provide Charging Party the opportunity to return to the position of sergeant, albeit without back-pay, seniority in that position or other benefits afforded to him by the passage of time since his resignation, and to allow the parties to move forward with whatever actions each deems appropriate, whether culminating in discipline or otherwise.

I have considered all other arguments of the parties and I conclude such does not warrant any change in the result. It is the conclusion of the undersigned that the City of Saline did violate Section 10(1)(a) of PERA with regard to Charging Party's *Weingarten* rights during the November 27, 2013, investigatory interview by demanding at the onset of the interview that Charging Party's union representative act as a witness only. I hold that the appropriate remedy for this violation, in addition to a cease-and-desist order, is to allow Charging Party the opportunity to return to the position of sergeant, without back-pay, seniority in that position or other benefits afforded to him by the passage of time since his resignation. Acceptance of reinstatement by Charging Party should not be seen as precluding the parties of the opportunity to proceed in whatever lawful fashion they so choose, which may include, but is not limited to, the imposition of discipline. Accordingly, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Based upon the above findings of fact and conclusions of law, Respondent, the City of Saline, its officers, agents, and representatives are hereby ordered to:

1. Cease and desist from interfering with, restraining or coercing public employees, including but not limited to, Christopher Boulter, in the exercise of rights guaranteed to them in Section 9 of PERA, including the right, upon request, to the presence and active assistance of a union representative at an investigatory interview which the public employee reasonably believes may lead to discipline.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

    a. Allow union representatives to actively participate in investigatory interviews where requested by public employees.

    b. Offer Christopher Boulter reinstatement to his previously held position of sergeant, without back-pay, seniority in that position or other benefits afforded to him by the passage of time since his resignation, with the understanding that Respondent may still pursue disciplinary action upon the acceptance of reinstatement.

c. Post the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

DATED: April 16, 2015

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, **THE CITY OF SALINE**, a public employer under the **PUBLIC EMPLOYMENT RELATIONS ACT**, has been found to have committed an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

Interfere with, restrain or coerce public employees, including but not limited to, Christopher Boulter, in the exercise of rights guaranteed to them in Section 9 of PERA, including the right, upon request, to the presence and active assistance of a union representative at an investigatory interview which the public employee reasonably believes may lead to discipline.

WE WILL

Allow union representatives to actively participate in investigatory interviews where requested by public employees.

Offer Christopher Boulter reinstatement to his previously held position of sergeant, without back-pay, seniority in that position or other benefits afforded to him by the passage of time since his resignation, with the understanding that he may be subject to disciplinary action upon acceptance of reinstatement.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

CITY OF SALINE

By: _____

Title: _____

Date: _____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.