STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF GRAYLING,
Public Employer-Respondent in MERC Case No. C18 C-022,

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Respondent in MERC Case No. CU18 C-005,

-and-

TODD E. HATFIELD,
An Individual Charging Party.
_____/

APPEARANCES:

Cohl, Stoker and Toskey, P.C. by Mattis D. Nordfjord and Courtney A. Gabbara, for the Public Employer

Christopher Tomasi, General Counsel, for the Labor Organization

Manda L. Danieleski, PLLC, for Charging Party

DECISION AND ORDER

Procedural History:

On August 29, 2019, Administrative Law Judge Travis Calderwood (ALJ) issued his Decision and Recommended Order[1] in the above matter finding that Respondents did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Charging Party had not established that the Employer violated either Section 10(1)(a) or Section 10(1)(c) as alleged in Case No. C18 C-022. The ALJ further found that Charging Party had not established that the Union has violated its duty under PERA to fairly represent him in Case No. CU18 C-005.

On October 21, 2019, Charging Party filed exceptions to the ALJ's Decision and Recommended Order, and, on November 22, 2019, Respondent POAM filed a brief in support of

[1] MOAHR Hearing Docket Nos. 18-005696 & 18-005697

the ALJ's decision. On December 6, 2019, Respondent City of Grayling filed a response to Charging Party's exceptions.

For the reasons set forth below, we believe that the charge against the Employer is without merit and should be dismissed. We further believe, however, that the Union breached its duty of fair representation.

Factual Summary:

Charging Party Todd Hatfield was first employed by the City of Grayling (City or Employer) as a paid on-call firefighter in August of 1997. At that time, the City's Police Department and its Fire Department were separate departments. Although the City's full-time police officers were part of a bargaining unit represented by the Fraternal Order of Police (FOP), the City's firefighters were not represented by any labor organization.

In 2013, the City combined its Police Department and its Fire Department into a single Department of Public Safety (Department). Douglas Baum, the Chief of Police and City Manager at the time, was appointed Public Safety Director (Director) and supervised both the Police Division and Fire Division.

On or about the same time as the merger of the two divisions, the Department received a contract from the Michigan Department of Military and Veterans Affairs to provide fire coverage for Camp Grayling, a local army base. This contract allowed the Department to hire several former on-call firefighters for permanent positions, including Charging Party Hatfield, who assumed the role of Assistant Fire Chief on October 1, 2013. Additionally, the full-time fire fighters, including Charging Party and Deputy Fire Chief/Fire Marshall Steve Eddy, came to be a part of the FOP bargaining unit along with the police officers.

The contract between the FOP and the City was effective from 2014 through June 30, 2017 (Exhibit 1). Articles 3, 9 and 18 of the contract are discussed at length at page 3 of the ALJ's decision. According to Director Baum, the Employer and the FOP agreed that Charging Party's position was covered by the contract, provided the position had no "disciplinary powers" (Tr. 165).

In early 2014, the City sponsored Charging Party's attendance at the Kirtland Regional Police Academy (Academy) at Kirtland Community College. In connection with this sponsorship, the City covered the costs of the ten-week program, including tuition and related equipment expenses, in addition to maintaining Charging Party's full-time status and benefits. Charging Party graduated from the Academy in May of 2014 and received his MCOLES certification on May 21, 2014. Although Charging Party continued in his role as Assistant Fire Chief, he also began to act as a backup sworn law enforcement officer, covering shifts due to vacations or other absences.

In the summer of 2017, members of the bargaining unit discussed contacting other unions in an effort to change the unit's bargaining representative. According to Charging Party, around this same time, he was in Director Baum's office where the two discussed the topic of unions.

Charging Party testified that Baum "brought up non-union and didn't feel that we needed a union because we had good benefits and he took care of us and gave us everything he could…" Charging Party further claimed that, during that discussion, the Director "acknowledged that he shouldn't be talking union issues with me." Baum, in describing the encounter, claimed that Charging Party came to him with "concerns" telling the Director that "the membership were looking at what their options were…" Further describing the conversation, Baum stated:

> I said, obviously one option is you don't have a union, the other option would be you, the membership would vote on a different union or you stay with the one that you have. But I said, I can't negotiate with you individually, I can't have the union, that type of union discussion with you as far as what to do in that situation, I said that's up to you and other membership.

Following this conversation, members of the bargaining unit met with Respondent Police Officers Association of Michigan (POAM or Union) and another labor organization to discuss representation. Representation proceedings were filed with the Commission, Case Nos. R17 C-033 and R17 C-039, and, on May 11, 2017, an election was conducted. The POAM won the election and was certified as the bargaining representative on May 23, 2017, for a unit described as:

> All regular full time and part time plus police officers and public safety officers, Sergeant, Deputy Chief and Assistant Chief of the public safety department.

After the POAM's certification, the Union and the Employer began negotiations for a successor contract. Charging Party testified that he participated in these negotiations initially and attended meetings with Paul Postal, the Union's Business Agent assigned to the bargaining unit, to discuss the upcoming contract.

Without the knowledge of Charging Party or Eddy, members of the POAM unit discussed removing the officers' positions from the unit because of their perceived supervisory nature and, sometime in June of 2017, the membership met, without Charging Party or Eddy, and, as noted in the ALJ's decision, voted "to remove the two Chiefs from the unit." Director Baum testified that he was made aware of the Union's position that it did not want the two positions to remain in the unit during one of the telephone conference calls held between the Employer, the FOP, and the Respondent Union regarding the election petitions filed in Case Nos. R17 C-033 and R17 C-039 (Tr. 167).

Neither Charging Party nor Eddy were aware of the Union's desire to remove them or their positions from the unit until after the internal vote on the issue in June of 2017. Charging Party testified that he first learned of his potential removal from Postal at a bargaining session held at the City Hall sometime in July or August of 2017. According to Charging Party, Postal told him that "the City was having command officers removed from the union" (Tr 28-29). After that meeting, Charging Party and Eddy met with Postal to discuss their options regarding representation. According to Charging Party, Postal told the two that they could form a "command

union." Eddy and Charging Party later met without Postal and agreed that they would try to form a command union.

Charging Party and Eddy then contacted John Stidham with the Police Officers Labor Council (POLC) in order to form a command union. Sometime shortly after this, both Charging Party and Eddy went to Director Baum's office to let him know they would be forming a command union.

During this time period, the Employer and the Union also continued bargaining over their first contract and reached a tentative agreement on August 2, 2017 (Tr. 279, 285, Ex. 11).

A variant of the tentative agreement was ultimately ratified and, in late January of 2018, the parties entered into a collective bargaining agreement effective from July 1, 2017, through November 30, 2018.

On September 13, 2017, the Employer filed a unit clarification petition, UC17 I-008, in which it sought Commission action to approve the removal of the two positions held by Charging Party and Eddy (Exhibit 5). According to Baum, the POAM insisted that Charging Party's position not be allowed in the contract and assisted him with filing the petition (Tr. 167-168). In his decision, the ALJ notes that the unit clarification petition was never referred to an ALJ for a hearing and appears to have been uncontested by POAM. For reasons not known by the ALJ, UC17 I-008 remained in active status with the Commission until February 2, 2019, at which time the petitioner, the Employer, withdrew it.

In October of 2017, Stidham contacted Director Baum to discuss the formation of a command bargaining unit. Stidham and Director Baum exchanged emails and set up a meeting for October 12, 2017, to begin negotiating a new contract. For reasons set forth below, however, that meeting never occurred.

On October 10, 2017, Charging Party was called into Director Baum's office where he was told that his position as Assistant Fire Chief was being eliminated as a result of the restructuring of the Department. Director Baum testified that, around this time, the Department was experiencing "problems" within the Fire Division which he described as "morale issues." Director Baum attributed the problems to the Division's current command structure which was comprised of part-time Chief Strohpaul and the two Assistant Chiefs, Charging Party and Eddy. According to the Director, he discussed the issues with the City's Mayor and Chief Strohpaul before ultimately deciding that Chief Strohpaul would assume the role of Chief on a full-time basis.

Director Baum explained that, with Chief Strohpaul going full-time, the Fire Division would now have three full-time "chief" positions and that such a staffing level could not be sustained under the Department's contract with the Michigan Department of Military and Veterans Affairs, which only funded four full-time fire positions. Director Baum also testified that the decision was made to layoff Charging Party because he had lower seniority than Eddy.

At the October 10, 2017 meeting, Director Baum also offered Charging Party a position as a patrol officer, effective October 16, 2017, and Charging Party accepted the offer. As a result of the transfer, Charging Party's hourly wage was reduced one dollar an hour, but his bi-weekly schedule increased from 80 hours to 84 hours. Additionally, Charging Party would, by nature of his position as a patrol officer, be a member of the bargaining unit represented by the Respondent Union. Charging Party testified that he was not informed at this meeting that he would have to serve a probationary period following his acceptance of the new position or told he would lose his seniority (Tr. 36, 39, 41). According to Charging Party, however, he was offered a "14-day notice" under the FOP Agreement but waived the Agreement's requirement (Tr. 91-92). Although Charging Party requested to remain on the "fire side" of the Department, his request was denied (Tr. 109).

On November 6, 2017, during a mandatory meeting involving the entire Public Safety Department, Director Baum asked Fire Chief Strohpaul to discuss the recent changes in the Department's structure. Strohpaul proceeded to outline the various changes, including his transition to full-time, the promotion of Amanda Clough, and Charging Party's transition to a patrol officer. The Fire Chief then went on to list seniority within the Department's two divisions initially stating that for the Police Division, the order was Director Baum, Clough, Detective-Sergeant Mike Grossberg, Charging Party, Brock Baum (the Director's son), and finally Travis VanDeCasteele. Director Baum indicated that the order was wrong, and that Charging Party was the lowest seniority officer because "he just came over." According to Charging Party, this was the first time, he realized he had lost his seniority (Tr. 43).

Charging Party further testified that he believed he should not have been the lowest officer in seniority because his MCOLES certification date was earlier than both Brock Baum and VanDeCasteele. Charging Party raised the issue with Jon Williamson, who was a Fire Sergeant as well as a Steward for the Respondent Union. Charging Party also contacted Business Agent Postal and left a voicemail message in which he asked that a grievance be filed on his behalf. Williamson testified that he then met with Director Baum to discuss the issue. Director Baum testified that he had consulted with the City's Attorney as well as Postal regarding where on the seniority list Charging Party should be placed. According to the Director, "we viewed [it] as [going from] a non-union into a union position, he would be starting at the bottom…" The Director further testified that Postal had told him that, if Charging Party were placed anywhere else on the list, the Union would file a grievance (Tr. 178, 180-181). Charging Party testified that he asked Postal to file a grievance over his placement on the seniority list (Tr. 43, 48). According to Charging Party, however, Postal replied that "he could not do anything because there was not a signed contract in place" (Tr. 48, 94-95, 98). No grievance was ever filed.

On November 15, 2017, deer hunting season for regular firearms began. Sometime around this time, the Michigan Department of Natural Resources (DNR) was conducting aerial sweeps of Crawford County searching for possible deer-baiting violations on both private and public land. Those aerial sweeps identified two suspected illegal bait piles located on adjacent parcels of land: one owned by Charging Party, the other by his brother, Mike Hatfield. Those suspected bait

violations were marked with GPS coordinates and forwarded to DNR Conservation Officer (CO) John Paul Huspen and CO James Benjamin McAteer, IV.

CO Huspen went to Mike Hatfield's property on November 15, 2017, and spoke with the brother, viewed the bait pile and issued a misdemeanor ticket for excessive bait. Despite the fact that the two properties identified by the DNR's aerial sweeps were adjacent to each other, CO Huspen declined to go to Charging Party's property to investigate the second suspected illegal bait pile. CO Huspen, who testified that he knew Charging Party personally, when asked why he did not go to Charging Party's property, stated:

Honestly, I wasn't really into trying to write a police officer, a fellow police officer a ticket, and I was hoping that after dealing with Mike, that Todd -- or Mike would talk to Todd and Todd would get the bait pile cleaned up.

That same day, CO Huspen went to the Crawford County Courthouse to turn in the tickets he had written that day, including the one issued to Mike Hatfield. There CO Huspen approached then-sergeant Amanda Clough and explained to her that two suspected bait piles were identified, one on Charging Party's property and the other on his brother's, and that he, CO Huspen, and been to Mike Hatfield's property but did not go to Charging Party's property. Clough testified that she advised CO Huspen to take "enforcement action." Clough further testified that, given the nature of the conversation with CO Huspen, she believed there could still be pending action taken against Charging Party by the DNR and communicated the information to Director Baum. Neither she nor the Director confronted Charging Party at that time.

Also, that same day, CO McAteer sent a text message to Detective-Sergeant Grossberg and let him know that the CO would be talking to Charging Party. The next day, November 16, 2017, CO McAteer went to Charging Party's property, arriving at approximately 9:40 am. According to the CO, when he arrived at the property, he found Charging Party in his garage processing a deer. After taking pictures of the deer and making note of its hunting tag, CO McAteer informed Charging Party that he was there about the bait pile. CO McAteer testified that Charging Party "knew what I was talking about" and that he led the CO to the pile.

According to CO McAteer, when the two were walking to the bait pile, Charging Party made a point to tell him that he had not hunted over the bait pile. Charging Party also revealed to CO McAteer that it was his father who had placed the bait at the property. CO McAteer testified that he believed there to have been approximately 30 gallons of bait present. DNR regulations at the time limited the amount of bait to only 2 gallons at any given time. McAteer proceeded to take pictures of the bait pile testifying that, after he was done, Charging Party "became pretty emotional" and stated that if "he got any kind of citation, he was going to lose his job." It was after this that CO McAteer interviewed Charging Party's daughter regarding the deer that Charging Party had been processing. McAteer, in describing what he ultimately did, testified:

> So at that point I told Mr. Hatfield that I was going to give him an hour to clean up the bait site, I told him I would be back in an hour to verify that it was cleaned up; in the event it was not cleaned up, I was going to be issuing him a citation for over limit of bait.

McAteer, in explaining why he did what he did stated during the hearing:

> Every situation's a little bit different, Typically, yes, I would have issued a citation. What I took into consideration, there were a couple of things I took into consideration on this day: (1) He's a law enforcement officer who I have backed up on a couple of different things and we live in a small community, I took that into consideration. Secondly, when he mentioned that he was going to lose his job for getting a citation, that weighed pretty heavy on my decision-making process. We spoke in the past, and as I have said in the past, any time that someone might lose their job as a result of me giving them a citation, that's going to make me think a little bit harder on whether I'm going to issue that or not. For this case, I didn't find it justified to issue that citation.

McAteer then left the property and, when he returned, the bait pile had been removed. McAteer claimed during the hearing that he did inform Charging Party that Charging Party's employer had been notified of the situation.

Sometime after the above incident, Amanda Clough contacted CO McAteer for more details regarding what had happened. According to CO McAteer, he told Clough that the pile had been cleaned up.

At the hearing Charging Party denied that he was responsible for the excessive amount of bait found at his property. Charging Party claimed that initially he was putting out bait on the property but that it never exceeded the legal limit. However, following his transition to patrol officer, his shifts did not allow him to continue to do so and instead his father started baiting the property.

On November 30, 2017, Amanda Clough approached Charging Party and presented him with a letter dated November 28, 2017. Charging Party testified that Clough told him the letter was an acceptance of the police officer position and that he should sign it and return it to her. That letter, which Director Baum claimed was a form letter provided to new hires that he had created, stated as follows:

> Dear Todd:
>
> We are please to offer you a position as patrol officer with the City of Grayling Public Safety Department effective October 16th, 2017. As a patrol officer, you will be operating under the terms of the labor agreement between the City of grayling and the Police Officers Association of Michigan, Grayling Public Safety Unit, and you with report directly to the Deputy Chief.

> By contract, you will be paid your negotiated wage of $26.52. You must serve a probationary period of twelve consecutive months from time of acceptance of the new position. Fringe benefits, vacation, and sick time are provided as defined under the Labor Agreement.
>
> As a patrol officer for the City of Grayling, you are required to treat the citizens and guests of the city with the utmost respect and professionalism while performing your duties. You are also expected to suggest meaningful ways of improving the quality and efficiency of the Police Department and to give your total support to new and reasonable practices and procedure.

The letter was signed by Director Baum and had a spot in which Charging Party could sign his name to signify his acceptance of its terms.

Charging Party did not initially sign the letter, testifying that he was concerned with its terms, specifically that he would be a probationary employee. According to Charging Party, both Art Clough, a former employee, and Brock Baum, transferred into the position of patrol officer from the position of fire fighter and did not serve probationary periods. Amanda Clough testified that she believed when she was promoted to Deputy Chief she was placed in a probationary period. Charging Party expressed his concern with the letter to several people, including, Eddy, Williamson, Postal and Chief Strohpaul. Charging Party claims that he spoke with Postal by telephone regarding this letter sometime in the days following its receipt. In recounting that conversation, Charging Party testified:

> Anyways, I asked Paul what my options were, and he goes, do you need your job; I said yes, I need my job. He asked if had a family[sic]; I said, well, I'm divorced, but I do have two daughters, I told him I didn't feel comfortable signing the letter, I didn't feel I should be on probation again. I told him I felt there was a target on my back, Paul's advice to me was, this letter's already postdated from November, so you really only have 11 months left to do; he suggested I sign it, come to work, get in my patrol car, go do my job, fly under the radar, and the 11 months would go by fast.

Charging Party, in furtherance of his testimony regarding the above conversation, and in response to questions whether the two discussed the prior contract's enforceability, stated:

> So, he once again told me this is why we need to have a signed contract in place, and there's nothing he can do until we have that signed contract in place.

On December 6, 2017, Amanda Clough approached Charging Party while he was at the Fire Department working out on his day off and asked if he had signed the November 28, 2017 letter. Charging Party responded that he had not and that he wanted to talk to Director Baum first. Clough advised him that the Director was in a meeting but that he should be available soon. Approximately 45 minutes later Williamson appeared and told Charging Party that the Director wanted to see them in his office. At the same time, Chief Strohpaul walked in and said the Director

wanted to see him too. The three walked over to the Director's office where they found Director Baum, Deputy Chief Clough and the City Clerk Lisa Johnson waiting for them.

According to Charging Party, Director Baum began by saying the "this is going to be short and one-sided and it's being recorded." Following some further remarks, Baum asked Charging Party if he had any recent contact with law enforcement. Charging Party initially denied any contact, testifying at the hearing that he believed the Director was referring to contact with police officers. Director Baum then asked whether he had any contact with DNR Officers. At that point Charging Party claims he admitted that CO McAteer had come to his house on November 16, 2017, and had checked "his deer" and "my bait pile" but that he had not been issued any citation. According to Director Baum's testimony, Charging Party initially said the CO was there to check the deer and that when specifically asked whether the CO had indicated he was there to check a bait pile, Charging Party responded that was not the reason for the visit but that the bait issue had come up later. Director Baum testified that following Charging Party's statement during the meeting that CO McAteer had not been on the property to check his bait pile, he told Charging Party that he would "have to check on that."

During this meeting, Director Baum also asked about two earlier incidents: the first involving Charging Party's termination from a previous employer and, the second concerning Charging Party's possible involvement in returning a game camera to a local sporting goods store that was different from the one he had originally purchased. According to Charging Party, the Director at one point told him that "you have no Union representation right now" because the contract with the FOP had expired and a new one had not yet been reached with the Respondent Union.

The meeting continued with Charging Party asking about his seniority status as well as what would happen if he did not sign the employment letter that he had been presented earlier. According to Charging Party's unrefuted testimony, at the end of the meeting Director Baum asked Charging Party why he should "keep him." Charging Party further testified that following his response, Director Baum then instructed him to sign the employment letter or he would be out of a job.

Charging Party also claimed that he and Williamson left the office to go get the letter which was still in Charging Party's mailbox in the officer's room. There Charging Party asked Williamson whether he had any choice in the matter. According to Charging Party, Williamson said he did not know. Charging Party, feeling as if he did not have a choice, signed the letter and gave it back to Director Baum.

Following the meeting, Director Baum instructed Clough to follow-up with CO McAteer regarding some of Charging Party's statements. Director Baum, explaining why he thought confirming Charging Party's statements that CO McAteer was there because of the deer and not the bait pile was important, testified:

> And that's why I wanted to clarify with the [Command Officer] what exactly – did he tell you that – or the [Command Officer] tell him he was there regarding the baiting, and he was; I afforded him the opportunity to tell me the truth, he did not.

Clough did contact CO McAteer; both Clough's testimony and McAteer's testimony indicate that that the Conservation Officer was clear in communicating the intent of his visit to Charging Party's property was to check the bait pile and that checking the deer was secondary and occurred as happenstance. Moreover, Clough revealed that McAteer informed her of Charging Party's statements regarding losing his job if he got into trouble. Testimony also revealed at this time that Charging Party had been borrowing Eddy's dump-trailer to transport bait to his property.

Following the meeting and follow-up information received from CO McAteer, Director Baum made the decision that Charging Party's conduct required that he be terminated. In explaining this decision, the Director stated that Charging Party was not truthful regarding his contact with CO McAteer, and that the Director considered that conduct to be insubordinate. Moreover, the Director, in describing the importance of being truthful stated at the hearing:

> [I]n law enforcement, a law enforcement [sic], you have to have integrity; if you don't have that, you're not credible, you can not go any – you can't go any further with criminal cases.

On December 14, 2017, Charging Party, accompanied by Williamson, again met with Director Baum at which time the Director told him he could resign or be terminated. As part of this choice, Charging Party testified that two documents were placed on the desk, one was a document entitled "Report of Disciplinary Action" dated that same day while the other was a letter of resignation. The Director then told Charging Party that he could take the two documents and discuss it with his Union representative. Williamson and Charging Party then left and went to another room where they, along with Detective Grossberg, discussed what Charging Party should do. At some point Grossberg called Postal and all of them spoke on speaker phone. Postal attempted to contact legal counsel but was unable to do so. He then reportedly suggested that they ask Director Baum for more time to make a decision or to accept a resignation in lieu of termination. Both requests were denied. Postal reportedly told Charging Party that if he were to resign, he might be able to find a job with another police department but that if he was terminated finding another job in law enforcement would be difficult. Ultimately Charging Party chose to be terminated apparently under the belief that he could grieve the termination but not the resignation.

The Report of Disciplinary Action identified three portions of the Department's Policy 320, Standards of Conduct, allegedly violated by Charging Party. More specifically, the subsections of 320.5.9 referenced within the Report, identified the following as unacceptable and/or prohibited conduct by a police officer:

> (a) Failure of any member to promptly and fully report activities on his/her part or the part of any other member where such activities resulted in contact with any other law

enforcement agency or that may result in criminal prosecution or discipline under this policy.

* * *

(h) Criminal, dishonest or disgraceful conduct, whether on- or off-duty, that adversely affects the member's relationship with this department.

* * *

(m) Any other on- or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this department, is contrary to good order, efficiency, or morale, or tends to reflect unfavorably upon this department or its members.

The Report went on to conclude by stating, "Due to Officer Hatfield's dishonest and insubordinate actions he is discharged from employment with the City of Grayling as of December 14, 2017."

Charging Party testified that later that same night he told Williamson he wanted to grieve his termination. Charging Party also claimed that the following day he emailed Postal telling him as well that he wanted to file a grievance to which Postal reportedly stated "it was an FOP issue" (Tr. 69-70). In a lengthy email sent on December 18, 2017, to Jim Cross, another of the Union's Business Agents who was not assigned to Charging Party's bargaining unit but who Charging Party had met earlier, Charging Party provided a rough timeline of the events that led to his termination. In that email Charging Party clearly expresses a desire that a grievance be filed but that he does not know whether Postal has or will do so. Cross's response clearly reveals that, while having some knowledge of what occurred, he was generally confused as to the actual issues.

On December 19, 2017, Charging Party sent Postal an email. That email appears to reference the time period where he was laid off from the position of Assistant Chief and claims there "was a target on my back." The email concludes with Charging Party asking, "[i]s there nothing we can do [sic] I am confused and thought I had Union protection." Postal responded that same day and wrote:

> I'm pretty sure this is an FOP issue under the old agreement. If you were still under the FOP agreement the business agent should have advised you what your options were. I would call him.

Ultimately, no grievance was ever filed challenging Charging Party's termination. On March 16, 2018, Charging Party filed the instant unfair labor practice charges against the City of Grayling and the Police Officers Association of Michigan. Charging Party's initial claim against the Employer makes several allegations in support of its overall contention that the Employer "acted with an anti-union animus and discriminated" against him when it demoted and later terminated him as retaliation for his union activity. In the charge against the Union, Charging Party alleges that the Union breached its duty of fair representation with respect to both the

demotion and eventual termination. The charges were consolidated and a hearing was held on November 7, 8 and 9, 2018.

Discussion and Conclusions of Law:

I. The Charge Against the Employer

Section 10(1)(c) of PERA makes it unlawful for a public employer to "discriminate with regard to hire, terms, or other conditions of employment to encourage or discourage union membership." The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Taylor Sch Dist v. Rhatigan*, 318 Mich App 617, 636 (2016); *Saginaw Valley State Univ*, 30 MPER 6 (2016); *Utica Community Schools*, 28 MPER 11 (2014); *Grandvue Medical Care Facility*, 27 MPER 37 (2013); *City of Detroit*, 24 MPER 11 (2011); *Grand Valley State Univ*, 23 MPER 70 (2011); *Univ of Michigan*, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. 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. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707.

Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). See also *City of St Clair Shores*, 17 MPER 27 (2004); *North Central Cmty Mental Health Services*, 1998 MERC Lab Op 427, 436. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA v Evart Pub Sch*, 125 Mich App at 74.

In the present case, there is no dispute that Charging Party engaged in activity protected by PERA. Similarly, there is no dispute that Respondent knew of his protected activity. Nonetheless, in his Decision and Recommended Order, the ALJ found that Charging Party failed to establish a prima facie case under Section 10(1)(c) because the record was devoid of any direct evidence that established that Director Baum harbored anti-union animus. The ALJ noted that, although Director Baum discussed the topic of unions and questioned the necessity of them in a meeting initiated by Charging Party, his comments did not rise to the level of showing animus. Moreover, there was no indication that the Director was upset or otherwise hostile to the idea of Charging Party and Eddy forming a command union through the POLC. To the contrary, the record established that, but for the restructuring of the Department, Director Baum would have likely went ahead with negotiations with Stidham and the POLC.

Although Charging Party, in his exceptions, relies upon the timing of Charging Party's October 10 job abolishment and December 14 discharge to establish motive, the Commission has

repeatedly held that suspicious timing is not sufficient, by itself, to establish unlawful motive. Rather, there must be other circumstantial evidence which supports the conclusion that the temporal relationship was not mere coincidence. See, e.g., *Amalgamated Transit Union & Its Affiliated Local 26*, 31 MPER 58 (2018); *Southfield Pub Sch*, 22 MPER 26 (2009); *Macomb Twp (Fire Dep ' t)*, 202 MERC Lab Op 64, 73; *City of Detroit (Water & Sewerage Dep ' t)*, 1985 MERC Lab Op 777, 780.

Additionally, 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 rights guaranteed to them under § 9 of the Act. These rights include the right to engage in union activities and other "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." Under § 9 of PERA, employees have the right to engage in protected concerted activities free from employer threats. *MERC v.* Reeths-Puffer School District, 391 Mich 253, 265-66 (1974), *aff ' g* 1970 MERC Lab Op 967; *Birmingham Public Schools*, 33 MPER 12 (2019).

In the present case, the ALJ found that the statements attributed to Director Baum in the meeting between Charging Party and Director Baum that took place in the summer of 2017 did not "rise to any level even approaching threats, coercion or otherwise unlawful under PERA." Similarly, the ALJ found that the discussion between Director Baum, Charging Party and Eddy, regarding the latter employees' desire to form a command union was also devoid of any statements that violated Section 10(1)(a) of the Act.

Finally, the ALJ found that a reasonable employee would not interpret Charging Party's demotion (and associated loss of seniority) as a direct response to his efforts to form the command union or an implied threat to retaliate against him if he continued to engage in conduct protected by Section 9 of PERA given the surrounding circumstances of those actions, i.e., the restructuring of the Department predicated on morale issues and the restrictions regarding the same vis a vis the Department's contract to provide fire services to Camp Grayling. The ALJ concluded that it was unreasonable for an employee to associate the layoff and new job with protected activity as opposed to other reasons for the Employer's actions.

Although Charging Party, in his exceptions, takes issue with the ALJ's findings, we believe substantial evidence support's the ALJ's decision. Consequently, we believe that the charge against the Employer is without merit and should be dismissed in its entirety.

II. The Charge Against the Union

A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171 (1967).

In *Goolsby v. Detroit*, 419 Mich. 651 (1984), the charging parties filed ULP charges against AFSCME, alleging a breach of the duty of fair representation. An ALJ found that the failure to

process the grievance involved in the dispute was without explanation, but not an unfair labor practice, and recommended dismissal of the charge. The Commission adopted the recommendation, finding insufficient evidence to prove that AFSCME's handling of the grievance was discriminatory. The Court of Appeals affirmed the decision. The Supreme Court, however, reversed the judgment of the Court of Appeals, and held that the charging parties did not have to show bad faith on the part of the union to establish a breach of the duty of fair representation due to arbitrary conduct. *Goolsby v. Detroit,* 419 Mich. 651, 678 (1984). The Supreme Court further held that the union's inexplicable failure to comply with the grievance procedure's time limits indicated inept conduct undertaken with little care or with indifference to the interests of the charging parties, which could have been reasonably expected to foreclose the further pursuit of grievances by the charging parties and that, as a result, the union breached its duty of fair representation to the charging parties. *Id.,* p. 682. The Supreme Court then remanded the matter to the Commission for a determination of relief due.

In affirming the Commission's decision on remand, the Court of Appeals, in *Goolsby v. City of Detroit,* 211 Mich. App. 214 (1995), held:

> To prevail on a claim of unfair representation, a charging party must establish a breach of the union's duty of fair representation and also a breach of the collective bargaining agreement. *Knoke v. East Jackson Public School Dist.,* 201 Mich.App. 480, 488, 506 N.W.2d 878 (1993); *Martin v. East Lansing School Dist.,* 193 Mich.App. 166, 181, 483 N.W.2d 656 (1992). Here, it was established by the Supreme Court's decision in *Goolsby* that the union had breached its duty of fair representation. However, as previously discussed, the charging parties have not established a breach of the collective bargaining agreement. Accordingly, the MERC did not err in determining that no damages were due the charging parties.

Charging Party alleges that the Union breached its duty of fair representation when it would not file a grievance over his November 6, 2017 loss of seniority and when it would not file a grievance over his December 14, 2017 discharge. We agree.

In the present case, the Commission conducted a representation election during the term of the existing 2014 contract between the FOP and the City of Grayling. As a result, the Respondent POAM was certified as the bargaining representative on May 23, 2017 for a unit that included the Assistant Chief of the Public Safety Department position held by Charging Party. It is well established that when a representation election is conducted during the term of an existing contract, that contract continues in effect until its expiration even if the incumbent representative is defeated. *Macomb County v. Michigan Fraternal Order of Police Labor Council*, 33 MPER 37 (2019); *Ionia Co Road Comm*, 1969 MERC Lab Op 82; *Garden City Pub Schs*, 1974 MERC Lab Op 364; *Jonesville Bd of Ed*, 1980 MERC Lab Op 891. An employer is obligated to comply with the terms of that contract and has a duty to bargain with the new representative. *West Bloomfield Pub Schs*, 1985 MERC Lab Op 24.

Additionally, it is also well established that, at the expiration of the labor contract, wages, hours, and other terms and conditions of employment constituting mandatory subjects of bargaining that were established by the contract generally survive the expiration of the contract by operation of law during the bargaining process. *Local 1457, IAFF v Portage*, 134 Mich App 466, 472 (1984). Unilateral action over mandatory subjects of bargaining may not be taken by either party absent an impasse in negotiations. An employer that takes unilateral action on a mandatory subject of bargaining prior to impasse in negotiations commits an unfair labor practice. *Portage*, at 473.

Nonetheless, on October 10, 2017, Charging Party was told that his position as Assistant Fire Chief was being eliminated. He was offered a position as a patrol officer and accepted the offer. On November 6, 2017, during a meeting of the Public Safety Department, Director Baum indicated that Charging Party had lost all his seniority and had the least seniority of any police officer because "he just came over." According to Charging Party, this was the first time, he realized he had lost his seniority (Tr. 43). Director Baum testified that, after Charging Party's Assistant Chief position was removed from unit, he consulted with POAM representative Postal regarding where on the seniority list Charging Party should be placed. According to the Director, "we viewed [it] as [going from] a non-union into a union position, he would be starting at the bottom…" The Director further testified that Postal had told him that, if Charging Party were placed anywhere else on the list, the Union would file a grievance (Tr. 178, 180-181). Charging Party testified that he asked Postal to file a grievance over his placement on the seniority list (Tr. 43, 48). According to Charging Party, however, Postal replied that "he could not do anything because there was not a signed contract in place" (Tr. 48, 94-95, 98). No grievance was ever filed.

In his Decision, the ALJ noted that "the decision to remove Charging Party and Eddy from the unit, whether initiated by Postal or someone else, does not appear on its face unreasonable, arbitrary or otherwise unlawful under the Act." The ALJ further noted that "Following Charging Party's removal from the unit, the Respondent Union no longer owed him any duty as he was no longer a member of the unit." The ALJ relies upon a tentative agreement between the POAM and the City of Grayling made in August of 2017 (Ex. 11).

We find the ALJ's Decision in error. Although the parties reached a tentative agreement on August 2, 2017, this agreement (or a variant of it) was not ratified and executed until late January of 2018. Similarly, although a unit clarification petition was filed in September 2017, more than a month after the tentative agreement, that sought the removal of Charging Party's position from the unit, the unit clarification petition was never referred to an ALJ for a hearing and remained in active status with the Commission until February 2, 2019, at which time it was withdrawn. Consequently, Charging Party's position could not properly have been removed from the bargaining unit until January 2018. Moreover, even if Charging Party's position were properly removed in August 2017, the Union still owed him a duty of fair representation as a result of the seniority he held in the unit as a police officer and fireman.

Although the ALJ further noted that "had Charging Party transitioned into the position of patrol officer at such time as the FOP's contract was still effective, his seniority status would have been governed by his MCOLES certification date as required therein" and "that was not the circumstances of the situation at that time; there existed a tentative agreement that supports the Employer's actions," there was no successor agreement to the 2014 agreement until January 2018, months after Charging Party's seniority was taken. A tentative agreement is not a legally enforceable collective bargaining agreement under PERA. *Family Service and Children's Aid of Jackson County*, 1 MPER 19044 (1988); *El-Ga Credit Union*, 1973 MERC Lab Op 652, 654; *Gratiot Comm. Hosp.*, 1970 MERC Lab Op 252, 254-255; *Armada School Dist*., 1973 MERC Lab Op 221, 224-225; *North Dearborn Heights School District*, 1967 MERC Lab Op 673; *Pontiac Township*, 1982 MERC Lab Op 716, 718; and *Washtenaw County*, 1972 MERC Lab Op 794, 801.

Significantly, the ALJ also commented on the Union's role in the loss of Charging Party's seniority: "Director Baum's testimony that he faced a possible grievance were Charging Party placed anywhere on the list but the bottom, while not only unopposed was also reasonable and credible." Moreover, even if the 2018 agreement were executed months earlier, nothing in this agreement required the loss of Charging Party's seniority or that he be required to complete another probationary period. Stated differently, there is nothing in the 2018 Agreement that would require an employee to forfeit all his seniority if his position is removed from the unit.

Consequently, we believe that the Union breached its duty of fair representation when it would not file a grievance over Charging Party's November 6, 2017 loss of seniority and reclassification as a probationary employee.

With respect to Charging Party's contention that the Union breached its duty of fair representation when it would not file a grievance over his December 14, 2017 discharge, we also find the ALJ"s Decision to be in error. In his Decision, the ALJ noted that "given that a Charging Party must show a contract violation by an employer in order to prove a duty of fair representation claim based on a union's handling of a grievance, there is no corresponding, and actual, contractual violation identified herein." Contrary to the ALJ's contention, however, the record establishes that Charging Party argued that he was not properly classified as a probationary employee and that the Employer did not have just cause for his discharge under Article 5 of the Agreement. That is, he contends that he was not guilty of the offense for which he was discharged and, even if he was guilty of some offense, such would not justify his discharge. In connection with this, there is no dispute that Charging Party was first employed by the City in 1997, that he was first employed in a bargaining unit position in 2013, that he had no discipline on his record prior to his discharge and that Director Baum referred to him as an excellent employee. Given Charging Party's years of service, we think it is likely an arbitrator would agree that his discharge was not for just cause.

Although the ALJ further notes that the "record is not clear however, whether Charging Party actually did communicate his desire to Postal that his termination be grieved," we believe the record is sufficiently clear to establish that Charging Party did communicate his desire to the Union that his termination be grieved and that, in response, Union Representative Postal told him

to contact his former representative, the FOP (Tr. 69-70). See *Quinn v POLC*, 456 Mich 478 (1998).

Finally, although the POAM argues in its brief that Charging Party had no right to arbitrate a discharge grievance because he was a probationary employee, Charging Party should not have lost his seniority in 2017 and should not have been classified as a probationary employee. Consequently, the POAM should have filed a grievance over his discharge in December 2017 alleging that the discharge was not for just cause.

After reviewing the record, we believe, contrary to the ALJ, that, subsequent to its certification, the Union treated Charging Party with hostility and, at the very least, engaged in behavior that constituted inept conduct undertaken with little care or with indifference to the interests of Charging Party. The ALJ's Decision with respect to Case No. CU18 C-005 is therefore reversed in its entirety and the case is remanded to the ALJ for issuance of an appropriate cease and desist order.

With respect to the issue of damages associated with Charging Party's discharge, although we are cognizant of the requirements of the Court of Appeals' decision in *Goolsby v. City of Detroit* cited above, we find it appropriate to remand the case to the ALJ for the purpose of issuing an Order recommending that the City of Grayling and the POAM arbitrate the merits of Charging Party's discharge pursuant to Article 4 Grievance Procedure of the collective bargaining agreement. The City and the POAM are to equally share the cost of the Grievance Arbitration. The POAM should further pay the cost of Charging Party's Representative for the Grievance Arbitration. The selected Grievance Arbitrator will commence the arbitration hearing no later than September 30, 2020 with an award issued no later then October 31, 2020. Any costs associated with MCOLES re-certification shall be paid by the City.

Should the City fail to consent to arbitration, the Commission will, in accordance with the *Goolsby* decision, require the Union to pay Charging Party for all damages (back pay minus mitigation).

Although our dissenting colleague argues that we should enter an order consistent with the National Labor Relations Board's decision in *Alamillo Steel*, we must respectfully disagree. In *Hurley Medical Center*, 31 MPER 41 (2018), we recently noted that, while federal precedent under the NLRA is often given great weight in interpreting PERA, at least where PERA's language is identical to that of the NLRA, MERC is not bound to follow "every turn and twist" of NLRB case law. *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co Health Dep ' t*, 1993 MERC Lab Op 901, 906. This is especially true where NLRB precedent conflicts with that of the Commission, the Michigan Courts or with other NLRB precedent. See *Kent County*, 21 MPER 61, 221 (2008); *Seventeenth District Court (Redford Twp)*, 19 MPER 88 (2006); and *Michigan Technological Univ*, (no exceptions). In the present case, we believe that *Ironworkers Local Union 377 (Alamillo Steel)*, 326 NLRB 375 (1998) conflicts with the *Goolsby* decisions cited above as well as with other Board precedent such as *Rubber Workers Local 250 (Mack-Wayne II), 290 NLRB 817* (1988) and with our decision in *Police Officers Labor Council*,

12 MPER 30039 (1999). This notwithstanding, on June 26, 2020, the NLRB's General Counsel issued Memorandum GC 20-09. The Guidance Memorandum instructs Regional Directors to urge the Board to reverse *Alamillo Steel* and notes that :

> The unduly high and difficult standard imposed on the General Counsel in these cases has prevented wronged employees from achieving not only make whole relief, but often, any relief at all, thereby permitting this type of illegality with impunity.
> Thus, it is clear that this outdated standard should be abandoned…

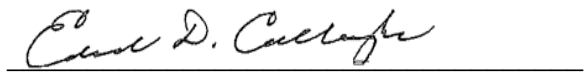
We agree with the NLRB's General Counsel and decline to follow a standard that permits "illegality with impunity."

We have also considered all other arguments submitted by the Parties and conclude that they would not change the result in this case.

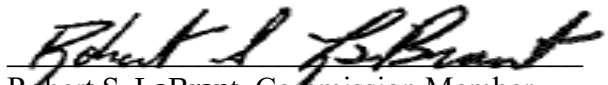
ORDER

The unfair labor practice charges are disposed of in accordance with the foregoing.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Edward D. Callaghan, Commission Member



Robert S. LaBrant, Commission Member

Issued: August 11, 2020

Separate Opinion of Samuel R. Bagenstos, Commission Chair.

I agree with my colleagues on some aspects of this case, and I disagree with them on others. I file this separate opinion to set forth my position.

1. The Unfair Labor Practice Charge Against the Employer

Although I find the matter a close one, I agree with my colleagues that Hatfield did not establish that his transfer to the police side of the department constituted anti-union discrimination or unlawful interference, restraint, or coercion in violation of PERA. The timing of the transfer is indeed suspicious, and that is what makes the matter a close one. But the employer offered nondiscriminatory reasons for the transfer – notably, a supervisory restructuring prompted by morale issues within the fire side of the department, and the budget-driven need to reduce the number of assistant chief positions following the restructuring. Based on the testimony at the three-day ALJ hearing, I believe that a finding of anti-union animus may have been *supportable*. But it was not *compelled*. Judge Calderwood "saw the witnesses, and we did not." *Grand Rapids Employees Independent Union and Tatyana Ford*, 33 MPER ¶ 41 (2020). Substantial evidence supports his conclusion that the employer's story was more credible. See *id.* ("Questions of motive rest significantly on the credibility of witnesses. That is particularly true where, as here, reasonable factfinders could draw multiple, conflicting inferences from the testimony.").

After Hatfield was transferred to the police side of the department, the City placed him at the bottom of the seniority ladder. In my view, that decision was quite likely a violation of the collective bargaining agreement. The agreement had at that point expired, but its relevant terms remained in force. See *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage*, 134 Mich App 466, 472; 352 NW2d 284, 287 (1984) ("At contract expiration, those 'wages, hours, and other terms and conditions of employment' established by the contract which are 'mandatory subjects' of bargaining survive the contract by operation of law during the bargaining process."). Under Article 18, Section 5(a) of the agreement, seniority was to be calculated "from date of [Michigan Commission on Law Enforcement Standards] certification as activated with the City of Grayling." And it appears to be uncontested that Hatfield received and activated his MCOLES certification earlier than did Brock Baum or Travis VanDeCasteele, two workers who were placed above him on the seniority list.

Not incidentally, the circumstances surrounding Hatfield's loss of seniority also give off a strong odor of favoritism. See my colleagues' opinion at page 5 ("The Fire Chief then went on to list seniority within the Department's two divisions initially stating that for the Police Division, the order was Director Baum, Clough, Detective-Sergeant Mike Grossberg, Charging Party, Brock Baum (the Director's son), and finally Travis VanDeCasteele. Director Baum indicated that the

order was wrong, and that Charging Party was the lowest seniority officer because 'he just came over.'").

By treating Hatfield as a probationary employee following his transfer, the employer also likely violated the CBA. Under Article 3, Section 1 of the agreement, Hatfield should not have been treated as a probationary employee following his transfer to the police side, because more than six consecutive months of employment had elapsed since his "last hiring date" as defined in the contract. The same answer appears to follow under Article 3, Section 3's special rule for workers who receive Michigan Commission on Law Enforcement Standards certification during their time of employment: "Employees currently employed in the Public Safety Department, who become MCOLES Certified, and [are] assigned police officer duties, shall be on six months (6) probation." Hatfield received his MCOLES certification in May 2014, and began to be "assigned police officer duties" on a fill-in basis shortly thereafter, well more than six months before his fall 2017 transfer to serve as a full-time employee on the police side.

And if Hatfield was not properly understood as a probationary employee, the agreement's just-cause provision should have applied to his termination. Determinations of just cause are generally within the province of an arbitrator, and I am not confident how the CBA's provision should have applied in this case. Hatfield's misconduct, involving both lawbreaking and dishonesty, was plausibly serious, especially for a police officer. That fact might support a conclusion that the employer had just cause for termination. But Hatfield did apparently have an unblemished disciplinary record during many years of employment with the City of Grayling. And the circumstances of his termination, as I have indicated, raise serious questions of favoritism. Those facts would support a conclusion that the termination lacked just cause. I am not confident of the ultimate answer. But at a minimum the treatment of Hatfield as a probationary employee, stripped of his just-cause protection, seems to me quite likely a violation of the contract.

It is a long-established principle, however, that violations of a collective bargaining agreement do not, in and of themselves, constitute unfair labor practices. See, *e.g.*, *City of Detroit (Department of Transportation) and Amalgamated Transit Union, Local 26*, 33 MPER ¶ 48 (2020). And again, I see no basis for overturning Judge Calderwood's conclusion that the denial of seniority and termination were not motivated by union activity. Under our labor law, workers must look to their collective bargaining representatives to protect them against generalized favoritism or arbitrary employer conduct. Although I think it is likely that the City of Grayling's treatment of Hatfield fits that description, I do not believe that we can offer him a remedy against his former employer.

2. <u>The Duty of Fair Representation Claim Against the Union</u>

Like my colleagues, I believe that the union breached its duty to fairly represent Hatfield. Indeed, it is precisely because workers rely on their unions to protect them against favoritism and arbitrary employer conduct that the duty of fair representation is so important.

The basic premise of our labor law is that workers will often find themselves in a stronger bargaining position if they can join together than if they must negotiate separately . Chief Justice Charles Evans Hughes explained the point when he described "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer" as "a fundamental right." *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 33 (1937). Workers decided to join together in unions, he said, "out of the necessities of the situation":

> that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

Id.

Our Public Employment Relations Act, enacted ten years after *Jones & Laughlin*, rests on the same premise. It guarantees public employees the right to "[o]rganize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice." MCL 423.209(1)(a).

Our Legislature recognized public employees' fundamental right to join together in unions for mutual aid and protection. But a necessary consequence of that right is that the union must fairly discharge its responsibility to the workers it represents. As the U.S. Supreme Court explained, "the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele v Louisville & NR Co*, 323 US 192, 202 (1944).

PERA thus sets up a bargain: "The union speaks for the member. It makes a contract of employment on his behalf. The union offers its member solidarity with co-workers, expertise in negotiation, and faithful representation. In exchange, the member pays his union dues, and gives his support and loyalty to the union." *Lowe v Hotel & Rest Emp Union, Local 705*, 389 Mich 123, 145; 205 NW2d 167, 177 (1973). When workers choose to be represented by a union, they recognize that the bargain is a good one for them – that they have more bargaining power when they stand together than when they remain apart. But the union has a correlative responsibility. As our Supreme Court has said, "[i]n many ways, the relationship between a union and its member is a fiduciary one. Certainly, it is a relationship of fidelity, of faith, of trust, and of confidence." *Id.*

To be sure, we must accord a union a very wide discretion in carrying out its responsibilities. When employees decide to join together, they necessarily give up the

opportunities some of them might have to make individual bargains with their employers at the expense of their coworkers. And that means that the union will not always give each and every individual worker what that worker wants. If employees find that their chosen representative is not adequately serving them, the principal response our law provides is democratic: They can vote for a different union, or vote to abjure collective representation altogether. The U.S. Supreme Court explained the point shortly before our Legislature adopted PERA (apologies for the masculinist language): "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." *JI Case Co v NLRB*, 321 US 332, 339 (1944).

Applying these principles, both the Commission and the Michigan courts have rightly erected a very high bar to establishing a violation of the duty of fair representation. Just this year, we reiterated that "[a] union has considerable discretion to decide how—and even whether—to proceed with a grievance" and that "[a] union's decision on how to proceed with a grievance is lawful as long as it is not so far outside a wide range of reasonableness as to be irrational." *City of Detroit (Department of Transportation) and Amalgamated Transit Union, Local 26*, *supra*. In *Lowe*, 389 Mich at 146; 205 NW2d at 178, our Supreme Court said that the union's "regard for the good of the general membership" vests it "with discretion which permits it to weigh the burden upon contractual grievance machinery, the amount at stake, the likelihood of success, the cost, even the desirability of winning the award, against those considerations which affect the membership as a whole."

Although the bar is exceedingly high, I believe that Hatfield has cleared it here. The union's failure to file a grievance when Hatfield was stripped of his seniority, assigned a new probationary period, and terminated without the benefit of just-cause protections seem to me to be exactly the sort of "arbitrar[y]" and "inexplicable" conduct that violates the duty of fair representation under the precedents we must follow. See *Goolsby v City of Detroit*, 419 Mich 651, 680; 358 NW2d 856, 871 (1984) *(Goolsby I*).

Not only does it seem likely that the stripping of seniority and the new probationary period violated the CBA, but the union's reasons for failing to press a grievance were plainly erroneous. POAM Business Agent Paul Postal refused to file a grievance because he concluded that there was "nothing he [could] do until we have that signed contract in place" following the expiration of the 2014 agreement. Decision and Recommended Order at 10. As my colleagues demonstrate, that was incorrect. The substantive provisions of the former CBA continued in effect following its expiration, until the new agreement was ratified.

Moreover, when Postal refused to grieve Hatfield's termination, he did so because he concluded that, because the matter arose under the 2014 agreement, it was "an FOP issue." Decision and Recommended Order at 14. Postal urged Hatfield to call the FOP's business agent. *Id.* But although the FOP had been the collective bargaining representative that had signed the

2014 CBA, POAM took over responsibility for administering that contract when it won the May 2017 representation election. It was plainly wrong for Postal to refer Hatfield to the FOP, which had no continuing responsibility for the bargaining unit.

Reviewing the record, I conclude that Postal's conduct goes well beyond mere negligence. He persistently refused to pursue Hatfield's rights under the CBA terms that remained in effect. And he did so not on the basis of any minimally plausible interpretation of the contract, or any even slightly colorable judgment about the tradeoffs that attend to managing a collective bargaining relationship. Instead, he did so based on the plainly incorrect premise that the CBA did not even apply. His actions clear the very high bar of "inept conduct undertaken with little care or with indifference to the interests of those affected," undertaken with "extreme recklessness or gross negligence." *Goolsby I*, 419 Mich 651 at; 358 NW2d at 870.

3. The Remedy for the Breach of the Duty of Fair Representation

With respect, I cannot agree with the remedy my colleagues order.

Section 16(b) of PERA governs our remedial decisions. That section provides that, when we find that a person has committed an unfair labor practice, we "shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act." MCL 423.216(b). It also provides that we may not "require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause." *Id.*

I read this provision as consistent with the basic rule of remedies in our legal system—that a remedy should, insofar as possible, restore the victim to the position they rightfully would have occupied in the absence of the wrongdoer's violation of law. That is the "affirmative action … as will effectuate the policies of this act." The Michigan courts have endorsed that reading. See, *e.g.*, *Lansing Fire Fighters Union Local 421 v City of Lansing*, 133 Mich App 56, 72; 349 NW2d 253, 260 (1984) (PERA remedy should "place the parties in the position they were in before the unlawful act occurred").

Here, we cannot order Hatfield's reinstatement, for at least two reasons. First, we have not found any unfair labor practice committed by the City. And our remedial jurisdiction under Section 16 extends only to those persons whom we have found to have violated the statute. We may impose a remedy on the union, but not on the employer. Second, we simply do not know whether there was "cause" to discharge Hatfield. As I explained in the first section of this opinion, that is a matter that is very much in doubt, and one that should, if possible, be decided by an arbitrator in the first instance.

The same questions about the existence of "cause" mean that we cannot, at this stage, impose a back-pay obligation on the union. Section 16 makes clear that neither a reinstatement nor a back-pay remedy is permitted if the charging party was terminated for cause.

So how can we restore Hatfield to his rightful position? In similar circumstances, the National Labor Relations Board has ordered offending unions to initiate the grievance process they would have initiated had they complied with their duty of fair representation in the first place. In a recent case, for example, the Board ordered the union "to promptly request that the Employer consider the class action grievance and, if the Employer does so, to process the grievance in accordance with the collective-bargaining agreement between the National Union and the Employer, including whatever settlement discussions or proposals may be consistent with the parties' processing of the grievance." *Am Postal Workers Union Local 238 (United States Postal Serv) & Jana Kerley*, 369 NLRB No 87 (May 22, 2020). But because the union would have had the opportunity, had it properly initiated the grievance process, to decide not to pursue the grievance all the way up the chain to arbitration, the Board has emphasized that the union retains the "discretion, consistent with its fiduciary duty of fair representation, [to] decide in good faith whether to pursue the grievance to arbitration." *Id.*

The Board has also recognized that the employer, who is not bound by an order against the union, might refuse to process the grievance. If the employer does not cooperate, the Board has said, the union will be liable to make the injured employees "whole," but only "if the General Counsel shows in compliance proceedings that a timely pursued grievance would have been successful in arbitration." *Id.*

The Board's approach, which was first articulated in *Iron Workers Local Union 377, Intl Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (Alamillo Steel Corp.)*, 326 NLRB No 54 (1998), properly restores injured workers to their rightful position. Given the similarities between the remedial provisions of the National Labor Relations Act and PERA, I would adopt the Board's *Alamillo Steel* approach in cases in which we find that a union has breached its duty of fair representation by failing to process a grievance.[2]

[2] My colleagues simply assert that *Alamillo Steel* conflicts with our jurisprudence, but they never offer an explanation to support that assertion. By contrast, I have demonstrated that the *Alamillo Steel* approach comports with the text of PERA and the rightful-position standard for PERA remedies adopted in *Lansing Fire Fighters*. As I show in text, my colleagues' approach conflicts with PERA by potentially giving a windfall to Hatfield, and by potentially conflicting with Section 16's "discharged for cause" language. If Hatfield was not injured by the breach of the duty of fair representation, we cannot give him a compensatory remedy. Rhetoric about "illegality with impunity" does not change that baseline legal principle. Nor do I accord any particular weight to the recent action of the NLRB's General Counsel. The *Board* has not backed away from *Alamillo Steel*. Rather, the NLRB's General Counsel has simply directed his staff to find a vehicle in which to *ask* the Board to reconsider that decision. Until the General Counsel's staff does so, and the Board endorses the General Counsel's position, the legal effect of *Alamillo Steel* stands unimpaired.

My colleagues go significantly beyond *Alamillo Steel*, however. Their remedy places Hatfield, not in the position he would rightfully have occupied in the absence of the union's breach, but in a *better* position than he would rightfully have occupied. As a result, the remedy serves to punish the union, not to make Hatfield whole.

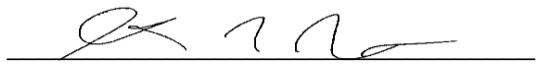
My colleagues' remedy achieves this result in two ways. First, it requires the union not just to initiate the grievance process but to pursue it all the way through arbitration. But even if the union had timely initiated the grievance process, it would not have been required to pursue the grievance through arbitration. That is true in the ordinary case, as the Board's *United States Postal Service* decision explains. And it is especially true here, because the relevant conduct occurred after the expiration of the collective bargaining agreement that the employer violated. As I have explained, the *substantive* provisions of the CBA "survive[d]" by "operation of law." *Local 1467, Intern Ass'n of Firefighters*, 134 Mich App at 472; 352 NW2d at 287. And the grievance provisions also survived—with one crucial exception. As the Michigan Supreme Court has held, a provision requiring arbitration is special. Because arbitration is peculiarly a matter of consent, an arbitration provision is the rare requirement that does *not* survive the expiration of a collective bargaining agreement. See *Gibraltar Sch Dist v Gibraltar MESPA-Transportation*, 443 Mich 326; 505 NW2d 214 (1993) (following the U.S. Supreme Court's holding in L*itton Fin Printing Div, a Div of Litton Bus Sys, Inc v NLRB*, 501 US 190 (1991)). Had the union grieved Hatfield's transfer and termination at the time, it simply *could not* have taken the matter all the way to arbitration, because there was no arbitration agreement in effect. Therefore, I do not believe that we have the power to order the union to arbitrate the matter now.

Second, if the employer refuses to cooperate with the remedy, my colleagues order the union to pay Hatfield back pay minus mitigation. One wonders why the employer would choose to cooperate in such circumstances. A refusal, after all, would not harm the employer one bit, but it would automatically saddle the union with a large debt and thereby weaken the entity that might otherwise serve as a check on its management decisions. More to the point, as the Board has recognized in its *Alamillo Steel* jurisprudence, there is no basis for providing back pay to an employee absent a showing that the breach of the duty of fair representation in fact resulted in the denial of pay to that worker. That is why the Board has required the union to provide a monetary remedy only when the general counsel can establish "that a timely pursued grievance would have been successful in arbitration."

To make the equivalent showing here, Hatfield would have to establish that (a) the just-cause provision of the collective bargaining agreement should have applied to him, and (b) his termination lacked just cause. As I have said above, I am fairly confident he can establish the first of these propositions, but I am far less confident he can establish the second. Absent such a showing, there would be no basis for an order of back pay.

I would thus enter an order consistent with the Board's decision in *Alamillo Steel*. To the extent that the majority's order departs from that approach, I respectfully dissent.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Samuel R. Bagenstos, Commission Chair

Issued: August 11, 2020

TRUE COPY

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF GRAYLING,
Public Employer-Respondent in Case No. C18 C-022; Docket No. 18-005696-MERC,

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Respondent in Case No. CU18 C-005; Docket No. 18-005697-MERC,

-and-

TODD E. HATFIELD,
An Individual Charging Party.
_____/

Appearances:

Cohl, Stoker, and Toskey, P.C., by Mattis D. Nordfjord and Courtney A. Gabbara, for the Public Employer

Christopher Tomasi, Police Officers Association of Michigan, Assistant General Counsel, for the Labor Organization

Manda L. Danieleski, PLLC, by Manda L. Danieleski, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On March 16, 2018, Todd Hatfield (Charging Party), filed the above captioned unfair labor practice charges against his former employer, the City of Grayling (City or Employer) and the Police Officers Association of Michigan (POAM or Union). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, these cases were assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, formerly the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). The charges were consolidated pursuant to Rule 164 of the Commission's General Rules, R 423.164, 2002 AACS; 2014 AACS. Based upon the entire record, including the transcript of hearings held on November 7, 8 and 9, 2018, and the exhibits admitted into the record, I make the following findings of fact, conclusions of law and recommended order.

Charging Party's initial claim against the Employer makes several allegations in support of its overall contention that the Employer "acted with an anti-union animus and discriminated" against him when it demoted and later terminated him as retaliation for his union activity. The charge made additional claims which will be discussed in more detail herein. In the charge against the Union, Charging Party alleges that the Union breached its duty of fair representation with respect to both the demotion and eventual termination.[1]

On May 29, 2018, POAM filed a motion for summary disposition under Rule 165. The City filed its own motion seeking dismissal on June 1, 2018. Charging Party filed its response to the motions(s) on July 13, 2018. Reply filing(s) were received on July 20, 2018. In an interim order issued on September 12, 2018, the Respondents' motions were denied, and this matter was set for hearing.

Findings of Fact:

Charging Party began his employment with the City of Grayling as a volunteer, paid on-call firefighter in August of 1997. At that time, the City's Police Department and Fire Department were separate departments. The City's full-time law enforcement were part of a bargaining unit represented by the Fraternal Order of Police (FOP); the City's firefighters were unrepresented.

In January of 2009, the City hired Douglas Baum as the Chief of Police. In 2010, the City Council appointed Baum to the position of City Manager; he remained Chief of Police as well. Russell Strohpaul was the City's long-time Fire Chief, albeit on a half-time basis; Strohpaul also served as the City's Director of Public Works.

In 2013 the City merged the Police Department and Fire Department into the Department of Public Safety (Department). Baum, the Chief of Police and City Manager at the time, was appointed Public Safety Director (Director) of the Department and oversaw both the Police Division and Fire Division; he remained City Manager as well.

Sometime around the same time as the merger of the two divisions, the Department received a contract from the Michigan Department of Military and Veterans Affairs to provide fire coverage for nearby Camp Grayling, a local army base. This contract provided funding that allowed the Department to hire several former on-call firefighters into permanent positions, including Charging Party, who on October 1, 2013, assumed the role of Assistant Fire Chief. Also, around this time, the full-time fire fighters, including Charging Party as Assistant Fire Chief and Steve Eddy, a Deputy Fire Chief/Fire Marshall, came to be a part of the FOP

[1] The initial charge filed in Case No. CU18 C-005, also listed the Fraternal Order of Police (FOP) as a respondent. On April 30, 2018, the FOP filed a Motion for Summary Disposition under Rule 165 of the Commission's General Rules, R 423.165, 2002 AACS; 2014 AACS. On May 9, 2018, Charging Party withdrew its charges as they related to the FOP. As such, the FOP is no longer a party to this proceeding.

bargaining unit alongside the law enforcement officers.[2] Eddy began his employment with the City's Fire Department as a volunteer part-time firefighter. Sometime in 2012 or 2013, Eddy became the Department's Fire Marshal and would also eventually become a Deputy Chief as well.

The contract between the FOP and the City was effective from sometime in 2014 through June 30, 2017. Article 3 of that contract, entitled "Probation Period" stated in Section 1, "All employees shall be probationary employees during their first six (6) consecutive months of employment since their last hiring date. The term "last hiring date" was defined as the "date upon which time the employee reported for work at the instruction of the Employer since which time he/she has not quit, retired or been discharged." Section 3 of that article, entitled "Newly Certified Employees" applied to those individuals who receive Michigan Commission of Law Enforcement Standards (MCOLES) law enforcement certification, and states in the relevant part:

> Employees currently employed in the Public Safety Department, who become MCOLES Certified, and assigned police officer duties, shall be on six months (6) probation...
>
> * * *
>
> If, at any point during this probationary period, the Employer determines the employee has failed to successfully complete the probation the employee shall be returned to their original classification, shift and assignment without loss of seniority.

The Employer's decision whether to deny regular status following the probationary period in either Section 1 or Section 3 could not be challenged by the contract's grievance procedure as set forth in Article 4 of the contract.

Article 9, entitled "Hours of Work and Overtime" provided in Section 1 that "hours of work and work schedules" would be set by the Department's Director. Section 6, stated in the relevant part that overtime opportunities would be "offered on a seniority basis within that classification, with the highest seniority employee in the class being offered the overtime first."

Article 18, Section 5, provides the contract's layoff and recall procedure. Subsection (a) covers the Police Division, while subsection (b) addressed the Fire Division. For either division, the least senior employee would be laid off first. For purposes of layoff in the Police Division, seniority was based on the date of MCOLES certification as activated with the City.

Sometime in early 2014, the City sponsored Charging Party to attend the Kirtland Regional Police Academy (Academy) at nearby Kirtland Community College. In connection with the sponsorship, the City covered the costs of the ten-week program, including tuition and related equipment expenses, in addition to maintaining his full-time status and benefits while he

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[2] While everyone agreed that the Fire Division's command officers, with the exception of Fire Chief, were represented by FOP, the first contract following the creation of the Department excluded the positions of Deputy Chief and Assistant Chief in the recognition clause. The record does not provide clarification regarding this apparent inconsistency.

attended the academy. Charging Party graduated from the Academy in May of 2014. Charging Party received his MCOLES certification on May 21, 2014. Charging Party continued in his role as the Assistant Fire Chief, but also acted as a backup sworn law enforcement officer covering shifts due to vacations or other absences.

Charging Party testified that in the summer of 2017, members of the bargaining unit were discussing contacting other unions in what appears to have been an effort to change the unit's bargaining representative. According to Charging Party, around this same time, he was in Director Baum's office where the two discussed the topic of unions. Charging Party testified that Baum "brought up non-union and didn't feel that we needed a union because we had good benefits and he took care of us and gave us everything he could..." Charging Party further claimed that during that discussion the Director "acknowledged that he shouldn't be talking union issues with me." Baum, in describing the encounter, claimed that Charging Party came to him with "concerns" telling the Director that "the membership were looking at what their options were..." Further describing the conversation, Baum stated at the hearing:

> I said, obviously one option is you don't have a union, the other option would be you, the membership would vote on a different union or you stay with the one that you have. But I said, I can't negotiate with you individually, I can't have the union, that type of union discussion with you as far as what to do in that situation, I said that's up to you and other membership.

Sometime following the above conversation, members of the bargaining unit met with the Respondent Union and another labor organization to discuss representation. Representation proceedings were filed with the Commission, Case Nos. R17 C-033 and R17 C-039, and on May 11, 2017, an election by mail was conducted in which the bargaining unit could choose between the FOP as the incumbent union, POAM, Police Officers Labor Council (POLC), or no union at all. The Respondent Union won the ballot and was certified as the bargaining representative on May 23, 2017, for a unit described as, "All regular full time and part time plus police officers and public safety officers, Sergeant, Deputy Chief and Assistant Chief of the public safety department."

Shortly after the Respondent Union's certification, the Union and the Employer began negotiations for a successor contract. Charging Party testified that he participated in negotiations initially and attended meetings with Paul Postal, the Union's Business Agent assigned to the bargaining unit, to discuss the upcoming contract.

Unbeknownst to Charging Party or Eddy, members of the unit had discussed removing the two command officers from the unit. Sometime in June of 2017, the membership met, sans Charging Party and Eddy, voting to remove the two Chiefs from the unit. Director Baum testified that he was made aware of the Union's position that it did not want the two Chief positions to remain in the unit during one of the telephone conference calls held between the Employer, the FOP, POLC, and the Respondent Union regarding the election petitions filed in Case Nos. R17 C-033 and R17 C-039.

There is no indication that either Charging Party or Eddy were aware of the Union's desire to remove them from the unit until after the vote on the issue in June of 2017. Charging Party testified that he first learned of his and Eddy's removal from Postal at a bargaining session at the City Hall sometime in July or August of 2017. After that meeting Charging Party and Eddy met with Postal to discuss their options regarding representation. According to Charging Party, Postal told the two that they could form a "command union." Eddy and Charging Party later met without Postal and agreed that they would try to form a command union.

Charging Party and Eddy would soon contact John Stidham with the POLC in order to form a command union. Sometime shortly thereafter, both Charging Party and Eddy went to Director Baum's office to let him know they would be forming a command union. Charging Party, when explaining why they did that, testified, "[j]ust out of respect, just so he wasn't surprised when the POLC contacted him."

Around this same time period the Employer and the Union continued bargaining over their first contract. Director Baum testified that in the end of June or early part of July he drafted a document that would eventually serve as the basis for a tentative agreement (TA) between the two. That document was admitted into the record. The TA appears to indicate that Postal agreed to its terms on August 2, 2017. That agreement's recognition clause clearly expresses an intention to exclude the positions of Assistant Fire Chief from the unit.[3] Also relevant to this dispute, the TA appears to indicate that the Respondents agreed to an extension of the probationary period from six-months to one year from the "last hiring date." Otherwise that article's language appears unchanged from the prior contract with the FOP. The TA also appears to indicate that the assignment of overtime would remain done by seniority in the classification – the same manner under the FOP contract. Lastly, for purposes of this dispute, the TA also indicates that the Respondent's agreed to a change with respect to layoff language. Under the TA, the parties agreed that Article 18, Section 15(a) would be changed to:

> Police Classifications and Fire Fighters layoff and recall. In the event of a layoff, part time employees cannot do any union shift work [sic] the least senior employees shall be laid off first and so on up the Seniority List.

No testimony was provided at the hearing, to explain what the above, and clearly poorly worded, change meant, nor was there testimony to explain how seniority for purposes for layoff and recall would be established, i.e., would it be the same as under the FOP contact from the date of MCOLES certification, or would it be by seniority in classification.

That document would eventually be encapsulated in a collective bargaining agreement effective from July 1, 2017, through November 30, 2018. That contract was executed in late January of 2018 by the parties. Ultimately, and relevant to this matter, the TA's provisions regarding probationary period and assignment over overtime carried over to the executed contract. The contract's layoff and recall provisions do not however mirror what appears the

[3] On September 13, 2017, the Employer filed a unit clarification petition, UC17 I-008, in which it sought Commission action to approve the removal of the two positions. That case was never referred to an ALJ for a hearing and appears to have been uncontested by POAM. For reasons not known, UC17 I-008, remained in active status with the Commission until, February 2, 2019, at which time the petitioner, the Employer, withdrew it.

parties agreed to in the TA. First and foremost, the new contract explicitly states probationary employees would be the first employees removed were reductions in their classification necessary. Next, the contract provided that reductions in force as a result of layoff would be based on "inverse classification seniority." The clause that seniority for police officers was determined by MCOLES certification date contained in the prior contract is absent from this contract.

The record indicates that Stidham contacted Director Baum to discuss the formation of the command unit. In October of 2017, Stidham and Director Baum exchanged emails and set up a meeting for October 12, 2017, to begin negotiating a new contract. For reasons set forth below that meeting never occurred.

On October 10, 2017, Charging Party was called into Director Baum's office where he was told that his position as Assistant Fire Chief was being eliminated as a result of restructuring the Department. Director Baum testified that around this time the Department was experiencing "problems" within the Fire Division which he described as "morale issues." Director Baum attributed the problems to the Division's current command structure which was comprised of a part-time Chief in Strohpaul and two assistant Chiefs in Charging Party and Eddy. According to the Director, he discussed the issues with the City's Mayor and Chief Strohpaul before ultimately deciding that Chief Strohpaul would assume the role of Chief on a full-time basis.

Director Baum went on to explain that with Chief Strohpaul going full-time the Fire Division would now have three full-time chief positions and that such a staffing level could not be sustained under the Department's contract with the Michigan Department of Military and Veterans Affairs, which only funded four full-time fire positions. Director Baum testified that the decision was made to layoff Charging Party because he was of lower seniority then Eddy.

At the same October 10, 2017, meeting where Charging Party learned his position was being eliminated, Director Baum offered him a position as a patrol officer effective October 16, 2017; Charging Party accepted the offer. As a result of the transfer, Charging Party's hourly wage was reduced one dollar an hour, but his bi-weekly schedule increased from 80 hours to 84 hours. Also, Charging Party would, by nature of his position as a patrol officer, once again be a member of the bargaining unit represented by the Respondent Union. Charging Party testified that he was not informed at this meeting that he would have to serve any probationary period following his acceptance of the new position.

Around the same time that Charging Party transitioned into the role of a full-time patrol officer, Amanda Clough, another patrol officer who had held the rank of Sergeant, was promoted to the rank of Deputy Chief. Eddy testified during the hearing that, while he could have approached Clough in order to continue pursing a command union, he did not do so, citing that

he was at that time seeking "other employment."[4]

On November 6, 2017, during a mandatory business meeting involving presumably the entire Public Safety Department, Director Baum asked Fire Chief Strohpaul to go over the recent changes in the Department's structure. Strohpaul proceeded to outline the various changes, including his transition to full-time, the promotion of Amanda Clough, and Charging Party's transition to a patrol officer. The Fire Chief then went on to list seniority within the Department's two Divisions initially stating that for the Police Division, the order went Director Baum, Clough, Detective-Sergeant Mike Grossberg, Charging Party, Brock Baum, and finally Travis VanDeCasteele. Director Baum indicated that the order was wrong, and that Charging Party was the lowest senior officer because "he just came over."

Charging Party testified that, both then and at the hearing, he believed he should not have been the lowest senior officer because his MCOLES certification date was earlier than both Brock Baum and VanDeCasteele. Charging Party addressed the issue with Jon Williamson, who was a Fire Sergeant as well as a Steward with the Respondent Union. Charging Party also contacted Postal and left a voicemail message in which he claims he asked that a grievance be filed on his behalf. Williamson testified that he then met with Director Baum to discuss the issue.[5] Director Baum testified that he had consulted with the City's Attorney as well as Postal regarding where on the seniority list Charging Party should be placed. According to the Director, "we viewed [it] as [going from] a non-union into a union position, he would be starting at the bottom..." The Director further testified that Postal had told him that were Charging Party placed anywhere else on the list, the Union would file a grievance. Charging Party testified that he verbally asked Postal to file a grievance over his placement on the seniority list. According to Charging Party, Postal replied that "he could not do anything because there was not a signed contract in place." Williamson testified that it was his belief that Charging Party could have filed a grievance. No grievance was ever filed.

Sometime that same month, Charging Party, who had been asking Williamson for a copy of the contract between the Respondents, finally received a draft agreement. According to Charging Party's testimony he immediately noticed the changes to the seniority provision as identified above.

In 2017, deer hunting season for regular firearms began on November 15, 2017. Sometime around this time, the Michigan Department of Natural Resources (DNR) was conducting aerial sweeps of Crawford County searching for possible deer-baiting violations on

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[4] Eddy's employment with the City ended in January of 2018 at which he time left voluntarily for employment with the State of Michigan. During the hearing, it was revealed that sometime following Eddy's leave from the City an investigation had begun into allegations that he had falsified records. Eddy testified that he was fearful of appearing at the hearing because he was of the opinion that the investigation into allegations against him was a result of his earlier submission of an affidavit he had signed and included in Charging Party's pre-hearing filings. Despite this fear, Eddy did appear and did testify. The undersigned makes no judgement regarding the nature of the allegations made against Eddy nor of his fears of retaliation as no evidence was admitted into the record; those issues appear irrelevant for purposes of this hearing, especially in light of the testimony provided by Eddy was either unopposed or otherwise duplicative or supportive of other matters already testified to by others.

[5] Although not entirely clear, Williamson's testimony in so far as stated that the discussion occurred "during a meeting we had with the POAM and the director" implies that Postal may also have been at the meeting.

both private and public land.[6] Those aerial sweeps identified two suspected illegal bait piles located on adjacent parcels of land; one owned by Charging Party, the other by his brother, Mike Hatfield. Those suspected bait violations were marked with GPS coordinates forwarded to DNR Conservation Officer (CO) John Paul Huspen and CO James Benjamin McAteer, IV.

CO Huspen went to Mike Hatfield's property on November 15, 2017, whereupon he spoke with the brother, viewed the bait pile and issued a misdemeanor ticket for excessive bait. Despite the fact that the two properties identified by the DNR's aerial sweeps were adjacent to each other, CO Huspen declined to go to Charging Party's property to investigate the second suspected illegal bait pile. CO Huspen, who testified that he knew Charging Party personally, when asked why he did not go to Charging Party's property, stated:

> Honestly, I wasn't really into trying to write a police officer, a fellow police officer a ticket, and I was hoping that after dealing with Mike, that Todd -- or Mike would talk to Todd and Todd would get the bait pile cleaned up.

That same day, CO Huspen went to the County's Courthouse to turn in the tickets he had written that day, including the one issued to Mike Hatfield. There CO Huspen approached then-sergeant Amanda Clough and explained to her that two suspected bait piles were identified, one on Charging Party's property and the other on his brother's, and that he, CO Huspen, and been to Mike Hatfield's property but did not go to Charging Party's property. Clough testified that she advised CO Huspen to take "enforcement action." Clough further testified that, given the nature of the conversation with CO Huspen, she believed there could still be pending action taken against Charging Party by the DNR and communicated the information to Director Baum. Neither she nor the Director confronted Charging Party at that time.

Also, that same day, CO McAteer send a text message to Detective-Sergeant Grossberg and let him know that the CO would be talking to Charging Party. The next day, November 16, 2017, CO McAteer, went to Charging Party's property arriving at approximately 9:40 am. According to the CO, when he arrived at the property, he found Charging Party in his garage processing a deer. After taking pictures of the deer and making note of its hunting tag, CO McAteer informed Charging Party that he was there about the bait pile.[7] CO McAteer testified that Charging Party "knew what I was talking about" and that he led the CO to the pile.

According to CO McAteer, when the two were walking to the bait pile, Charging Party made a point to tell him that he had not hunted over the bait pile. Charging Party also revealed to CO McAteer that it was his father who had placed the bait at the property. CO McAteer testified that he believed there to have been approximately 30 gallons of bait present; DNR regulations at the time limited the amount of bait to only 2 gallons at any given time. McAteer proceeded to take pictures of the bait pile testifying that after he was done, Charging Party

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[6] Deer baiting, while now banned in the Lower Peninsula, was allowed in 2017 in Crawford County, where hunters could begin baiting for deer as early as September 15, 2017. However, the amount of bait was strictly regulated by the DNR.

[7] CO McAteer testified that he was initially concerned that the deer may have been taken illegally near the bait pile. However, after interviewing Charging Party's daughter, the person to whom the hunting tag was issued, he concluded that the deer had not been taken illegally.

"became pretty emotional" and stated that if "he got any kind of citation, he was going to lose his job." It was after this that CO McAteer interviewed Charging Party's daughter regarding the deer that Charging Party had been processing. McAteer, in describing what he ultimately did, testified:

> So at that point I told Mr. Hatfield that I was going to give him an hour to clean up the bait site, I told him I would be back in an hour to verify that it was cleaned up; in the event it was not cleaned up, I was going to be issuing him a citation for over limit of bait.

McAteer, in explaining why he did what he did stated during the hearing:

> Every situation's a little bit different, Typically, yes, I would have issued a citation. What I took into consideration, there were a couple of things I took into consideration on this day: (1) He's a law enforcement officer who I have backed up on a couple of different things and we live in a small community, I took that into consideration. Secondly, when he mentioned that he was going to lose his job for getting a citation, that weighed pretty heavy on my decision-making process, We spoke in the past, and as I have said in the past, any time that someone might lose their job as a result of me giving them a citation, that's going to make me think a little bit harder on whether I'm going to issue that or not. For this case, I didn't find it justified to issue that citation.

McAteer then left the property and when he returned the bait pile had been removed. McAteer claimed during the hearing that he did inform Charging Party that Charging Party's employer had been notified of the situation.

Sometime after the above incident, Amanda Clough reached out to CO McAteer asking for more details regarding what had happened. According to CO McAteer, he told Clough that the pile had been cleaned up. Charging Party did not disclose his contact with CO McAteer to his Employer.

At the hearing Charging Party denied that he was responsible for the excessive amount of bait found at his property. Charging Party claimed that initially he was putting out bait at the property but that it never exceeded the legal limit. However, following his transition to patrol officer his shifts did not allow him to continue to do so and instead his father started baiting the property.

On November 30, 2017, Amanda Clough approached Charging Party and presented him with a letter dated November 28, 2017. Charging Party testified that Clough told him the letter was an acceptance of the police officer position and that he should sign it and return it to her. That letter, which Director Baum claimed was a form letter provided to new hires that he had created, stated as follows:

Dear Todd:

We are please to offer you a position as patrol officer with the City of Grayling Public Safety Department effective October 16th, 2017. As a patrol officer, you will be operating under the terms of the labor agreement between the City of grayling and the Police Officers Association of Michigan, Grayling Public Safety Unit, and you with report directly to the Deputy Chief.

By contract, you will be paid your negotiated wage of $26.52. You must serve a probationary period of twelve consecutive months from time of acceptance of the new position. Fringe benefits, vacation, and sick time are provided as defined under the Labor Agreement.

As a patrol officer for the City of Grayling, you are required to treat the citizens and guests of the city with the utmost respect and professionalism while performing your duties. You are also expected to suggest meaningful ways of improving the quality and efficiency of the Police Department and to give your total support to new and reasonable practices and procedure.

The letter was signed by Director Baum and had a spot in which Charging Party could sign his name to signify his acceptance of its terms.

Charging Party did not initially sign the letter, testifying that he was concerned with its terms, specifically that he would be a probationary employee. According to Charging Party, both Art Clough, a former employee, and Brock Baum, transferred into the position of patrol officer from the position of fire fighter and did not serve probationary periods. Amanda Clough testified that she believed when she was promoted to Deputy Chief she was placed in a probationary period. Charging Party took his concern with the letter to several people, including, Eddy, Williamson, Postal and Chief Strohpaul. Charging Party claims that he spoke with Postal by telephone regarding this letter sometime in the days following its receipt. In recounting that conversation, Charging Party testified:

> Anyways, I asked Paul what my options were, and he goes, do you need your job; I said yes, I need my job. He asked if had a family[sic]; I said, well, I'm divorced, but I do have two daughters, I told him I didn't feel comfortable signing the letter, I didn't feel I should be on probation again. I told him I felt there was a target on my back, Paul's advice to me was, this letter's already postdated from November, so you really only have 11 months left to do; he suggested I sign it, come to work, get in my patrol car, go do my job, fly under the radar, and the 11 months would go by fast.

Charging Party, in furtherance of his testimony regarding the above conversation, and in response to questions whether the two discussed the prior contract's enforceability, stated:

> So, he once again told me this is why we need to have a signed contract in place, and there's nothing he can do until we have that signed contract in place.

On December 6, 2017, Amanda Clough approached Charging Party while he was at the Fire Department working out on his day off and asked if he had signed the November 28, 2017, letter. Charging Party responded that he had not and that he wanted to talk to Director Baum first. Clough advised him that the Director was in a meeting but that he should be available soon. Approximately 45 minutes later Williamson appeared and told Charging Party that the Director wanted to see them in his office; at the same time Chief Strohpaul walked in where the two were and said the Director wanted to see him too. The three walked over to the Director's office where they found Director Baum, Deputy Chief Clough and the City Clerk Lisa Johnson waiting for them.

According to Charging Party, Director Baum began by saying the "this is going to be short and one-sided and it's being recorded." Following some further remarks, Baum asked Charging Party if he had any recent contact with law enforcement. Charging Party initially denied any contact, testifying at the hearing that he believed the Director was referring to contact with police officers. Director Baum then asked whether he had any contact with DNR Officers. At that point Charging Party claims he admitted that CO McAteer had come to his on house on November 16, 2017, and had checked "his deer" and "my bait pile" but that he had not been issued any citation. According to Director Baum's testimony, Charging Party initially said the CO was there to check the deer and that when specifically asked whether the CO had indicated he was there to check a bait pile, Charging Party responded that was not the reason for the visit but that the bait issue had come up later. Director Baum testified that following Charging Party's statement during the meeting that CO McAteer had not been on the property to check his bait pile, he told Charging Party that he would "have to check on that."

During this meeting Director Baum also asked about two earlier incidents; the first involving Charging Party's termination from a previous employer and, the second an incident regarding Charging Party's possible involvement in returning a game camera to a local sporting goods store that was different from the one he had originally purchased. According to Charging Party, the Director at one point told him that "you have no Union representation right now" because the contract with the FOP had expired and a new one had not yet been reached with the Respondent Union.

The meeting continued with Charging Party asking about his seniority status as well as what would happen if he did not sign the employment letter that he had been presented earlier. According to Charging Party's unrefuted testimony, at the end of the meeting Director Baum asked Charging Party why he should "keep him." Charging Party further testified that following his response, Director Baum then instructed him to sign the employment letter or he would be out of a job.

Charging Party claims that he and Williamson left the office to go get the letter which was still in Charging Party's mailbox in the officer's room. There Charging Party asked Williamson whether he had any choice in the matter. According to Charging Party, Williamson said he did not know. Charging Party, feeling as if he did not have a choice, signed the letter and gave it back to Director Baum.

As stated above, following the meeting, Director Baum instructed Clough to follow-up with CO McAteer regarding some of Charging Party's statements. Director Baum, explaining why he thought confirming Charging Party's statements that CO McAteer was there because of the deer and not the bait pile was important, testified:

> And that's why I wanted to clarify with the [Command Officer] what exactly – did he tell you that – or the [Command Officer] tell him he was there regarding the baiting, and he was; I afforded him the opportunity to tell me the truth, he did not.

Clough did contact CO McAteer; both Clough's testimony and McAteer's testimony indicates that that the Conservation Officer was clear in communicating the intent of his visit to Charging Party's property was to check the bait pile and that checking the deer was secondary and occurred as happenstance. Moreover, Clough revealed that McAteer informed her of Charging Party's statements regarding losing his job if he got into trouble. Testimony also revealed at this time that Charging Party had been borrowing Eddy's dump-trailer to transport bait to his property.

Following the meeting and follow-up information received from CO McAteer, Director Baum made the decision that Charging Party's conduct required that he be terminated. In explaining this decision, the Director stated that Charging Party was not truthful regarding his contact with CO McAteer, and that the Director considered that conduct to be insubordinate. Moreover, the Director, in describing the importance of being truthful stated at the hearing:

> [I]n law enforcement, a law enforcement [sic], you have to have integrity; if you don't have that, you're not credible, you can not go any – you can't go any further with criminal cases.

On December 14, 2017, Charging Party, accompanied by Williamson, again met with Director Baum at which time the Director told him he could resign or be terminated. As part of this choice, Charging Party testified that two documents were placed on the desk, one was a document entitled "Report of Disciplinary Action" dated that same day while the other was presumably a letter of resignation.[8] The Director then told Charging Party that he could take the two documents and discuss it with his Union representative. Williamson and Charging Party then left and went to another room where they, along with Detective Grossberg, discussed what Charging Party should do. At some point Grossberg called Postal and all of them spoke on speaker phone. Postal attempted to contact legal counsel but was unable to do so. He then reportedly suggested that they ask Director Baum for more time to make a decision or to accept a resignation in lieu of termination; both requests were denied. Postal reportedly told Charging Party that if he were to resign, he might be able to find a job with another police department but that if he was terminated finding another job in law enforcement would be difficult. Ultimately Charging Party chose to be terminated apparently under the belief that he could grieve the termination but not the resignation.

[8] The Report would come to be Charging Party's letter of termination and was signed by Director Baum.

The Report identified three portions of the Department's Policy 320, Standards of Conduct, allegedly violated by Charging Party. More specifically, the subsections of 320.5.9 referenced within the Report, identified the following as unacceptable and/or prohibited conduct by a police officer:

> (a) Failure of any member to promptly and fully report activities on his/her part or the part of any other member where such activities resulted in contact with any other law enforcement agency or that may result in criminal prosecution or discipline under this policy.
>
> * * *
>
> (h) Criminal, dishonest or disgraceful conduct, whether on- or off-duty, that adversely affects the member's relationship with this department.
>
> * * *
>
> (m) Any other on- or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this department, is contrary to good order, efficiency, or morale, or tends to reflect unfavorably upon this department or its members.

That Report went on to conclude by stating, "Due to Officer Hatfield's dishonest and insubordinate actions he is discharged from employment with the City of Grayling as of December 14, 2017."

Charging Party testified that later that same night he told Williamson he wanted to grieve his termination. Charging Party also claimed that the following day he emailed Postal telling him as well that he wanted to file a grievance to which Postal reportedly stated "it was an FOP issue." While other emails, as will be discussed further on were admitted into the record, this alleged email was not introduced at the hearing. In a lengthy email sent on December 18, 2017, to Jim Cross, another of the Union's Business Agents who was not assigned to Charging Party's bargaining unit but who Charging Party had met earlier, Charging Party provided a rough timeline of the events that led to his termination. In that email Charging Party clearly expresses a desire that a grievance be filed but that he does not know whether Postal has or will do so. Cross's response clearly reveals that, while having some knowledge of what occurred, he was generally confused as to the actual issues.

On December 19, 2017, Charging Party sent Postal an email. That email, while somewhat confusing and poorly worded, appears to reference the time period where he was laid off from the position of Assistant Chief and claims there "was a target on my back." The email concludes with Charging Party asking, "[i]s there nothing we can do [sic] I am confused and thought I had Union protection." Postal, presumably not understanding the initial email, responded that same day and wrote:

> I'm pretty sure this is an FOP issue under the old agreement. If you were still under the FOP agreement the business agent should have advised you what your options were. I would call him.

Ultimately, no grievance was ever filed challenging Charging Party's termination.

Discussion and Conclusions of Law:

Before addressing the actual arguments regarding the merits and allegations of these disputes, it is necessary to address the noticeable absence of witness testimony from Paul Postal, the POAM Business Representative assigned to the bargaining unit in question at all times relevant to this proceeding. Generally speaking, as the Commission stated in *Ionia County,* 1999 MERC Lab Op 523, citing *Ready Mixed Concrete Co v NLRB*, 81 F3d 1546, 1552 (CA 10, 1996), and more recently restated in *Detroit Public Schools (Heather Miller),* 30 MPER 2 (2016), "An adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if she 'may reasonably be assumed to be favorably disposed to the party.'" The preceding notwithstanding, Michigan Courts also recognize that "where a witness is equally available to either party, the presumption that the missing witness would testify adversely to any particular theory is not recognized." *Barrigner v Arnold,* 358 Mich 594 (1960), 603-605. Our Commission, in *Port Huron Area School District,* 28 MPER 45 (2014), considered the availability of witnesses not called and stated:

> Respondent is not required here to offer evidence to refute Charging Party' s claims. Inasmuch as the evidence offered by Charging Party was insufficient to establish a violation of PERA, Respondent was not obligated to offer additional testimony to refute Charging Party' s case. Further, had Charging Party viewed the testimony of Paul or Falk as necessary to its own case, the Association could have subpoenaed them as witnesses. *Southfield Pub Sch*, 25 MPER 36 (2011).

While not explicitly made part of the record, during off the record discussions, it was revealed by the Respondent Union's counsel that Postal was no longer employed as a Business Agent for POAM and that he was now employed by another labor organization. Throughout various witness testimony that are part of this record, inferences and references are made that Postal would not be testifying and that the parties were aware that he was no longer employed by POAM. Moreover, there is no indication that the Respondent Union, nor Charging Party for that matter, attempted to secure Postal's appearance at hearing, despite both being presumably equally capable of doing so by way of a witness subpoena.[9] Accordingly, in those instances, as discussed below, the undersigned is reluctant to ascribe the adverse inferences to all facts upon which Postal could have presumably testified to as requested by Charging Party.

[9] I note that Charging Party's counsel went to considerable effort to secure the appearance of Eddy at the hearing given the former employee's reluctance to testify due to possible criminal investigation into certain activities while he was employed by the Employer. Eventually, and not until the undersigned participated in a conference call with Eddy's attorney, of which all parties conceded and agreed to, did Eddy agree to testify.

Charge Against the Employer

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 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. *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 Tramp Auth,* 21 MPER 35 (2008). An implicit or explicit threat to terminate employees, reduce their wages or otherwise adversely change their working conditions because of protected activity violates Section 10(1)(a) of the Act. See *Keego Harbor,* 28 MPER 24 (2014), citing *Michigan State Univ*, 26 MPER 36 (2012) (no exceptions). In order to determine what actions violate Section 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.

Keeping the above in mind, one must be careful to accept that not all communications between an employer and employees regarding and/or even criticizing unions are unlawful; provided the information is factual information regarding the status of negotiations or its position at the bargaining table, and is communicated in a non-coercive manner and without disparaging the bargaining agent no violation will result. *MEA v North Dearborn Heights School District*, 169 Mich App 39, 45-46 (1988); *Jackson County*, 18 MPER 22 (2005).

Section 10(1)(c) of PERA makes it unlawful for a public employer to "[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." In order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act, a charging party must show: (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. The aforementioned analysis was first enunciated by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Line, Inc, 251 NLRB 1083 (1980),* enf'd 662 F2d 899 (CA 1, 1981) and approved by the United States Supreme Court in *NLRB v Transportation Management Corp*, 462 US 393 (1983). Under the *Wright Line* test, later adopted under PERA in *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983), it is only after a prima facie case has been established that the burden of proof shifts to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent

the protected conduct. 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.*

Inferences of animus and discriminatory motive may be drawn from competent circumstantial evidence, including, but not limited to, the timing of the adverse employment action in relation to the protected activity, indications that the respondent gave false or pretextual reasons for its actions, and the commitment of other unfair labor practices by the employer during the same period of time. *Keego Harbor,* supra. 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). Moreover, it is well established that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result of anti-union animus. See *Southfield Pub Sch*, 22 MPER 26 (2009) (A temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation).

The preceding notwithstanding, paramount to understanding the Commission's jurisdiction, one must remain cognizant that not all unfair, or even unlawful, treatment of its employees by a public employer violates PERA. The authority of the Commission is limited to the enforcement of PERA, and it cannot find an unfair labor practice unless it finds a violation of some provision of Section 10 of that Act. Absent a factually supported allegation that the employer interfered with, restrained, and/or coerced an employee in the exercise of Section 9 rights or retaliated against the employee for engaging in, or refusing to engage in, union or other activities of the type protected by PERA, the Commission has no jurisdiction to make a judgment on the fairness of the employer's actions. See, e.g., *City of Detroit (Fire Dep't),* 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524.

The starting point from which to properly consider whether the Employer violated Section 10(1)(a) most logically begins with the meeting between Charging Party and Director Baum that took place in the summer of 2017 wherein the two discussed the topic of unions. However, nowhere within Charging Party's description of that conversation do the statements attributed to Director Baum rise to any level even approaching threats, coercion or otherwise unlawful under PERA. Similarly, the discussion between Director Baum, Charging Party and Eddy, regarding the latter's desire to form a command union is also devoid of any statements that violate Section 10(1)(a) of the Act.

Charging Party argues that he was "demoted, stripped of his seniority, and placed on probation on the heels of his efforts to form a command union." Given the circumstances surrounding the preceding actions, Charging Party further claims that "a reasonable employee would interpret the demotion (and associated attack on his seniority and employment) as a direct response to efforts to form the command union and an implied threat to retaliate against him if he continued to engage in conduct protected by Section 9 of PERA." Ignoring Charging Party's deliberate use of verbiage to characterize Charging Party's job change as a demotion, I disagree as, given the surrounding circumstances of those actions, i.e., the restructuring of the Department predicated on morale issues and the restrictions regarding the same vis a vis the Department's

contract to provide fire services to Camp Grayling, I find that it is unreasonable for an employee to associate the layoff and new job with protected activity as opposed to the other, seemingly legitimate, reasons for the Employer's actions.

Moving on to address Charging Party's claims under Section 10(1)(c) of the Act, it is axiomatic that the first two elements of a prima facie case for retaliation were met. Charging Party engaged in protected activity, both with respect to his former bargaining representative the FOP, his attempts to form a command union, as well as with POAM following his change in jobs, each of which Director Baum was aware. Moreover, the timing of the actions Charging Party complains off, his layoff, the transfer to the position of police officer along with a probationary period, his placement on the seniority list, and the investigation into the baiting incident and subsequent termination, did occur in close temporal proximity to the above cited protected activity. The preceding notwithstanding, the record is devoid of any direct evidence that establishes that Director Baum harbored anti-union animus. While Charging Party did make statements during the relevant period of time and again at the hearings that he was being targeted, those allegations are conclusory and without support. According to Charging Party's testimony and discussed in the context of a possible 10(1)(a) violation, while the Director discussed the topic of unions and questioned the necessity of the same, his comments do not rise to the level of showing animus. Moreover, there is no indication that the Director was upset or otherwise hostile to the idea of Charging Party and Eddy forming a command union through the POLC; rather the record establishes that, but for the restructuring of the Department, Director Baum would have likely went ahead with beginning negotiations with Stidham and the POLC.

With respect to the Charging Party's layoff and subsequent transition to police officer, for the undersigned to accept the premise that the same were made in retaliation for Charging Party's protected activity, to impede or prohibit the organization of a command union, and/or for some other reason otherwise unlawful under PERA, would also require a finding that Director Baum undertook significant changes in not only the Department's organizational structure, but also the City's structure since Chief Strohpaul had also been the Director of Public Works, for the purpose of retaliating against and/or otherwise violate Charging Party's rights under the Act. Such a belief, without actual evidence of anti-union animus on the part of Director Baum, seems wholly implausible and akin to a herculean effort for no real benefit. Moreover, further conflating that premise to an even more unreasonable conclusion, one would have to accept that Director Baum undertook the measures to restructure the Department and transition Charging Party to a position in which he could unilaterally impose a probationary period after which the Department would wait patiently for an event to occur that would allow it to then summarily dismiss Charging Party. Such an outcome is again implausible as the record reflects, and there is no direct or otherwise compelling circumstantial evidence to suggest otherwise, that the Director valued Charging Party as an employee and wanted to keep him in whatever role could benefit both Charging Party and the Department. In this case, the Department had already invested both time and money in training and certifying Charging Party as a law enforcement officer and then upon the Department's restructuring allowed him the opportunity to continue employment as a patrol officer after his position in the Fire Division was eliminated.

Furthermore, even were Charging Party to have established a prima facie case under Section 10(1)(c), such that the burden would have shifted to the Employer to provide credible

evidence of a legal motive and that the same action would have been taken even absent the protected conduct, it would be my finding that the Employer has done just that. Director Baum's cited reasons for taking the actions he did in restructuring the Department, i.e., morale issues and subsequent concerns regarding the sustainability of the terms of the Department's contract to provide fire protection for Camp Grayling, appeared to the undersigned as both reasonable and truthful; there was no credible and/or supported evidence provided in the record that contradicts the same.

Next, Charging Party's placement on probation as well as his position on the seniority list following his transition to patrol officer also appear reasonable and appropriate given the surrounding circumstances. The record clearly reflects that the Charging Party was employed as an Assistant Chief in the Fire Division who filled in as a patrol officer on an as needed basis. Charging Party was laid off from his position as Assistant Chief and then offered the position of patrol officer. While there was conflicting testimony regarding whether there existed a past practice of employees transitioning from one position to another being placed on probation, the record, as developed by the parties, contains significant gaps regarding those particular situations as well as corroborating testimony or evidence, such that the undersigned is precluded from making any finding of fact regarding whether placing Charging Party on probation was a deviation from any past practice. The preceding notwithstanding, it appears that contractual language agreed to between both Respondents as part of the tentative agreement, and which ultimately became part of the parties' contract, supports the placement of Charging Party on probation.[10] Moreover, while Charging Party objects to his placement at the bottom of the seniority list of patrol officers, this decision by Director Baum also appears to be guided by the language of the tentative agreement as well as the eventual executed contract. Additionally, Director Baum's testimony that he faced a possible grievance were Charging Party placed anywhere on the list but the bottom, while not only unopposed was also reasonable and credible.

Lastly, and while not ignored by Charging Party, remains the issue which served as the impetus for Charging Party's termination, the bait pile and visit by CO McAteer. Charging Party did address this issue both at the hearing and in his post-hearing filings. However, despite his claims and assertions that he was not responsible for the pile and that his father was, the fact remains that the pile was located on his property and that it was large enough that CO McAteer was sent out to investigate it.[11] One must remain cognizant that it is not the place of the undersigned to make a determination regarding Charging Party's actual involvement or culpability with respect to that bait pile. Moreover, even if in fact it was determined that Charging Party was innocent of any connection to that bait pile, such a determination for

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[10] To the extent that Charging Party appears to also argue that the Employer's requirement that Charging Party sign the letter acknowledging his probationary status somehow violated PERA under the theory that the same was direct dealing, Charging Party lacks standing to do so. An allegation of "direct dealing" is considered a violation of an Employer's duty to bargain with the certified bargaining representative; an individual charging party is not owed that duty and as such cannot maintain a direct dealing claim. Moreover, in so far as Charging Party maintains that the Employer's "direct dealing" is supportive of any of its other claims against it, as stated herein, the contract clearly appears to support the placement of Charging Party in probationary period.

[11] Charging Party's post-hearing brief with respect to his charge against the Employer states, "[t]he record is very clear that Hatfield did not use excessive bait and his father apparently was the culprit." In no way is the record, as established herein, "clear" on this point. Rather, what is clear is that said claim is Charging Party's position, not that the proposed factual scenario he lays out was in fact what actually occurred.

purposes of the discussion under PERA is wholly irrelevant. What is relevant, however, assuming Charging Party met its burden, which he did not, would be whether that bait pile and subsequent circumstances at that time provided a credible legal motive that guided and influenced Director Baum's actions. Additionally, it was not the presence of the bait pile or even whether Charging Party was responsible for it that led to his termination, rather it was the untruthful manner by why Charging Party conducted himself when answering questions regarding the pile. While speculative, it remains reasonable to assume that had Charging Party been truthful forthright about the contact with CO McAteer, both in terms of it occurring and the actual purpose of the visit, he would not have been terminated as insubordinate or for conduct unbecoming.

For these reasons I find that Charging Party has not established that the Employer violated either Section 10(1)(a) or Section 10(1)(c) as alleged in Case No. C18 C-022.

Charge Against the Union

In Michigan's public sector, a union owes those employees it represents a duty of fair representation under Section 10(2)(a) of PERA. This duty is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651 (1984). A union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . ." *Merritt v International Assn of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Assn*, 156 F3d 120, 126 (CA 2, 1998). The *Gooslby* Court described "arbitrary" conduct by a union as: (a) impulsive, irrational or unreasoned conduct; (b) inept conduct undertaken with little care or with indifference to the interests of those affected; (c) the failure to exercise discretion; and (d) extreme recklessness or gross negligence. *Id* at 679.

Although a union owes a duty of fair representation to every employee it represents, its primary duty is to its bargaining unit's entire membership as a whole. *Lowe v Hotel Employees*, 389 Mich 123 (1973). In this regard, a union is not required to follow the dictates of any individual employee, but rather it may investigate and handle the situation and/or issue in the manner it determines to be best. See *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. In other words, a union possesses the legal discretion to make judgments about the general good of the membership and to proceed on such judgments, despite the fact that they may conflict with the desires or interests of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218, citing *Lowe*, supra. The Commission will not find an unfair labor practice on the mere fact that a member is dissatisfied with their union's efforts. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131.

Regarding alleged violations of a union's duty as it relates to grievances, the Commission has "steadfastly refused to interject itself in judgment" over decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. A union can exercise significant discretion in determining whether a grievance is meritorious so long as it acts in good faith and not from improper motives, e.g., personal hostility toward the member that has nothing to do with the merits of the dispute, a

union has considerable discretion to decide how to handle and how far to proceed with a grievance. See *Washtenaw County Road Commission,* 32 MPER 61(2019) (no exceptions). That is, a union does not have to arbitrate every grievance but can weigh the likelihood of the grievance succeeding against the costs of the arbitration. See, e.g., *Ann Arbor Pub Schs,*16 MPER 15 (2003). Furthermore, to prevail on a claim of unfair representation in a case involving the handling of a grievance, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Goolsby,* supra. If a union's decision regarding a grievance do not fall so far outside the range of reasonableness that they can fairly be characterized as "irrational," a union's good faith decision about how to handle a grievance does not breach its duty of fair representation. *Air Line Pilots Int'l Assn v O'Neill*, 499 US 65, 66 (1991). Moreover, a decision made by a union with respect to the handling of a grievance is not irrational simply because it turns out in retrospect to have been the wrong decision or a mistake. *O'Neill*, at 77; *City of Detroit (Fire Dept)*, 1997 MERC Lab Op 31, 34. Equally as important, mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation. See *AFSCME Council 25, Local 207*, 23 MPER 101 (2010); See also *SEIU, Local 579,* 229 NLRB No 104 (1977).

Charging Party's various complaints and allegations against the POAM occupy three distinct time periods; the period of time following POAM's recognition as the unit's bargaining representative, the period of time following the removal of Charging Party and Eddy from the unit, and the period of time following Charging Party's transition to patrol officer and return to the bargaining unit. For the reasons set forth below, only allegations that fall within the latter time period are actionable for purposes of this dispute.

In the present matter, Charging Party's list of potential grievances against POAM, the Respondent Union, begins with the bargaining unit membership's decision in June of 2017, to remove the Assistant Chief positions from the unit following the Union's successful campaign to become the recognized bargaining agent. However, neither that internal membership decision nor the subsequent agreement between Respondents in August of 2017 could be actionable under the Act as both clearly occurred outside of PERA's six-month statute of limitations. See MCL 423.216a. Even ignoring the timeliness issue, the decision to remove Charging Party and Eddy from the unit, whether initiated by Postal or someone else, does not appear on its face unreasonable, arbitrary or otherwise unlawful under the Act. Moreover, Charging Party failed to provide any evidence that could establish said action to remove the positions from the unit were in some fashion violative of the Union's duty of fair representation. Additionally, the record supports the conclusion that the Respondent Union was considering removal of the positions even prior to wining the consent election, filed in Case Nos. R17 C-033 and R17 C-039.

Following Charging Party's removal from the unit, the Respondent Union no longer owed him any duty as he was no longer a member of the unit. See *Port Huron Area School District*, 1998 MERC Lab Op 43, where the Commission held, "[i]f the [c]harging [p]arty was not a member of the bargaining unit, the Union owed him no duty of fair representation under PERA."

On October 16, 2017, Charging Party assumed the position of a patrol officer and was a proper member of the bargaining unit represented by POAM. As such, the Union now owed him a duty to fairly represent him. Almost immediately Charging Party became concerned with his seniority placement as it relates to the other patrol officers. It is clear that under the FOP contract, his seniority for purposes of layoff and recall, would have been based upon the May 2014 activation of his MCOLES certification. However, not only did that contract expire by its express terms on June 30, 2017, the FOP was displaced as the bargaining representative by POAM. The Commission has long held that when a representation election is conducted during the term of an existing contract, that contract continues in effect until its expiration even if the incumbent representative is defeated. *Ionia Co Road Comm*, 1969 MERC Lab Op 82. In this context, an employer is obligated to comply with the terms of an existing contract. *West Bloomfield Pub Schs*, 1985 MERC Lab Op 24, citing *Columbia Broad Sys, Inc, Fender Musical Instruments Div*, 175 NLRB 873, 874 (1969). During this period, an employer, however, has a duty to bargain with the new representative, even though the new representative is also bound by the terms of the pre-existing contract during its term. *City of Romulus*, 1988 MERC Lab Op 504.

Under the above cited established law, had Charging Party transitioned into the position of patrol officer at such time as the FOP's contract was still effective, his seniority status would have been governed by his MCOLES certification date as required therein.[12] However, that was not the circumstances of the situation at that time; there existed a tentative agreement that supports the Employer's actions. Furthermore, while Charging Party attempted to establish that there was an agreement between the Respondents that the prior contract's term remain in place until such time as a successor agreement is in place, the fact remains that as the bargaining representative, POAM and the Employer could have agreed to any changes at that time. Moreover, it is not the place of the Commission to second guess agreements between employers or unions. Here, while the timing of the actual decision may be in question, the established record indicates that the Employer and the Union agreed to change seniority from MCOLES certification to seniority in classification.[13] While Charging Party may disagree with this change, especially since it clearly disadvantages him, that dissatisfaction unaccompanied by allegations beyond mere speculation does not establish that the Union's actions were based on arbitrary, unreasonable or otherwise unlawful motive.[14]

Moving on to Charging Party's complaints with respect to the requirement that he serve a one-year probationary period and further that he sign a letter accepting the same, I first note that both the FOP and POAM contracts, while differing in initial duration, both appear on their face to support placing Charging Party on probation. While Charging Party claimed that others before him that moved from being a fire fighter to patrol officer were not required to serve the same period, as discussed in relation to the claims against the Employer, these claims were

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[12] Whether in that situation the newly certified bargaining representative could bargain with the Employer to change the seniority provisions while the FOP's contract was still in place is neither relevant nor necessary for purposes of this dispute.

[13] The TA's poor wording does not provide clear text to establish what the Respondents had agreed upon regarding this subject. Nonetheless, the executed agreement clearly captures the change.

[14] Here Charging Party asks the undersigned to ascribe an adverse inference because of the absence of Postal's testimony. However, to do so, in light of Charging Party's failure to introduce credible evidence that could suggest that the Union or Postal's actions or inactions with respect to this issue were unlawful reasons would be, in the opinion of the undersigned, inappropriate under *Port Huron Area School District,* 28 MPER 45 (2014).

somewhat contradicted by Amanda Clough's testimony and the record does not establish that the circumstances of Charging Party's transfer and those of the other individuals identified were similar in nature. More importantly though, here too Charging Party failed to introduce evidence beyond mere speculation or conclusory statements that could establish that Postal and/or the Union acted in a way that was based on an unlawful motive or otherwise arbitrary. In so far as Charging Party objects to and/or complains that Postal failed to challenge the Employer on the issue, I note that Postal, according to Charging Party's own testimony, did in fact address this issue with Charging Party and even provided him with advice. Here too, Charging Party's dissatisfaction with that advice is not indicative of an unfair labor practice.[15]

Charging Party's final allegation against the Union and Postal in particular, stem from what occurred following Charging Party's termination in December of 2014. Charging Party claims that he explicitly asked Postal to file a grievance. The record clearly reveals that no grievance was filed. The record is not clear however, whether Charging Party actually did communicate his desire to Postal that his termination be grieved; the emails admitted into the record do not establish that Charging Party made a direct request that a grievance be filed. The preceding notwithstanding, presuming that Charging Party did in fact make the request, as established above however, the mere fact that an employee asks that a grievance be filed but one is not, does not per se establish an unfair labor practice. Moreover, and more important for purposes of this allegation, given that a Charging Party must show a contract violation by an employer in order to prove a duty of fair representation claim based on a union's handling of a grievance, there is no corresponding, and actual, contractual violation identified herein.

For these reasons, I find that Charging Party has not established that the Union has violated its duty under PERA to fairly represent Charging Party.

Conclusion:

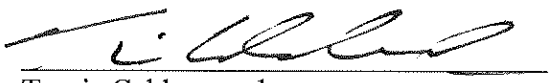
Having considered all arguments set forth by the parties, and concluding that such does not warrant any change in the result, it is my finding that Charging Party has failed to establish that any of the actions complained of within these consolidated cases violated PERA. For this reason, I recommend that the Commission issue the following order.

[15] Moreover, our Commission has previously held that a union's failure to adequately communicate with a member about a grievance is not in itself a breach of its duty of fair representation. See, e.g., *Suburban Mobility Authority for Regional Transportation (SMART) 19 MPER 39 (2006).*

RECOMMENDED ORDER

Charging Party's unfair labor practice charges against the City of Grayling, Case No. C18 C-022, and the Police Officers Association of Michigan, Case No. CU18 C-005, are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: August 29, 2019