STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ROYAL OAK (POLICE DEPARTMENT),
Public Employer-Respondent,

Case No. C00 B-034

-and-

ROYAL OAK POLICE OFFICERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Dennis B. DuBay, Esq., Keller, Thoma, Schwarze, Schwarze, DuBay and Katz, P.C., for the Respondent before the Administrative Law Judge; Mark O. Liss, Esq., Assistant Deputy City Attorney, for the Respondent on Exceptions

L. Rodger Webb, P.C. by L. Rodger Webb, Esq., for the Charging Party

DECISION AND ORDER

On June 28, 2004, Administrative Law Judge (ALJ) Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Charging Party, the Royal Oak Police Officers Association (ROPOA), waived its right to bargain Respondent City of Royal Oak's decisions to make special assignments pursuant to the terms of the collective bargaining agreement between Respondent and Charging Party. The ALJ further found that past practice did not restrict Respondent's right to make such assignments. However, the ALJ found that Respondent violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), when it refused to bargain over the effects of making special assignments to Charging Party's members. The ALJ recommended that Respondent be ordered to cease and desist from refusing to bargain and, upon demand, bargain with Charging Party concerning the effects of making special assignments. In so finding, the ALJ held that Respondent should not be required to rescind any assignment pending satisfaction of its bargaining obligation. The ALJ also found that several unfair labor practices asserted by Charging Party, but not material to our Decision in this matter, had not been established.

The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Both Respondent and Charging Party filed timely

exceptions to the ALJ's Decision and Recommended Order. The exceptions included supporting arguments without separate briefs and each party filed a timely response to the other party's exceptions.[1]

Respondent contends in its exceptions that the ALJ erred in finding that its duty to bargain the effects of special assignments encompasses a duty to bargain as to eligibility requirements and selection procedures. It argues that these are rights reserved to management by the parties' collective bargaining agreement and should not be included as "effects."

In its exceptions, Charging Party contends that the ALJ erred in finding that the Respondent acted lawfully when it created and filled the position of Crime Suppression Task Force (CSTF) officer; when it removed officer Karyn Risch from the Narcotics Enforcement Team (NET), a multi-jurisdictional task force; and when it assigned a member of another bargaining unit to NET. Charging Party argues that its right to bargain newly created positions was not waived; that the removal of Risch was in retaliation for her exercise of protected rights; and that Risch's NET position was removed from Charging Party's bargaining unit based on union animus.

Background:

Charging Party represents a bargaining unit of nonsupervisory police officers and police dispatchers in the Respondent's police department. Charging Party's original charge was filed on February 25, 2000, alleging that Respondent violated Section 10(1)(e) of PERA by bargaining in bad faith during the parties' negotiations for a successor to their collective bargaining agreement. From that date until July 24, 2002, Charging Party amended the charge six times, adding numerous allegations. Many of these allegations were resolved, either by withdrawal or due to a change of circumstances. The remaining allegations were discussed in the ALJ's Decision and Recommended Order. We hereby accept the findings of fact as set forth in the ALJ's Decision and Recommended Order.

Despite the lengthy charge, we are concerned here only with the following matters: Respondent's exception to the inclusion of eligibility requirements and selection procedures as subjects to be addressed in effects bargaining; Charging Party's exceptions to limiting bargaining to effects; and Charging Party's exceptions to the ALJ's findings that the removal of Risch from her NET position and the assignment of a command officer to NET did not violate PERA.

Respondent Employer's Exceptions:

[1] Neither party filed a brief conforming to our Rules, as amended in 2002. The arguments contained within each document setting forth exceptions were not accompanied by an index of authorities, a statement of questions involved or citations to specific page references in the transcript. See Rule 176(3)(c) and (4)(b)(c)(d) and (e) of the Commission's General Rules, 2002 AACS, R 423.176(3)(c) and (4)(b)(c)(d) and (e). In its argument, Charging Party makes repeated references to its 77 page post-hearing brief, which exceeded our 50-page limit and was improperly bound. Respondent's 150 page, post-hearing brief, also exceeded the page limit. See Rule 184(1) and (2). That these submissions were not rejected for failure to comply with our Rules should not be viewed as an indication that we will accept such submissions in the future.

Respondent has taken no exception to the ALJ's conclusion that it had a duty to bargain the effects of its decisions to assign Charging Party's members to the bike patrol, SRT and CSTF. However, Respondent takes exception to the ALJ's inclusion of eligibility requirements and selection procedures as effects to be bargained.

No issues regarding the specific subjects to be included in effects bargaining were properly before the ALJ, and we are not inclined to decide such issues on the record before us. Although the ALJ in *dicta* did indicate certain subjects which she believed would be included in effects bargaining, the ALJ's Recommended Order, which we adopt as our own, contains no language concerning the specific subjects that constitute the effects over which Respondent must bargain. Because such direction to the parties would be premature, we decline to offer it at this time.

Charging Party's Exceptions:

I. Waiver of Bargaining as to the CSTF Position

In its post-hearing brief to the ALJ, Charging Party conceded that "to establish a new position/assignment is an inherent management right" subject to "effects bargaining." Charging Party also recorded the following acknowledgment: "In respect of the 3 positions/assignments at issue herein, the ROPOA demanded bargaining on the terms and conditions of employment and the impact on the unit, not on the fact of the creation of such positions/assignments."

The ALJ concluded that Charging Party had waived its right to bargain decisions to assign this work and limited Respondent's bargaining obligation to the effects of such assignments. Based upon the Charging Party's representation to the ALJ that it did not demand bargaining as to Respondent's decisions to make special assignments, we decline to overrule the ALJ and we adopt the Recommended Order as to this issue. See *Detroit Pub Schs*, 17 MPER 14 (2004); *Kalamazoo Co Sheriff*, 1992 MERC Lab Op 63; *SEIU Local 586 v Village of Union City*, 135 Mich App 553 (1984).

II. Removal of Risch from NET

Charging Party claims that the removal of officer Karyn Risch from her NET assignment was retaliatory and based on union animus. The record establishes that there was friction between Risch and her NET supervisor, Sergeant John Fitzgerald. There is also evidence in the record that other members of the NET team were dissatisfied with Fitzgerald's leadership. However, the friction between Risch and Fitzgerald and criticism of Fitzgerald's leadership were related to Risch's job performance, not to union activity. On one occasion when summoned to a meeting with Fitzgerald, Risch asked to have a witness present. Although it is disputed whether she stated to Fitzgerald that her request for a witness was at the suggestion of her union, it is undisputed that her request for a witness was granted.

Charging Party cites facts and circumstances from which we are asked to attribute union animus to Respondent's Chief of Police, Theodore Quisenberry. However, those facts and circumstances are not related to any issue having to do with Risch's NET assignment or her

removal from NET. The ALJ did find that the Chief was hostile toward the grievance protesting Risch's removal from NET and that he was coercive in his effort to persuade her to withdraw her grievance. The ALJ credited Risch's testimony that Chief Quisenberry expressed anger at the Union's demand in Risch's grievance that he be personally sanctioned, and stated "that with all these grievances, how could [they] give [her] the position back and not be seen as buckling to the Union." The Chief also referred to another officer who had "handled the Union and taken responsibility and handled the matter himself." In any case, the ALJ concluded that Risch would not have been reinstated to NET even if she had complied with the Chief's wishes and dismissed this allegation.

We are not convinced on this record that Chief Quisenberry had the authority to reinstate Risch. NET's by-laws provide that all NET personnel "shall be given their assignments or relieved of those assignments at the discretion of the NET commander," a position designated by the Oakland County Sheriff's Department. However, a finding that Risch could not or would not have been reinstated does not preclude a finding that Respondent violated Section 10(1)(a) of PERA. We find that, by disparaging her use of the grievance process, and by seeking to persuade her to withdraw her grievance and her allegiance from Charging Party, Chief Quisenberry interfered with Risch's right to engage in protected activity. Although we agree that a violation of Section 10(1)(c) has not been established, we find that his conduct violated Section 10(1)(a) of PERA.

III. Assignment of Command Officer to NET

After Risch was removed from her NET assignment, members of Charging Party's bargaining unit were asked to apply for that assignment in a memo stating, "this assignment will be for 2 years and selection will be made in accordance with the current labor agreement." No member of the bargaining unit applied, and Respondent did not exercise its contractual right to assign by reverse seniority. A NET sergeant position was created and when a sergeant from Respondent's command unit was assigned to the position, a member of Charging Party's bargaining unit was promoted to fill the vacated sergeant position in Respondent's command unit.

The ALJ held that the assignment of a sergeant to NET without bargaining was not unlawful because the work was different from the work performed by members of Charging Party, and because the assignment did not have a significant adverse impact upon Charging Party's unit. For the reasons articulated by the ALJ, we agree.

Based on the above discussion, we adopt the Recommended Order of the ALJ, as modified below:

ORDER

Respondent City of Royal Oak (Police Department), its officers and agents, is hereby ordered to:

1. Cease and desist from refusing to bargain with Charging Party Royal Oak Police Officers Association with respect to the effects on unit employees of its decisions to assign such employees to special assignments, including the bike patrol, the special response team, and the crime suppression task force.

2. Cease and desist from coercing Karyn Risch in the exercise of protected rights, by disparaging her use of the grievance process and by attempting to persuade her to withdraw her grievance and her support from the Union.

3. Cease and desist from interfering with, restraining, or coercing employees in any other manner in the exercise of rights guaranteed by Section 9 of PERA.

4 On request, bargain with Charging Party concerning the effects of its decision to assign a member of its bargaining unit to the crime suppression task force, and reduce to writing and execute any agreement reached as a result of such bargaining.

5. Post the attached notice in conspicuous places on its premises, including all places where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of Royal Oak (Police Department) has been found to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with Charging Party Royal Oak Police Officers Association with respect to the effects on unit employees of our decisions to assign unit employees to special assignments, including bike patrol, special response team, and the crime suppression task force.

WE WILL NOT coerce Karyn Risch in the exercise of protected rights, by disparaging her use of the grievance process and by attempting to persuade Risch to withdraw her grievance and her support from the Union.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 9 of PERA.

WE WILL, on request, bargain with Charging Party concerning the effects of our decision to assign a member of its bargaining unit to the crime suppression task force, and reduce to writing and execute any agreement reached as a result of such bargaining.

CITY OF ROYAL OAK (POLICE DEPARTMENT)

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

STATE OF MICHIGAN
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APPEARANCES:

Keller, Thoma, Schwarze, Schwarze, DuBay and Katz, P.C., by Dennis B. DuBay, Esq., for the Respondent

L. Rodger Webb, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on July 24, July 29, September 13, September 19, October 14, October 15, and December 20, 2002, and on January 6, 2003, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before May 20, 2003, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charges and Issues:

Charging Party Royal Oak Police Officers Association represents a bargaining unit of nonsupervisory police officers and police dispatchers, known as police service aides (PSAs), employed in the City of Royal Oak Police Department. The Royal Oak Command Officers Association represents sergeants and lieutenants (command officers). A third labor organization, the Royal Oak Detectives Association, represents detectives.

The original charge was filed against the City of Royal Oak on February 25, 2000. This charge alleged that Respondent violated Section 10(1) (e) of PERA by bargaining in bad faith during the parties' negotiations for a successor to their current collective bargaining agreement.

After several postponements, the hearing was adjourned without date at the parties' request on March 23, 2001.

Charging Party filed its first amended charge on April 12, 2001. The amended charge alleged that, on or shortly after March 1, 2001, Respondent unlawfully refused to bargain with Charging Party over the wages, hours and terms and conditions of employment of a newly created bargaining unit position/assignment, bike patrol officer.

Charging Party filed a second amended charge on August 14, 2001. In this charge, Charging Party alleged that on or about June 2001, Respondent unilaterally altered its existing policies or practices with respect to permitting police officers to take time off during the annual "Dream Cruise" event. The second amended charge also alleged that Respondent unilaterally altered the working conditions of PSAs by prohibiting them from taking any time off on weekends in July and August 2001.

Charging Party filed a third amended charge on March 12, 2002. Charging Party alleged that on or about February 2002, Respondent unlawfully refused to bargain over the wages, hours, and terms and conditions of employment of a newly created bargaining unit position/assignment, special response team (SRT) officer. After the third amended charge, at Charging Party's request, the case was removed from its adjourned without date status and hearing dates were scheduled.

Charging Party filed a fourth amended charge on May 7, 2002. Charging Party alleged that on or about April 29, 2002, Respondent unlawfully refused to bargain over the wages, hours, and terms and conditions of employment of a newly created bargaining unit position/assignment, crime suppression task force (CSTF) officer. It also alleged that Respondent violated its duty to bargain when, on or about March 2002, it removed a bargaining unit position, narcotics enforcement team (NET) officer, from Charging Party's unit and placed it in the command officers' bargaining unit. Charging Party asserted that Respondent removed the position because Charging Party insisted that it be filled by seniority and that this action, therefore, also violated Sections 10(1)(a) and (c) PERA.

Charging Party filed a fifth amended charge on May 13, 2002. Charging Party alleged that on or about May 2002, Respondent unlawfully created a new bargaining unit position, computer-aided dispatcher coordinator. Charging Party also alleged that on or about January 2002, Respondent removed Karyn Risch, a member of Charging Party's bargaining unit, from her assignment as NET officer because of numerous grievances filed by Charging Party, and that Respondent later refused to reinstate Risch to this assignment because Charging Party had filed a grievance challenging her removal.

The first day of hearing on the charge, as amended, took place on July 24, 2002. At the hearing on that day, Charging Party amended its charge for the sixth time to allege that Respondent violated its duty to bargain by unilaterally transferring unit work, i.e. the duties of the newly created position bike patrol officer, to the command officers' bargaining unit.

During the hearing, Charging Party withdrew the allegation in its fifth amended charge that Respondent violated its duty to bargain by creating the position of computer-aided dispatch coordinator. In its post-hearing brief, Charging Party stated that it was withdrawing its allegation that Respondent bargained in bad faith during their contract negotiations. Moreover, Charging Party did not, in its extensive post-hearing brief, argue in support of the allegation made on the first day of hearing that Respondent violated its duty to bargain by unilaterally assigning command officers to the bike patrol. From this omission, I conclude that Charging Party has also withdrawn this allegation.

In sum, the issues remaining to be decided in this case are whether Respondent violated its duty to bargain under Section 10 (1) (e) of PERA by: (1) unilaterally changing an established policy permitting police officers to use banked leave time during the week before the annual "Dream Cruise" event; (2) unilaterally implementing a change in leave policy for police service aides; (3) refusing to bargain over the terms and conditions of three new bargaining unit positions/assignments, bike patrol, special response team and crime suppression task force; (4) unilaterally transferring bargaining unit work to the command officers' bargaining unit by assigning a sergeant to the NET task force. In addition, Charging Party maintains that Respondent violated Sections 10(1) (a) & (c) of the Act by: (1) removing bargaining unit member Karyn Risch from her NET assignment; (2) refusing to reinstate her because Charging Party had filed a grievance over her removal; (3) assigning a command officer to NET after removing Risch.

II. Section 10(1)(e) Allegations:

A. Unilateral Changes in Leave Policies

1. Facts

a. Applicable Contract Provisions

Under the collective bargaining agreement in effect at the time of the events covered by the charge, members of Charging Party's bargaining unit received sick, vacation, and personal leave that could be banked. Unit members could also elect to receive compensatory time off in lieu of overtime, and compensatory time could be banked. The various leave provisions set out in detail how leave was to be accumulated and used. Under these provisions, the use of any banked leave time was subject to supervisory approval. Section 16.7(a) of the contract stated, "Compensatory time off shall be granted with the permission of the shift or unit commander . . ." Under Section 32.8, the use of personal business days was "subject to the approval of the commanding officer." Section 31.9 provided that Respondent was to establish vacation schedules "so as to permit the continued operation of all Department functions without interference." Section 32.2 stated that employees who were required to work holidays could add the time to their vacation or take compensatory time off, "subject to the approval of the Commanding Officer and Chief of the Department."

In addition, Section 16.6 also allowed Respondent to require employees to work overtime "if the result of such refusal [to work overtime] would result in danger to the public safety or

inability of the police department to properly discharge its responsibility to the public and carry out its police functions in an adequate manner."

b. Use of Leave and Overtime During Dream Cruise Week

The "Dream Cruise" takes place each year on a Friday and Saturday in August. During the Dream Cruise, classic cars "cruise" (drive slowly) up and down Woodward Avenue through many suburban Detroit communities, including the City of Royal Oak. The event attracts many spectators. Respondent sets up post sites in the median of Woodward Avenue during the Dream Cruise. Maintaining order during the Dream Cruise is a major project for the jurisdictions along Woodward.

During the years immediately proceeding 2001, the Dream Cruise grew in size and scope. The event began attracting vehicles from outside the Detroit metropolitan area, and incidences of unauthorized cruising during the evenings preceding the actual event increased. Since Woodward Avenue is a major thoroughfare, these cruisers created a traffic problem. The weekday evening cruisers also attracted spectators.

In April 1997, Respondent announced that, during the August 1997 Dream Cruise, bargaining unit members would not be allowed to use banked leave (except sick time) and that regular days off would be canceled on Friday and Saturday. Respondent made similar announcements in the springs of 1998, 1999, and 2000, canceling all leaves for the Fridays and Saturdays of the Dream Cruise. Bargaining unit members whose regular days off fell on Friday or Saturday worked overtime on those days.

In 2001, the Dream Cruise took place on Friday, August 17, and Saturday, August 18. On April 3, 2001, Respondent issued a memo prohibiting the use of banked leave and canceling days off for the 2001 Dream Cruise as in previous years. However, after the memo was issued, Respondent decided that it needed more officers on duty during the week before the Dream Cruise. In June 2001, Respondent announced that it would not approve any additional leave requests for personnel on the afternoon and midnight shifts from Friday, August 10 through Sunday, August 19. Vacation leave for this period that had already been approved was exempt. Respondent also announced that all afternoon and midnight shift employees were to work mandatory overtime on their regular days off from August 10 through August 19.

After the June 2001 order, Charging Party's president, Ronald Race, demanded to bargain over the change in the existing practice of barring the use leave time only on the Dream Cruise weekend itself. Respondent Deputy Chief Thomas Wightman refused the demand, stating that Respondent had the right to cancel leaves and require overtime under the contract.

In the spring of 2002, Respondent issued an order establishing the leave policy for the 2002 Dream Cruise. Under this order, only afternoon shift employees were prohibited from taking time off during the week before the event. Charging Party again demanded to bargain, and Respondent again replied that it had the right under the contract to cancel leave.

c. Police Service Aide Leave

During 2001, Respondent had five PSAs (police dispatchers) on the day shift, four on the afternoon shift, and four on the midnight shift. From early July until the first week of September 2001, PSA Stacey Sheldon was on maternity leave. Sheldon normally worked the day shift, including both Saturday and Sunday. Sometime in early July, PSA Raymond Burns, who also normally worked both the Saturday and Sunday day shifts, came to Race and told him that Respondent had denied his request to take time off on the weekend. Burns told Race that his supervisor had told him that he could not use his leave time because, due to Sheldon's absence, he was one of only two PSAs scheduled to work. Race talked to Burns' supervisor, who told Race that he was not going to pay overtime to allow somebody to get a day off. Race complained to the supervisor's supervisor, a lieutenant. The lieutenant told Race that if he did not like the decision, he should grieve it.

Respondent's payroll records indicate that all three PSAs who normally work weekends were allowed to use vacation time on weekends in July and August 2001. Burns took vacation leave on Sunday, July 29, Sunday, August 12, and Sunday, August 27. Another PSA, who normally worked Saturdays, took a regular two-week vacation that encompassed a Saturday in July and a Saturday in August. A third PSA, who normally worked on Sundays, used vacation leave on Sunday, July 8, Sunday, July 15, and Sunday, July 22 and took a day off without pay on Sunday, August 19. All PSAs took time off on weekdays in July and August. Except for the incident above, there was no evidence that Respondent denied any PSA's request to take time off during July and August 2001.

2. Discussion and Conclusions of Law

Leave and leave policies are mandatory subjects of bargaining under PERA. *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44, 54-55 (1974); *Ingham Co,* 2001 MERC Lab Op 96, 98. However, an employer has no duty to bargain over mandatory subjects of bargaining covered by a collective bargaining agreement during the term of this contract. *Port Huron EA v Port Huron Area School Dist,* 452 Mich 309 (1996); *Houghton Lake Comm Schools,* 1997 MERC Lab Op 42, 47. If the term or condition in dispute is "covered by" the agreement, the details and enforceability of the provision are left to arbitration. *Port Huron, supra,* at 318-321. Even if the term or condition is not "covered by" the contract, the employer may have no duty to bargain if the contract clearly, explicitly and unmistakably waives the union's right to bargain over the specific change. *Port Huron, supra,* at 318.

Charging Party maintains that Respondent had a duty to bargain before changing the "established leave protocols" for the Dream Cruise event. Charging Party points out that Respondent's decision to prohibit afternoon and midnight shift employees from taking vacation time on two consecutive weekends in August affected their ability to schedule a summer vacation.

The parties negotiated detailed leave provisions, all of which required supervisory approval for the use of banked leave time. The vacation leave and overtime articles specifically gave Respondent the right to set vacation schedules and order mandatory overtime to carry out

its function of protecting public safety. Charging Party argues that the contract did not permit Respondent to issue a blanket prohibition on the taking of leave for a period of nine days. I find nothing in the language of the agreement to support Charging Party's claim. I find the contract language to be clear and unambiguous. Under either the "covered by" analysis, or the "clear and explicit waiver" standard, I conclude that the collective bargaining agreement gave Respondent the right to restrict the use of banked leave and require employees to work overtime during the week before the Dream Cruise.

I also find the evidence insufficient to establish that Respondent altered an existing term of employment when it announced that employees on the afternoon and midnight shifts could not take time off for the seven days preceding the 2001 Dream Cruise. The record demonstrates that Respondent announced its leave policy each spring for that year's Dream Cruise event. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties are all factors considered in determining whether a practice has attained the status of a term and condition of employment. *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 454-55. I find that the mere fact that Respondent's leave policy for the Dream Cruise was the same for four years in a row does not establish that the parties had even a tacit agreement that this particular policy would continue. I conclude that the leave policy in effect for the 1997, 1998, 1999 and 2000 Dream Cruise events did not become a term or condition of employment. For the reasons set out above, I conclude that Respondent did not violate its duties under Section 10(1) (e) of PERA by establishing leave policies for the 2001 and 2002 Dream Cruise events without giving Charging Party the opportunity to bargain.

Charging Party also maintains that in July 2001 Respondent unlawfully altered existing leave policies for PSAs by prohibiting them from using leave on weekends until PSA Sheldon returned from maternity leave. I find that the evidence does not establish that Respondent changed its leave policies. The statements made by Burns' supervisor to Race regarding his reason for denying Burns' leave request in early July 2001 suggest that Respondent intended to prohibit PSAs from using banked leave time on weekends until Sheldon returned. However, Respondent's time records indicate that Respondent continued to permit PSAS to use their banked leave time on weekends and that the denial of Burns' leave request was an isolated event. Since Charging Party did not demonstrate that there was in fact an alteration of existing leave policies, I conclude that Respondent did not violate its duty to bargain over changes in the PSAs' terms and conditions of employment.

B. Refusal to Bargain Over Terms and Conditions of New Positions/Assignments

1. Facts

a. Contract Provisions and Letters of Agreement

Section 6.1 of the parties' collective bargaining agreement has for many years given Respondent the right:

(a) To manage the Police department efficiently and economically, including the determination of quantity and quality of services to be rendered, the control of materials, tools and equipment to be used, and the discontinuance of any services, material or methods of operation.

* * *

(e) To hire, assign and lay off employees, to reduce the work week or effect reduction in the hours worked by lay-offs [sic] and reduction in work week and work day.

(f) To direct the work force, assign work and determine the number of employees assigned to various operations.

(g) To establish, combine or continue job classifications and prescribe and assign job duties, content and classifications, and to establish wage rates for any new or changed classifications.

Section 25 of the parties' contract has also remained unchanged for many years. Bargaining unit members work permanent shifts. Pursuant to Section 25.1, all regular shift assignments (including regular weekly days off) are put up for bid every six months and are awarded by seniority within classification. Section 25.3 also provides that two specific "temporary assignments," police officer desk/radio and records division, are to be put up for bid during the semi-annual shift selection and awarded to the most senior qualified officers.

Between 1995 and 1999, the parties negotiated a series of letters of agreement (LOAs) pertaining to other "temporary" or "special" assignments. Assignments covered by LOAs were NET officer, curtail auto theft team (CAT) officer, THINK (a student education program) officer, community policing officer, special assignment traffic safety officer, direct patrol unit (DPU) officer, and traffic safety motor officer. All of the LOAs provided that the assignments would be awarded to the most senior qualified officer bidding for the position. Most of the LOAs provided for two-year terms. The LOAs also set out the qualifications for each assignment. Some of the LOAs contained provisions covering scheduling and shift premiums.

On May 7, 1999, the parties entered into the following LOA:

A. The City of Royal Oak and the Royal Oak Police Officers Association agree that the vacancies in unit positions occurring between shift and assignment picks, as provided in Section 25.1 of the parties' collective bargaining agreement, shall be filled as follows:

(i) The vacant position shall be posted, and the most senior eligible unit member bidding shall fill the position. If no eligible unit member applies, if filled the position shall be filled among eligible unit members by reverse seniority.

(ii) Positions which are subject to a minimum two year term, viz, Traffic

Safety, Directed Patrol Unit, Curtail Auto Theft, Narcotics Enforcement Team, and Community Policing, if filled voluntarily, shall be filled for the two year term from the date of appointment to the position. If filled by reverse seniority, the term of appointment shall expire as of the next succeeding regular, semi-annual shift and assignment pick. In the event that the least senior eligible unit member is reassigned by reverse seniority at the job pick, s/he shall be given credit for the time served in the interim appointment against the two-year minimum. Reverse seniority assignments shall be subject to the assigned unit members' bumping rights at each subsequent job pick (irrespective of any agreed minimum assignment). The Records and Identification position, only, if filled by reverse seniority, shall be filled for a minimum one-year term, and shall then be subject to each subsequent shift and assignment pick and to the subject officer's bumping rights.

(iii) Previously established two year minimum seniority eligibility requirements for certain job picks, viz, Traffic Safety, Curtail Auto Theft, Narcotics Enforcement Team, Front Desk, Community Policing, and Records and Identification, or a one year minimum seniority eligibility requirement, viz Directed Patrol Unit, shall apply to involuntary reverse seniority assignments, as provided herein.

(iv) If two or more positions are determined to be filled by reverse seniority, same shall be filled by seniority pick among the affected unit employees.

B. Reverse seniority assignment to all otherwise unfilled positions, as provided herein, shall also apply to the regular six months' shift and assignment pick, as provided in Section 25.1 of the parties collective bargaining agreement.

C. This agreement shall take effect, and be immediately applicable to all unit positions, upon the date of its execution.

Regular picks take place each year on April 1 and October 1. Approximately two months before each pick, Respondent posts the assignments up for selection at that pick.

b. Bike Patrol Officer

Since at least 1980, Respondent has been assigning patrol officers to patrol on foot, rather than in cars, especially in Respondent's downtown area. Patrol officers receive foot patrol orders as part of their daily assignments or as a detail during a special event. Foot patrol is not covered by a LOA. Respondent also has a motorcycle patrol unit. The motorcycle patrol unit includes officers in the traffic division who ride motorcycles whenever the weather permits and officers in the road patrol division who ride at the direction of their shift supervisor when both weather and minimum staffing requirements permit. There is no LOA covering assignment to the motorcycle patrol unit, and motorcycle officers retain their assignments as long as they maintain their skills and certifications.

In early 2000, Respondent considered creating a program to assign road patrol officers to ride mountain bikes, rather than drive cars, for part of their shifts. On March 27, 2000, Charging Party sent Respondent's chief of police a letter stating that Charging Party had never agreed to officers being assigned to ride bikes and demanding to bargain over the issue. Respondent decided not to institute a bike program at that time.

In January 2001, Respondent hired a new police chief, Theodore Quisenberry. Quisenberry learned that there was considerable interest among patrol officers and command officers, in having a bike program. On March 8, 2001, Quisenberry met with the presidents of its three unions, including Charging Party President Ronald Race, to discuss the proposed assignment. Quisenberry told them that officers who volunteered would ride bikes during their regular shifts when patrol staffing levels and weather conditions permitted. Officers would mainly ride in the downtown area and near schools. Quisenberry said that those who volunteered for the assignment would receive training before going on bike patrol. Quisenberry told the union presidents that there would be no changes in wages or benefits for officers riding bikes. Quisenberry asked the union presidents for their input.

On March 12, Race sent Quisenberry a letter stating that if Respondent decided to implement a bike program, Charging Party demanded to bargain over the pay and working conditions of the assignment. Quisenberry replied on March 16. Quisenberry told Race that Respondent did not have a duty to bargain over the pay and working conditions of the assignment, although he indicated that he was interested in Charging Party's "thoughts, concerns and suggestions."

On April 4, 2001, Deputy Chief Wightman posted a memo asking patrol officers to apply to participate in a bike patrol, setting out qualifications for the position, describing the training bike patrol officers would receive, and stating that officers should consider a two-year commitment to the program. Wightman's memo also stated that once accepted, officers could remain in the program as long as they wanted. On April 5, Race sent Quisenberry another demand to bargain over wages, working conditions and work rules for the bike patrol position, including the hours of the day and in what weather officers would be expected to ride, how long they would have to ride before taking a rest period, and how long an officer would have to remain committed to the program. Race and Quisenberry met at least twice between April 4 and May 1 to discuss various aspects of the policy, although Quisenberry continued to take the position that Respondent did not have an obligation to bargain. On April 12, Respondent sent Charging Party a draft of a detailed policy covering bike patrol. Among other provisions, the draft policy stated that the most senior volunteers would be "given preference" in the selection process.

After receiving this draft, Charging Party filed its first amended charge alleging that Respondent had a duty to bargain over the wages and terms and conditions of the bike patrol assignment. On April 20, Race sent Wightman a letter stating that Charging Party was "reserving all rights, including reviewing any proposed policy with respect to the bike program," until after a ruling on its unfair labor practice charge.

On May 1, Respondent officially issued its bike patrol policy and purchased four bicycles. Although several members of Charging Party's unit initially applied for the assignment, all withdrew their applications. Several command officers also applied for the assignment. Thereafter, Respondent sent several command officers, all sergeants, to bike training school. At the time of the hearing, these officers were riding bikes for part of their shifts on weekends and during special events, when weather permitted and when command officer staffing was sufficient to allow them to leave the station.

c. Special Response Team

A special response team (SRT) is a unit trained to respond to special situations such as barricaded gunmen, hostages, and active shooters. Before 2001, Respondent had no officers with SRT training. Respondent's officers responded to situations where SRT training might be helpful, although Respondent could also call on SRT-trained officers from other departments for assistance. On November 15, 2001, Respondent sent a memo to all officers with at least one year of seniority, notifying them that Respondent was considering putting together a SRT. Respondent advised interested officers to contact a sergeant about the physical prerequisites so that they could start getting in shape.

On December 17, 2001, Respondents circulated a draft of a departmental policy for a SRT to the presidents of its three unions, including Race. The policy listed the situations to which the SRT would respond, the training the SRT members would receive, and the attendance requirements for training. The draft policy required all SRT members to report when called in while off duty and to keep their equipment in a secure, ready location while on duty. SRT officers would continue to hold their regular shift or other assignments, and the SRT would function only when and if an appropriate situation arose. The policy also set forth the criteria for selection to the unit and the selection procedure. According to the draft policy, applicants would have to pass a physical exam, a firearm proficiency test, and an oral interview, with the final selection to be made by the chief of police. The draft policy specifically stated that applicants must be volunteers. It further stated that SRT officers must commit to a four year tour of duty, after which they might "choose to transfer" out of the unit. The SRT policy did not provide a wage premium for serving on the SRT.

Respondent asked Charging Party to make comments or recommendations on the policy by January 7, 2002. On December 18, 2001, Race sent Quisenberry a letter demanding to bargain on issues "relative to, but not limited to, the pay and working conditions and selection process for the SRT." On December 20, Quisenberry responded, informing Race that Respondent did not have a duty to bargain over the implementation process for the SRT because it had the right under the contract to assign work, determine services, and create and modify rules. Quisenberry told Race that Respondent would "consult" with Charging Party and allow it to provide "input and suggestions" before finalizing any process, but would not bargain. Quisenberry asked Race to discuss any issues that Charging Party had concerning the initial policy draft with the deputy chief and told Race that Charging Party would get a final draft of the policy before it was promulgated. Race replied that Respondent had a duty to bargain, not merely to listen to comments and suggestions. He also told Quisenberry that he understood the Chief's position to be that he would never agree to negotiate a letter of understanding governing the terms and

conditions of the SRT, as Respondent had done in the past with new positions/assignments. Race indicated that Charging Party intended to amend its unfair labor practice charge to allege that Respondent refused to bargain. On February 23, 2002, Race sent Quisenberry another demand to bargain. Quisenberry referred Race to his December 20 response.

On February 24, 2002, Respondent promulgated an SRT policy. The following day, Respondent invited all sworn personnel, including members of the command and detectives units, to submit letters of interest. Because Respondent had implemented the policy without negotiating an LOA, Charging Party advised its members not to apply, and none did. Respondent eventually sent two sergeants, members of the command unit, to SRT training.

d. Crime Suppression Task Force

The Crime Suppression Task Force (CSTF) is a multi-jurisdictional task force made up of police officers from Royal Oak and four adjacent cities. The CSTF focuses on non-drug related high profile major crimes. The employers of the CSTF officers assign them to work with the task force on a temporary basis. CSTF officers work full-time for the task force for the duration of their assignments. CSTF officers may work in uniform or in plainclothes. Uniformed CSTF officers may patrol in marked police cars. The CSTF sometimes utilizes a directed patrol, i.e. uniformed and plainclothes officers working together in a defined geographical area to abate a specific problem. CSTF officers also do plainclothes surveillance and undercover work, as assigned.

Respondent did not participate in the CSTF until the spring of 2002. On April 29, 2002, Respondent posted a memo to all personnel stating that any officer interest in an assignment to the CSTF should submit a letter of interest. The memorandum set out the qualifications for the positions (nonprobationary officer who has demonstrated results orientation, self-motivation and the ability to work as a team player), the duration of the assignment (2 years, extendable upon approval of the chief), and the selection process (interview board with approval of the chief). The CSTF officer was to receive a city car for his or her use. The memo did not provide for extra pay for the assignment, although Respondent later decided to pay the CSTF officer afternoon shift premium pay because of his hours.

On the day that the memo was posted, Race wrote to Quisenberry demanding negotiations "on but not limited to, the wages, working conditions and terms of employment related to the position of Crime Suppression Task Force Officer." Quisenberry replied that it had complied with its obligations to consult with the union by meeting on several occasions with "union personnel" to solicit their input and recommendations. Quisenberry also told Race that Respondent had the right under Section 6 of the contract to make assignments and pointed out that there was no existing LOA covering this assignment.

One member of Charging Party's bargaining unit expressed interest in the CSTF assignment. Quisenberry formally assigned him to the position on May 9, 2002.

2. Discussion and Conclusions of Law

An employer has an inherent managerial right to determine what duties will be performed during the course of the workday and has no duty to bargain over the assignment of new duties unless they change the nature of the employees' jobs. *City of St Joseph,* 1996 MERC Lab Op 274; *City of Saginaw (Fire Dept),* 1973 MERC Lab Op 975. See also *City of Grand Rapids (Fire Dep't),* 1997 MERC Lab Op 69. Respondent asserts that it had no duty to bargain over the assignment of bargaining unit members to the bike patrol, SRT or CSTF because these assignments involved only "new techniques" for performing the normal duties of a police officer. Charging Party responds that the assignments at issue are not routine extensions of a patrol officer's duties, but are specialized assignments that require specialized qualifications, training, and the use of specialized equipment and tactics beyond the purview of the day-to-day duties of a road patrol officer.

I agree with Respondent that it had the inherent right to assign members of Charging Party's unit to the SRT and to assign them to patrol on bicycles. I find that patrolling on a bicycle is similar to patrolling on foot and in a patrol car – duties performed regularly by unit members. The record also indicates that patrol officers performed the type of work the SRT officers were to do, i.e. responding to hostage and similar situations. The purpose of assigning bargaining unit members to the SRT was to better train them to meet the challenges of these events. An employer does not have a duty to bargain over a decision to provide specialized training in a function employees already perform. *City of Grand Rapids, supra,* at 79. I conclude that assignment to the bike patrol or SRT would not have changed the nature of a patrol officer's job, and that, therefore, Respondent did not have to bargain over the assignment of bargaining unit members to perform this work.

Respondent also asserts that it had an inherent right to assign a bargaining unit member to the CSTF. According to Respondent, unit members already perform the kind of work a CSTF officer performs. However, I can find no indication in the record that the day-to-day job duties of patrol officers and/or PSAs in Charging Party's bargaining unit include plainclothes surveillance or undercover operations. I conclude that Respondent did not have an inherent managerial right to assign a bargaining unit member to the CSTF because the CSTF assignment was substantially different than the work normally performed by bargaining unit members.

However, I conclude that Respondent had the right under the contract to assign members of Charging Party's unit to the bike patrol, SRT and CSTF. As discussed above, an employer has no obligation to bargain over a mandatory subject of bargaining during the term of a collective bargaining agreement if the agreement "covers" the subject or if the union has clearly and unmistakably waived its right to bargain over this subject. I agree with Respondent that Section 6.1, and in particular, subsections (e), (f), and (g), "cover" the creation of new special assignments and also clearly and unmistakably waive any right to bargain Charging Party might have had during the term of the contract. Although the parties in the past bargained over the terms and conditions of certain special assignments, past practice is irrelevant where contract language is unambiguous unless the past practice is "so widely acknowledged and mutually accepted that it creates an amendment to the contract. " *Port Huron, supra,* at 329. I find no evidence of an intent by the parties to amend the contract to restrict Respondent's right to assign

work. If anything, the parties' practice of negotiating individual LOAs for specific assignments suggests that this was not their intent.

However, this does not resolve the issue of Respondent's obligation to bargain. An employer has an obligation to bargain over the effect on unit employees of a managerial decision, even if it has no obligation to bargain over the decision itself. *City of St Joseph, supra; Kiro, Inc*, 317 NLRB 1325, 1327 (1995). In *St Joseph*, the Commission held that although the employer had no duty to bargain over its decision to bargain over the assignment of lawn-mowing duties to fire fighters, the employer would have a duty to bargain over the effect of its decision upon receipt of an appropriate demand. Issues which the employer would have to bargain, according to the Commission, included proposals to allow fire fighters to take frequent rest breaks to mitigate their chance of suffering heat exhaustion at a fire after mowing in hot weather, and proposals to compensate them for damage caused to their footgear from the lawn work.

In *Good Samaritan Hospital*, 335 NLRB 901 (2001), the National Labor Relations Board (the Board) held that language in a management's right clause constituted a clear and explicit waiver of the union's right to bargain over a hospital's decision to change its "staffing matrix," i.e., the number of employees to be used on each shift based on the patient census of a particular unit. It also held, however, that this language did not waive the union's right to bargain over the decision's effects. The Board concluded that the employer had a duty to bargain over the effects of this change, on the union's request, "as long as there were alternatives that the parties could explore without calling into question the Respondent's underlying nonbargainable decision." These "effects" included, the Board found, the fact that fewer nurses had to shoulder a greater share of the usual nursing duties, had to perform duties normally performed by other nonunit employees, and had difficulty providing the mandated level of patient care.

In the instant case, Charging Party demanded to bargain over the "terms and conditions" of assignments to bike patrol, the SRT, and the CSTF. The issues over which Charging Party sought to bargain included eligibility requirements, selection procedures, training, wage premiums, duration of the assignment, overtime opportunities, and, in the case of the bike patrol, the hours of the day and in what weather officers would be expected to ride and how long they would have to ride before taking a rest period. I find that these issues were clearly effects of Respondent's decision to assign this work and that the parties could have bargained over these issues without impinging on Respondent's underlying right to assign bargaining unit members to the bike patrol, the SRT and the CSTF.

Although Respondent invited Charging Party to provide input into its policies, it clearly refused to bargain over the effects of Respondent's proposed assignments. I conclude that Respondent's refusal to bargain over these issues violated its duty to bargain under Section 10(1)(e) of PERA. I note, however, that once Respondent decided not to assign any member of Charging Party's unit to the bike patrol or the SRT, it obviously had no further obligation to bargain over the effects of the assignments. The bargaining order in this case must, therefore, be limited to an order requiring Respondent to bargain over the effects of its assignment of a unit employee to the CSTF. I also note that while the Board in *Good Samaritan* ordered Respondent to bargain with union concerning the effect on the unit employees of the implementation of new

staffing matrices and to reduce to writing and execute any agreement reached as a result of such bargaining, Respondent was not required to rescind the changes. In accord with the Board's reasoning in that case, I find that Respondent should not be required to rescind its assignment of a unit member to the CSTF assignment pending satisfaction of its obligation to bargain over the terms and conditions of the assignment, since this would improperly interfere with Respondent's contractual rights.

C. Unilateral Removal of NET Position/Work from Bargaining Unit

1. Facts

The Narcotics Enforcement Team (NET) is a multi-jurisdictional task force comprised of officers temporarily assigned to it from participating jurisdictions. NET's mission is narcotics enforcement. In 1995, Respondent and Charging Party entered into a LOA covering certain terms and conditions of the assignment of a police officer to NET, including the duration of the assignment. Under the terms of the parties' May 7, 1999 LOA, if the NET assignment became vacant during its term, the position/assignment was to be posted and awarded to the most senior eligible applicant or, if no eligible member applied, filled by reverse seniority.

Royal Oak police officer David McLennan was assigned to NET from 1999 until September 30, 2001. Police Officer Karyn Risch bid on and was awarded the NET assignment based on her seniority effective October 1, 2001. On January 8, 2002, Risch was removed from the NET assignment. On January 17, Respondent issued a memo asking officers interested in the NET assignment to submit their names to the deputy chief. The memo stated, "this assignment will be for 2 years and selection will be made in accordance with the current labor agreement." No member of the bargaining unit responded to the memo. Although Respondent had the right under the parties' LOAs to assign a bargaining unit member to the NET assignment by reverse seniority, it decided not to do so. Rather than withdraw from NET, Quisenberry met with Respondent's city manager and proposed creating an additional sergeant position to assign to NET. This request was approved, and on February 8, 2002, Respondent posted the assignment as a position in the command officers' unit. Sergeant John Kowalkski was selected and assigned to NET. Respondent then promoted a police officer to sergeant, in accord with promotional procedures set out in the contract, to fill the position Kowalski had vacated. The result was that Charging Party's unit lost a budgeted nonsupervisory police officer position and the command officer unit gained a position.

Because NET crews are generally set up by geographic area, Kowalski was assigned to the NET street crew on which Risch and McLennan had also served. NET rules require that a sergeant be present when a search warrant is executed; during the raid, the sergeant assumes command. Sergeants are also required to be present in some drug buy situations. At NET, all crew leaders are sergeants. Although street crews usually also have an assistant crew leader, the assistant crew leader is not required to be, and normally is not, a command officer. The leader of Kowalski's NET crew was Sergeant John Fitzgerald. When Kowalski joined NET, he was informed that, as a sergeant, he had the authority to counsel and discipline NET officers even though he was not a crew leader. In other respects, Kowalski's duties when he first joined NET were the same as those of other members of his crew. However, by December 2002, Kowalski

was supervising the caseloads of other crew members and in some other respects functioning as a co-crew leader. In addition, as a sergeant, Kowalski could and did supervise drug buys and raids made pursuant to a search warrant, both for his own and other crews.

2. Discussion and Conclusions of Law

Because unit placement is a not a mandatory subject of bargaining, but a matter ultimately reserved to the Commission under Section 13 of PERA, an employer cannot implement a change in the unit placement of an existing position even after bargaining the issue to impasse. *Local 128, AFSCME v Ishpeming*, 155 Mich App 501, 515 (1986); *Detroit Fire Fighters Assoc, Local 344, IAFF v Detroit*, 96 Mich App 543 (1980); *City of Warren*, 1994 MERC Lab Op 1019. Without a Commission order or the agreement of the union, an employer cannot lawfully remove a position from one bargaining unit and place it in another. *Northern Michigan Univ*, 1989 MERC Lab Op 139.

An employer has an obligation to bargain over the reassignment of work from a bargaining unit position to a position outside the unit if certain conditions are met. *City of Detroit (Dep't of Water & Sewerage)*, 1990 MERC Lab Op 34. Among these is the requirement that the transfer have a significant adverse impact on bargaining unit employees. The mere loss of unit positions or promotional opportunities does not constitute a significant adverse impact giving rise to a duty to bargain. *City of Detroit (Dep't of Water & Sewerage), at* 41.

I find that Kowalski's position at NET was not the same position/assignment that Risch had filled. Because NET crews are generally set up by geographical area, coming from Royal Oak Kowalski was assigned to the same NET crew as Risch. However, he did not perform exactly the same duties. When Kowalski joined NET, he was given the supervisory authority at NET consistent with his sergeant rank. In addition, after Kowalski became familiar with NET operations, he performed duties that only a sergeant can perform under NET rules. That is, Kowalski was present for and supervised raids conducted pursuant to search warrants. He also was present during drug buys where a sergeant's presence was required. Because I find that Kowalski's position at NET was not the position/assignment previously held by a member of Charging Party's bargaining unit, I conclude that Respondent did not remove a position from Charging Party's unit when it assigned Sergeant Kowalski to NET.

Kowalski did perform some duties formerly performed by the officer in Charging Party's unit assigned to NET. However, I find that Respondent did not have an obligation to bargain over the transfer of this work to the command officers' unit because the transfer of work did not have a significant adverse impact on employees in Charging Party's unit. No unit member was laid off or suffered any reduction in pay as a result of the transfer. Moreover, after Risch was removed from NET, no other member of the bargaining unit sought this assignment. Although Charging Party's unit lost one position, this does not constitute a significant impact under *City of Detroit (Dep't of Water & Sewerage), supra.*

As set out above, I conclude that Respondent did not unlawfully remove a position from Charging Party's bargaining unit when it assigned Kowalski to NET. I also conclude that Respondent did not have a duty to bargain over the transfer of work formerly performed by the

NET officer in Charging Party's bargaining unit to the command officers' unit because the transfer of work did not have a significant impact on Charging Party's unit.

III. Section 10(1)(a) and (c) Allegations:

A. Facts

1. Risch's Assignment To And Removal From NET

In July 2001, Karyn Risch bid on and was awarded an assignment to the NET task force in accord with her seniority and the procedures set out in the parties' 1995 and 1999 LOAs. Risch began working for the task force shortly before October 1, 2001.

NET consists of sworn police officers from 12 municipal police departments in Oakland County, personnel from the Oakland County Sheriff's Department, and an employee of the Federal Bureau of Investigations (FBI). NET is under the control of the Oakland County Sheriff's Department (hereinafter Oakland County). All NET personnel are deputized by the Oakland County Sheriff to expand their jurisdiction to all of Oakland County. Under the Urban Cooperation Act of 1967, MCL 124.501 et seq., municipalities participating in NET must enter into a contract with Oakland County. This contract provides that individuals supplied by participating law enforcement agencies will be under the control and supervision of the NET commander. The NET bylaws, which are part of the NET contract, state, "Personnel assigned to NET shall be given their assignments or relieved of those assignments at the discretion of the NET commander." In 2001, Chief Quisenberry was vice chairperson of NET's advisory board of directors. Lieutenant Joseph Quisenberry, an employee of Oakland County and Royal Oak Police Chief Theodore Quisenberry's brother, was the commander of NET. [2]

At the time Risch joined NET, the unit had three street crews. Street crews were responsible for developing investigations leading to the arrest of individuals violating controlled substance laws. Members of NET street crews developed contacts with informants; made hand-to-hand drug buys while undercover; supervised buys by informants; procured and executed search and arrest warrants; and followed through the prosecution process. Street crews usually consisted of four or five investigators and a sergeant who supervised the crew. Oakland County was divided into three street crew operational areas. A street crew supervised by Sergeant John Fitzgerald from the City of Southfield Police Department covered the mid-southern portion, including the City of Royal Oak. As the officer from Royal Oak, Risch was assigned to this crew.

Fitzgerald came to NET as crew supervisor in May 2001 without previous NET experience. Between May and October, both members of Fitzgerald's crew and the sergeants assigned to the other two street crews perceived problems with Fitzgerald's leadership. One of the other sergeants reported to Lieutenant Quisenberry that he thought that Fitzgerald tended to "micromanage." Lieutenant Quisenberry discussed Fitzgerald's performance with the two sergeants, who both reported that they thought that Fitzgerald lacked sufficient experience in

[2] Hereinafter, I refer to Joseph Quisenberry as Lieutenant Quisenberry, and Theodore Quisenberry as Quisenberry, Chief Quisenberry, or the Chief.

doing drug investigations. Between May and August, Lieutenant Quisenberry personally observed operations conducted by Fitzgerald's crew and noticed friction between Fitzgerald and his crew members. However, Lieutenant Quisenberry was satisfied that any problems would be resolved as Fitzgerald became more experienced.

During a crew meeting around Thanksgiving of 2001, crew members complained to Fitzgerald about his failure to appoint an assistant crew leader after the former assistant crew member had left NET. Risch suggested that an assistant crew leader be chosen by election, a suggestion Fitzgerald rejected. Other topics were also raised at the meeting, including Fitzgerald's request that crew members give him at least 24 hours notice before they took time off. Risch told Fitzgerald that Respondent had told her that a sergeant in Respondent's department would approve her leave requests. After this meeting, according to Fitzgerald, Risch began acting unfriendly toward him, and he thought she was being uncommunicative. Other members of the crew testified that there was friction between Risch and Fitzgerald even before this meeting.

On December 21, 2001, Fitzgerald reported to Lieutenant Quisenberry a remark made by a member of another NET crew which suggested that Risch might have tipped off a friend to the fact that NET was planning a raid on a local bar. Officers from Oakland County's special investigations unit were assigned to investigate the incident. The officers interviewed several witnesses, including the officer who made the remark Fitzgerald heard, and concluded that Risch had done nothing wrong. The officers issued their report on December 27.

A few days later, Fitzgerald concluded that Risch had been abrupt with him on the radio when he asked her for information on a surveillance she was conducting. Fitzgerald told Lieutenant Quisenberry that he thought that his ability to communicate with Risch had been damaged by the bar investigation incident. Lieutenant Quisenberry asked Fitzgerald to meet with Risch and try to work out their differences. On January 4, 2002, Fitzgerald ordered Risch to report to his office and close the door. Risch asked for a witness, and Fitzgerald granted her request. [3] Fitzgerald accused Risch of refusing to provide him with information when he talked to her during the surveillance. He pressed her to explain what was wrong between them and suggested that Risch was angry because he reported the remark leading to her investigation in the bar incident. Risch denied that she refused to give him information. Risch's and Fitzgerald's versions of the rest of the conversation differ. They agree that Risch admitted that she had been upset by the investigation, but did not now want to discuss it or thought it was a dead issue. They also agree that Fitzgerald asked Risch if she wanted to be transferred to a different crew, and Risch said she did not think she needed to be. Risch felt the meeting ended amicably. By the end of the meeting, however, Fitzgerald had decided to request that Risch be transferred out of NET.

On January 7, Fitzgerald went to Lieutenant Quisenberry to report the results of his meeting with Risch. Fitzgerald told Lieutenant Quisenberry that he had called Risch to his office to have a discussion, and that Risch told him, "on the advice of her union" she would not meet with him without a witness. After listening to Fitzgerald, Lieutenant Quisenberry agreed that Risch should be removed from NET. According to Lieutenant Quisenberry, he did not consider

[3] According to Fitzgerald, Risch said, "On the advice of my Union, I will not talk to you without a witness present." According to Risch, she simply asked for a witness.

transferring Risch to another crew, in part, because this would have been an unusual action given the geographic makeup of the street crews. The following day, January 8, Lieutenant Quisenberry called Chief Quisenberry, conveyed the substance of what Fitzgerald had said, and told him that Fitzgerald was requesting that Risch be removed from NET. Later that day, Lieutenant Quisenberry sent a memo to Chief Quisenberry:

> As you are aware, my office conducted a line investigation on Officer Karen [sic] Risch, and her conduct surrounding the [bar] investigation. As a result of this investigation, Officer Risch was cleared of any wrongdoing and this investigation is closed.
>
> One of my Crew sergeants, John Fitzgerald came to me yesterday and requested that Officer Risch be transferred from the unit. Sgt. Fitzgerald explained that ever since the administrative investigation was concluded, Officer Risch has been standoffish and genuinely rude to him. This had been demonstrated to Sgt. Fitzgerald by Officer Risch walking into the Crew Office and shutting the door between himself and the crew. Another example is that last week while executing a search warrant in Southfield, Sgt. Fitzgerald requested information over the radio from Officer Risch. Officer Risch refused to give the information and responded by saying "get it from Dante, he will be there soon." It became abundantly clear to Sgt. Fitzgerald that Officer Risch blamed him for the line investigation conducted on her. Sgt. Fitzgerald then advised me that he called Officer Risch into his office in an effort to clear the air and see if a teamwork relationship can exist. When Office Risch came into his office she responded to him by saying, "on the advice of my Union, I will not talk to you without a witness present." Sgt. Fitzgerald then called Deputy Dave Scott into the office to witness the discussion. After a short time, Sgt. Fitzgerald concluded that continuing the conversation was fruitless.
>
> I am requesting that you consider removing Officer Risch from the NET Unit. As I am sure you are aware, our obligation to the public and the efficiency of the task force can only succeed when members agree to work in a team environment. Sgt. Fitzgerald is the crew leader, and allowing a non-communicating environment within team members can and will compromise investigations.

On January 8, Risch was ordered to report to the Royal Oak police station, where Lieutenant Donald Foster gave her a notice stating that she had been removed from the NET assignment and transferred back to the patrol division. The memo also stated that Respondent would be conducting an administrative review of her conduct while assigned to NET. Risch asked Foster why she was being investigated, but Foster said he did not know.

2. Risch's Grievance And Attempts To Regain Her NET Assignment

On the evening of January 8, Charging Party's Board was meeting at a restaurant in Royal Oak. Risch came to the meeting to report what had happened to her. Risch asked a member of her NET crew to meet her there so she could return some NET property, and three

members of her crew showed up. Someone reported to Quisenberry that Risch and her NET crew members had met at the restaurant with Charging Party's officers, although Quisenberry could not remember who told him or exactly when he heard this.

On January 9, Charging Party sent Quisenberry a letter demanding that he provide it with a copy of the charges pertaining to her reassignment to patrol and any and all evidence he had against Risch. On the same day, Charging Party filed a grievance alleging that Respondent failed to give any cause for Risch's removal. Charging Party requested that Risch be reassigned to NET and placed on a different crew. The grievance also requested that "Chief Quisenberry be sanctioned for willful[sic] disregard of due process provisions of contract." On January 10, Quisenberry told Charging Party that there were no departmental charges against Risch. In his grievance response, Quisenberry stated that Risch had been removed from her NET assignment because NET had requested it.

Quisenberry assigned Lieutenant Foster to investigate whether Risch had conducted herself in an insubordinate manner during her assignment at NET. Foster delivered his report sometime between January 12 and 14. Foster interviewed 17 witnesses, including Fitzgerald, Risch, everyone on their NET crew, other NET crew sergeants and members of other NET crews. In his report of his interviews with the other members of Fitzgerald's crew, Foster noted that each was "one of the three NET officers who met with Officer Risch and board members of the ROPOA on the evening of January 8, 2002." Many of the interviewed officers criticized Fitzgerald's supervisory abilities. In his report, Foster noted that he did not find any evidence of insubordinate conduct on Risch's part. He concluded, however, that it was clear to everyone with whom Risch and Fitzgerald worked at NET that they had difficulty working together. Based on his interview with Risch, Foster concluded that Risch had decided that she could not trust Fitzgerald but, instead of taking action, tried to avoid him as much as possible. Foster opined that Risch had displayed poor judgment and immaturity.

Risch reported back to work in Royal Oak on January 11. Quisenberry saw her in the parking lot and invited her to come to his office with a union representative to discuss her removal. Sometime that day, Risch and two Charging Party board members met with Quisenberry. They asked him why Risch had been transferred. Quisenberry told them that Oakland County had requested it. Quisenberry gave Risch a copy of Lieutenant Quisenberry's January 8 memo. Risch asked if there was any way she could get her assignment back. Quisenberry told her to wait. He said that after a cooling off period he would make contact with NET and see if anything could be done.

A few days later, Quisenberry spoke to Lieutenant Quisenberry and Lieutenant Quisenberry's supervisor, Captain Eader. Quisenberry told them that he was conducting an internal investigation of Risch's conduct at NET and asked them if there was a possibility that Risch could come back to NET. Lieutenant Quisenberry told Quisenberry that Risch could come back if Fitzgerald agreed. When Risch called Quisenberry, he told her that communication between supervisor and officer was very important, but that if Fitzgerald agreed, Quisenberry would consider sending her back.

On January 17, Respondent posted the NET assignment for bid. Charging Party advised its members not to bid on the assignment, and no one did.

On January 21, Quisenberry met again with Risch and a Charging Party representative. Quisenberry told them that if Risch could work things out with Fitzgerald, Oakland County would be willing to have her return to NET. Risch immediately called Fitzgerald.

Risch and Fitzgerald met for lunch at a restaurant on January 22. Risch asked Fitzgerald what problems he had with her and to tell her what she needed to do to get her position back. Fitzgerald mentioned that he felt that she was not communicating with him. Fitzgerald asked her several times what problems she had with him and defended his action in reporting her alleged remark about the bar raid. Risch told him that this was in the past. She denied having any problems with him. Risch and Fitzgerald discussed the fact that Fitzgerald had told Lieutenant Quisenberry that Risch had asked for a witness at their January 4 meeting. Fitzgerald complained that Risch had asked for a witness when he just wanted to have a private conversation. Risch explained that she had heard that he was upset about their conversation while she was on surveillance and was worried that she might be disciplined. Risch left the meeting with the impression that Fitzgerald was going to think about recommending her return, but Fitzgerald felt that the meeting had not done anything to improve their relationship.

On January 24, Fitzgerald wrote a memo to Lieutenant Quisenberry describing his meeting with Risch. Fitzgerald complained that Risch had not apologized for past problems or identified what they were. Fitzgerald told Lieutenant Quisenberry that he felt that problems between he and Risch would reoccur and that the meeting had not changed his mind about his request to have her removed from NET.

3. Risch's Meetings with Lieutenant Quisenberry and Chief Quisenberry

After Quisenberry told Risch and her union representative that NET was not taking her back, he gave her permission to meet directly with Lieutenant Quisenberry. Risch came to Lieutenant Quisenberry's office on the afternoon of January 29. The following day, Risch met with Chief Quisenberry. As set out below, Risch's and the Quisenberrys' accounts of these meetings are materially different.

According to Risch, she first asked Lieutenant Quisenberry if there was anything she could do to get her position at NET back. Lieutenant Quisenberry asked her if she could work with Sergeant Fitzgerald, and Risch said she could, "but if the issue was that Sergeant Fitzgerald could not work with me, then, you know it's just a personality conflict." According to Risch, Lieutenant Quisenberry said that it "had gone past that point, now it had become about the union." Lieutenant Quisenberry mentioned that Charging Party had filed a grievance saying that NET was wrong in removing her from her assignment. When Risch replied that Charging Party had filed the grievance, Lieutenant Quisenberry told her that she could fire the union just like she could fire a lawyer. According to Risch, Lieutenant Quisenberry told her that she had more control than she thought and that she was being used as a puppet. Lieutenant Quisenberry brought up the case of a Royal Oak police officer who had been accused of wrongdoing and threatened with removal from his assignment to Respondent's directed patrol unit. Lieutenant

Quisenberry said that the officer had admitted his wrongdoing and written letters of apology and had his position back because he handled it himself. Risch told Lieutenant Quisenberry that her case was not similar. Lieutenant Quisenberry agreed, but said that the point was the way the officer had handled Charging Party. Lieutenant Quisenberry asked her how he or Chief Quisenberry or Fitzgerald could reinstate her "when the Union would rattle its sabers, saying we won, we won."

Lieutenant Quisenberry testified that he met with Risch in his office after she had lunch with Fitzgerald. According to Lieutenant Quisenberry, Risch told him that she wanted to return to NET and asked him what she would have to do. Lieutenant Quisenberry told her that she was going to have to work it out with Fitzgerald, and that Fitzgerald was going to have to decide if he wanted her back. Lieutenant Quisenberry knew from his brother that some kind of grievance had been filed after Risch had been removed from her NET assignment. According to Lieutenant Quisenberry, he told Risch that he found it odd that a grievance had been filed saying essentially that NET or Oakland County did not have the right to remove Risch from her assignment. Lieutenant Quisenberry denied making any of the other remarks Risch attributed to him.

The following day, Risch went to see Chief Quisenberry. Risch testified that the Chief first asked her if she wanted a witness and she said no. Risch asked him if he had heard anything from his brother. According to Risch, he said that he had spoken to Lieutenant Quisenberry that morning. Chief Quisenberry said that NET was concerned over what Charging Party was saying concerning her removal and that NET had a concern over her "taking meetings" to get her position back while also having Charging Party file a grievance. According to Risch, she told Quisenberry that she did not file the grievance, that Charging Party did because it was a contractual issue. Risch testified that Quisenberry told her that she could withdraw the grievance, and Risch said she could not. According to Risch, Quisenberry pulled out a file and started taking out what Risch thought were grievances and counting them. Quisenberry expressed anger at the union's demand (in Risch's grievance) that he be personally sanctioned. Risch testified that Quisenberry said, "with all these grievances, how could [Quisenberry] give [Risch] her position back and not be seen as buckling to the Union?" According to Risch, Chief Quisenberry brought up the issue of the officer who had apologized. He told Risch that this officer had "handled the Union and taken responsibility and handled the matter himself."

Chief Quisenberry testified that on January 30 he first he asked Risch if she wanted a union representative but she declined. According to Quisenberry, Risch asked him whether he had talked to his brother about their meeting the previous day. Quisenberry said no. Quisenberry testified that he told her that there was a decision and that decision remained, and that NET had not changed its mind and that there was nothing more he could do. According to Quisenberry, Risch was upset. Quisenberry told her that it was not his decision, that this was Oakland County's decision and that there was nothing that he could do to force them to take her back. According to Quisenberry, Risch acknowledged this. Quisenberry had Risch's grievance in front of him, and he read through the list of remedies that Charging Party had asked for. Quisenberry told Risch that, regarding the grievance, there was nothing he could do to facilitate her return to NET and that it was out of his hands. According to Quisenberry, Risch brought up the case of the Royal Oak police officer who apologized for his misconduct and pointed out that he had not lost his assignment. Quisenberry responded that the issues were different. According to Quisenberry,

he said that this officer's assignment was an internal assignment, that the officer being disciplined for his actions was an internal matter, and the Royal Oak Department controlled the issue. Quisenberry denied ever telling Risch that if she dropped the grievance she could go back to NET or saying anything that implied that it was his decision and not NET's. He also denied saying anything about other grievances or demands to bargain made by the Union.

I find Risch to be a credible witness. Risch impressed me with her straightforwardness and the detail she was able to provide regarding her discussion with Chief Quisenberry. I credit Risch's testimony of her meeting with Chief Quisenberry on January 30. Since Lieutenant Quisenberry was not Respondent's agent, and because, as discussed below, I find that he did not make the ultimate determination as to whether Risch would return to NET, I conclude that it is unnecessary for me to determine whether Risch's version of their January 29 conversation was accurate.

A. Discussion and Conclusions of Law

1. Risch's Removal from NET

The elements of a prima facie case of discrimination under Sections 10(1)(a) or (c) of PERA include: (1) employee union or other protected concerted activity; (2) employer knowledge of the activity; (3) union animus or hostility to the employee's protected rights; (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Univ of Mich*, 2001 MERC Lab Op 40, 43; *Fulton Schools*, 2000 MERC Lab Op 307, 311. The employer may rebut a prima facie case by demonstrating that the actions would have taken place even in the absence of the protected conduct. *Michigan Educational Support Personnel Assoc v Evart Public Schools*, 125 Mich App 71, 74 (1983); *Community Health Care Center of Branch Co*, 1999 MERC Lab Op 490, 500.

Before January 8, 2002, Risch's union or other activity protected by the Act consisted of, according to this record, her membership in Charging Party's bargaining unit and, arguably, her request for a witness at her January 4, 2004 meeting with Fitzgerald. There is no indication that Risch held any union office or had taken any active position in the disputes between Charging Party and Respondent over the scope of Respondent's duty to bargain. When Chief Quisenberry removed Risch from her assignment he obviously knew that she was a member of the bargaining unit. Lieutenant Quisenberry had also informed him in the Lieutenant's January 8 memo that Risch had refused, "on the advice of her union," to meet with Fitzgerald without a witness on January 4. However, the evidence does not support a conclusion that Respondent's decision to remove Risch from NET was based, even in part, on Risch's request for a union representative at this meeting.

Charging Party argues that Respondent wanted to remove Risch because she had obtained her assignment by exercising her seniority rights under the parties' LOA. This argument, however, ignores the fact that within two weeks after removing Risch from the NET assignment, Respondent posted the assignment for bid by members of Charging Party's bargaining unit. The record indicates that if members of Charging Party's bargaining unit had applied to fill the vacancy, Respondent would have awarded the assignment to the highest

seniority bidder. Charging Party also argues that Risch "was a pawn in the campaign Quisenberry was waging on [Charging Party]," but fails to explain why, if this was so, Risch was singled out as Quisenberry's target.

As for Risch's request for a witness at her January 4 meeting with Fitzgerald, it appears that both Fitzgerald and Lieutenant Quisenberry interpreted Risch's attempt to invoke her *Weingarten* rights[4] as additional evidence of her reluctance to communicate with Fitzgerald, since Fitzgerald elected to communicate Risch's request to Lieutenant Quisenberry and he specifically mentioned it in his memo to Chief Quisenberry. There is no evidence, however, that Chief Quisenberry viewed Risch's request that way. In fact, on both January 11 and January 30, Chief Quisenberry suggested that Risch have a union representative when meeting with him. More significantly, Chief Quisenberry clearly knew when he removed Risch from NET that Fitzgerald's complaints about Risch went beyond her request for a representative at the January 4 meeting, and, also, that Fitzgerald's complaints were the basis for Lieutenant Quisenberry's request that Risch be removed from her NET assignment. Whether or not Fitzgerald was a bad crew leader, as Charging Party contends, is irrelevant. Whether or not Chief Quisenberry, as a matter of fairness, should have taken Risch's side when he received the memo from his brother requesting her removal from NET is also beyond the scope of my authority, since Chief Quisenberry's decision on January 7 to comply with this request was not based on Risch's invocation of her *Weingarten* rights, and Risch had not engaged in any other activity protected by PERA at the time of her removal from NET.

2. Refusal to Reinstate Risch to Her NET Assignment

On the evening of January 8, 2002, Risch met with Charging Party's board and explained the circumstances surrounding her removal from NET. The following day, Charging Party filed a grievance on Risch's behalf and sent Respondent a letter demanding information about Risch's reassignment. Risch's filing of a grievance under the contract and her efforts to obtain Charging Party's assistance in getting her assignment back were protected by Section 9 of PERA. *MERC v Reeths-Puffer School Dist,* 391 Mich 253 (1974). Charging Party alleges that but for these actions, Risch would have been reinstated to her NET assignment.

I conclude that Charging Party has established that Chief Quisenberry was hostile to Risch's protected activity, i.e. filing a grievance and otherwise seeking Charging Party's assistance in regaining her NET assignment. I base this conclusion primarily on the statements made to Risch by Chief Quisenberry on January 30, 2002. As discussed above, I credit Risch's version of their conversation. During their discussion, Quisenberry attempted to persuade Risch not only to withdraw her grievance, but also to withdraw her allegiance from Charging Party. He did this, in part, by dangling in front of her the chance that she might regain her assignment if she forswore concerted action. This was clearly the reason Quisenberry referred to another officer's successful outcome after "handling the union" and why he asked her how he could give her the NET assignment without appearing to "buckle in" to Charging Party. Quisenberry did

[4] In *NLRB v J. Weingarten, Inc*, 420 US 251 (1975), the Supreme Court held that an employee's insistence upon union representation at an employer interview which the employee reasonably believes might result in disciplinary action is protected concerted activity under the National Labor Relations Act. 29 USC 151, et seq. The Commission adopted the *Weingarten* rule in *Univ of Michigan,* 1977 MERC Lab Op 496.

not suggest that Risch's grievance might be settled; he suggested that she might get what she wanted if she repudiated Charging Party's help. As Respondent points out, an expression of a negative opinion about unions, unaccompanied by threats or coercive actions, does not establish union animus. *Edwardsburg Public Schools,* 1994 MERC Lab Op 870. Likewise, the existence of "tension, conflict and disagreement" between employer and union representatives, standing alone, does not establish a violation of PERA. *Livonia Public Schools,* 1999 MERC Lab Op 416, 430. An expression of dismay over the filing of grievances is not evidence of an unlawful motive, unless accompanied by threats or direct action against the complaining employee or union representative. *City of Detroit (Lake Huron Water Treatment Plant),* 1999 MERC Lab Op 211, 217. However, in this case, Quisenberry did not merely express his dismay at Risch's grievance or dislike of Charging Party's actions, but tried to coerce her into giving up the rights guaranteed her by Section 9. I find that Quisenberry's remarks demonstrated his union animus.

I also find Foster's comments about Risch's January 8 meeting with Charging Party in his investigation report to be evidence of Respondent's union animus. Respondent provided no explanation of why Foster mentioned this meeting or the presence of members of Risch's NET crew in his report to Chief Quisenberry. It seems reasonable to infer that Chief Quisenberry had made a statement to Foster that lead him to conclude that Quisenberry would find Risch's meeting with her union relevant to the investigation of her possible misconduct at NET.

I conclude, however, based on the evidence as a whole, that Respondent would not have reinstated Risch to her NET assignment even if she had not filed a grievance or sought Charging Party's assistance in regaining her position. NET's bylaws give NET control over an officer's conduct and assignments while assigned to NET. It is not as clear that NET has authority under the NET contract to order a participating law enforcement agency to remove an officer it has assigned to the task force, as evidenced by the fact that, in Lieutenant Quisenberry's January 8, 2002 memo to his brother, he made a "request" that the Chief "consider" removing Risch from her NET assignment. Regardless of NET's actual authority, however, Chief Quisenberry clearly decided to defer to NET's decision from the start. As Charging Party indignantly points out, Chief Quisenberry did not investigate to determine whether Risch was culpable in incurring Fitzgerald's dislike before reassigning her. Rather, Chief Quisenberry decided to rely on his brother's representations, as Lieutenant Quisenberry had relied on Fitzgerald's. As discussed above, Chief Quisenberry's decision to accept NET's recommendations that Risch be removed from her assignment was not based on her union or concerted protected activity.

Charging Party argues that Chief Quisenberry's promise that Risch could return to her NET assignment if Fitzgerald agreed was a sham because he knew that Fitzgerald would not change his mind. However, since Quisenberry had deferred to Fitzgerald's judgment in deciding to remove Risch from NET, it was logical for him to put the decision as to whether she would return in Fitzgerald's hands. I conclude that despite his statements on January 30, Quisenberry never intended to allow Risch to return to NET without Fitzgerald's consent. Quisenberry never explicitly promised to return Risch to NET. Moreover, if Quisenberry had actually meant to allow Risch to return to her assignment if she dropped her grievance, there was no reason for him to wait to make this offer until Risch had talked to Fitzgerald. Aside from the statements Quisenberry made on January 30, 2002, there is nothing to support Charging Party's assertion that Quisenberry would have somehow intervened to get Risch back to NET if Risch had not

filed a grievance. For reasons set forth above, I conclude that Charging Party has not established that Risch's union or protected activity was the "but for" cause of Respondent's failure to reinstate her to NET. I conclude both that Risch's removal from NET was not motivated by union or other protected activity and that Risch would not have been reinstated to this assignment even if she had not filed a grievance or sought Charging Party's assistance.

3. Assignment of a Sergeant to NET

Charging Party alleges both that Respondent had a duty to bargain over the assignment of a sergeant to NET after Risch's removal, and that this action was motivated by union animus. Charging Party points out that the when an action comes soon after an employee has engaged in concerted protected activity, the timing of the action may be a factor in inferring a causal connection. Charging Party cites *Hall v NLRB*, 941 F2d 684, 689 (8th Cir, 1991), and *NLRB v Aquatech*, 926 F2d 538, 546 (6th Cir, 1991), which are two of numerous federal and state cases standing for this principle. According to Charging Party, the fact that Chief Quisenberry took steps to create a new sergeant position within days after no one in Charging Party's unit responded to the NET job posting demonstrates that the transfer of work was unlawfully motivated. Moreover, under the parties' May 7, 1999 LOA, when no eligible unit member applied for the vacant NET position Respondent was to fill it from among eligible unit members by reverse seniority. Charging Party asserts that the only plausible explanation for Respondent's decision not to assign the job by reverse seniority was that Respondent was seeking to "exploit the circumstance to strike back at [Charging Party] by removing one of its bargaining unit positions, thereby enabling [it] to remove the NET position from the negotiated pick protocols."

I do not agree. Respondent wanted the NET assignment filled, as demonstrated by its decision to post the assignment for bid by Charging Party's members soon after Risch was removed. However, I see no reason to discredit Chief Quisenberry's testimony that, rather than order a reluctant police officer to take the NET position, he decided not to fill it. Chief Quisenberry's decision to create a NET assignment in the command unit came after, not before, he had attempted to fill the position with a member of Charging Party's unit. Chief Quisenberry's haste in moving to create the new sergeant position after no one in Charging Party's unit bid is explained by his desire to get an officer to NET as soon as possible. I conclude that the evidence does not establish that Respondent's decision to assign a sergeant to NET was motivated by union animus.

IV. Summary of Conclusions:

I conclude that Respondent did not have a duty to bargain over the leave policies for the 2001 Dream Cruise that it announced in June 2001. I find that Respondent had the right under the parties' collective bargaining agreement to restrict the use of banked leave and require employees to work overtime during the week before the Dream Cruise. I also find that the "leave protocols" for the Dream Cruise event had not become a term and condition of employment.

I conclude that Respondent did not unilaterally alter its leave policies for PSAs in July and August 2001. I find that Charging Party did not establish that Respondent in fact changed these policies.

I conclude that Respondent had no duty to bargain over its decision to assign police officers in Charging Party's bargaining unit to the bike patrol, the SRT, or the CSTF, but that it did have an obligation to bargain over the effects of these assignments, including such issues as eligibility requirements, selection procedures, training, wage premiums, duration of the assignments, overtime opportunities, and other terms and conditions of these assignments. I find that Charging Party made timely demands to bargain over these issues and conclude that Respondent's refusal to bargain violated its obligations under Section 10(1)(e) of PERA. However, Respondent's obligation to bargain over the effects of assigning members of Charging Party's unit to the bike patrol and the SRT terminated when it changed its mind about assigning the work.

I conclude that Respondent did not unlawfully remove a position from Charging Party's bargaining unit when, after removing unit member Karyn Risch from her NET assignment in January 2002, it assigned Sergeant John Kowalski to that task force. I find that Kowalski's position at NET was not the same position/assignment that Risch had filled. I also conclude that Respondent did not have a duty to bargain over the transfer of work to the command officers' unit because the transfer did not have a significant adverse impact on employees in Charging Party's unit.

I conclude that Respondent did not violate Section 10(1)(a) or (c) of PERA by removing Risch from her NET assignment in January 2002 or by refusing to reinstate her to that assignment. I find that Charging Party did not establish that that Risch's request for a union representative at a meeting with her NET supervisor on January 4, 2002 was the cause of her removal and that Risch had not engaged in any other union or other protected activity before she was removed from NET on January 8, 2002. Although I find that Chief Theodore Quisenberry demonstrated his animosity toward Charging Party and toward Risch's filing of a grievance challenging her removal from NET, I conclude that Risch would not have been reinstated even if she had not sought Charging Party's assistance in regaining her position. Finally, I conclude that Respondent's assignment of a command officer to NET after no member of Charging Party's unit applied for the assignment did not violate Section 10(1)(a) or (c) of PERA.

In accord with the findings of fact, discussion and conclusions of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent City of Royal Oak (Police Department), its officers and agents, is hereby ordered to:

1. Cease and desist from refusing to bargain with Charging Party Royal Oak Police Officers Association with respect to the effects on unit employees of its decisions to assign unit employees to special assignments, including the bike patrol, the special response team, and the crime suppression task force.

2. On request, bargain with Charging Party concerning the effects of its decision

to assign a member of its barga ining unit to the crime suppression task force, and reduce to writing and execute any agreement reached as a result of such bargaining.

3. Post the attached notice in conspicuous places on its premises, including all places where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of Royal Oak (Police Department) has been found to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with Charging Party Royal Oak Police Officers Association with respect to the effects on unit employees of our decisions to assign unit employees to special assignments, including bike patrol, special response team, and the crime suppression task force.

WE WILL, on request, bargain with Charging Party concerning the effects of our decision to assign a member of its bargaining unit to the crime suppression task force, and reduce to writing and execute any agreement reached as a result of such bargaining.

CITY OF ROYAL OAK (POLICE DEPARTMENT)

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.