STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GENESEE COUNTY SHERIFF'S DEPARTMENT,
Public Employer-Respondent,

Case Nos. C00 D-52 & C00 H-153

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 25, LOCAL 2259, AFL-CIO,
Labor Organization-Charging Party,

-and-

MICHAEL CHERRY,
An Individual Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C. by Frederick B. Schwarze, Esq. and Richard Fanning, Esq., for Respondent

Gregory, Moore, Jeakle, Heinen & Brooks, P.C. by Scott A. Brooks, Esq., for Charging Parties

DECISION AND ORDER

On August 22, 2003, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter. Charging Parties American Federation of State, County, and Municipal Employees Council 25, Local 2259, AFL-CIO (AFSCME), and Michael Cherry, alleged that Respondent Genesee County Sheriff's Department violated the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*. by discriminating against Cherry and other employees because of their protected concerted activity and by interfering with rights protected by PERA. The ALJ found that certain of these allegations had merit.

The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Both parties were granted an extension to file exceptions to the ALJ's Decision and Recommended Order until October 15, 2003, as well as a second extension until October 20, 2003. On October 15, 2003, both parties filed exceptions to the ALJ's Decision and Recommended Order and briefs in support. Both parties were granted an extension to file a

response to the exceptions until December 3, 2003. On that date, both parties filed their response to each other's exceptions. In its exceptions and in its response to Charging Parties' exceptions, Respondent made a request for oral argument. After reviewing the parties' exceptions, we conclude that oral argument would not materially assist us in rendering this decision and, therefore, deny Respondent's request.

In summary, the ALJ found that Respondent violated PERA by its actions in suspending deputies Michael Cherry and Michael Potoczny for comments made about employee Tina Fielder; by allocating Cherry a low score on his 2001 performance evaluation; by suspending Lynda Germaine-Cherry (Germaine); and by giving Wayne McIntyre a negative performance evaluation for testifying in a MERC hearing. The ALJ dismissed all other allegations on the basis that Charging Parties failed to establish that the Employer's other personnel actions were motivated by protected concerted activity or interfered with rights under PERA. The Charging Parties' exceptions object to the dismissal of these allegations. We agree with the ALJ's findings and conclusions regarding these charges and, therefore, find no merit to Charging Parties' exceptions.

In its exceptions, Respondent maintains that the PERA violations found by the ALJ are not supported by the evidence. Respondent argues that the Sheriff's action allotting Cherry a low number of performance points on his 2001 evaluation for promotion was not motivated by his protected concerted activity. Respondent further claims that the ALJ erroneously found that the statements of Cherry and Potoczny concerning Fielder constituted protected activity. Next, Respondent asserts that the ALJ incorrectly found that Germaine's use of foul language when speaking to her supervisor amounted to protected activity because the conversation did not relate to discipline. As discussed below, we find merit to several of Respondent's exceptions.

Facts:

The facts of the case have been set forth in the ALJ's Decision and Recommended Order and will only be summarized as necessary here. The Genesee County Sheriff's Department is headed by Robert Pickell, who became Genesee County Sheriff on January 1, 1999, and by Undersheriff James Gage. Michael Cherry, his wife Linda Germaine-Cherry, and Wayne McIntyre are deputies in the department. Michael Potoczny, a former deputy, is no longer with the department. All have served as union officials or stewards for Charging Party AFSCME.

Cherry's Performance Points:

Michael Cherry began work with the Sheriff's Department in April 1992. He became a member of the Union's executive board in December 1997 and served as vice-president for a short period in 1999. The record establishes that Cherry received a number of disciplinary suspensions under both the previous Sheriff and Sheriff Pickell. In addition, command officers have expressed concerns in the past related to what they considered Cherry's poor judgment and performance and his failure to be a "team player." In September of 1999, Cherry overheard a conversation between Captain Michael Compeau and Jail Administrator Ken Emigh in which they referred to several employees as "shit stirrers." Cherry testified that he heard Compeau specifically refer to him during the conversation, but Compeau and Emigh testified that names were not mentioned. Cherry subsequently filed a complaint with the Department; after Undersheriff Gage investigated the

matter, he found that neither Compeau nor Emigh specifically mentioned Cherry in their conversation.

Every two years Respondent Genesee County Sheriff's Department creates a list of employees eligible for promotion from police deputy to sergeant, a non-bargaining unit position. Employees are evaluated by a panel on the basis of a written test, oral board review, performance points, and seniority. The written test accounts for 60 points. The oral board, composed of an outside law enforcement officer, a representative from the department, and a representative from the human resource department, accounts for 20 points. Performance points are determined by the Sheriff, who may award up to 20 points. Each candidate is allowed up to 10 points for seniority. Under the rule-of-three, the Sheriff retains the discretion to decide which deputy to promote from the top three candidates.

Although Cherry had a high ranking on the eligibility list, Respondent bypassed Cherry for promotion to sergeant on a total of ten occasions between 1999 and 2001.[1] In 1999, Sheriff Pickell discussed a possible promotion for Cherry with members of the command staff, but most did not recommend that Cherry be promoted. In August of 2001, Cherry was again considered for a promotion to sergeant. At this point, Cherry was tied for the highest written examination score, but was also tied for the lowest amount of performance points, the Sheriff allotting him only 5 out of a possible 20 points. This score was significantly lower than the number of performance points he received in 1999, when the Sheriff awarded him a total score of 17 points. According to Undersheriff Gage, it was his recommendation that the Sheriff award Cherry no performance points in 2001, as Cherry had not demonstrated that he could perform as a supervisor. With respect to the oral board, the independent member on the panel allotted Cherry 7.5 points in 2001, compared to the 13.5 points awarded in 1999; Undersheriff Gage awarded Cherry 13 points in 2001, the same number of points he gave in 1999.

Comments Regarding Fielder/Discipline of Potoczny and Cherry:

Tina Fielder, an African-American, had been the Union president and chief negotiator in May of 1999. After the 1999 contract was approved on May 11, Fielder was promoted to administrative assistant to the Sheriff, a non-bargaining unit position. According to Cherry, union members did not think she was qualified and he related these complaints to Undersheriff Gage. Cherry claimed that Undersheriff Gage then told him that Fielder's promotion was a token promotion to gain the African-American vote in the upcoming election. Cherry told several individuals about this alleged comment, including Deputy Michael Potoczny. Several months later, during a grievance meeting, Potoczny stated to Fielder that she was a token appointment. Fielder subsequently filed a complaint with the Employer's affirmative action office.

The Employer gave Potoczny a 30-day suspension for stating to Fielder that she was a token appointment during the grievance meeting. Cherry was subsequently given a 3-day suspension for making an untruthful statement, which was repeating Gage's alleged statement about a token appointment to other employees. Cherry filed a grievance over this suspension, which was submitted to arbitration. The arbitrator credited Undersheriff Gage's testimony denying the

[1]Although the ALJ stated that Cherry was bypassed five times, Charging Parties correctly assert that he was actually bypassed 10 times.

statement; Cherry did not testify at the arbitration hearing although he was present. The arbitrator reduced the discipline to a reprimand.

Germaine Discipline

Respondent disciplined Deputy Germaine because of her actions on January 4, 2000. On that date, Germaine's supervisor ordered her to pick up a police car before 5:00 p.m. She did not retrieve the car until later that night, however, because she left the district without permission in order to attend a union meeting. When her superior directed her to write a report on the incident, Germaine responded that the report was "chicken shit." As a consequence for failing to timely retrieve the car, for leaving her district without permission, and for using foul language to a superior, she received a one-day suspension. The suspension was later reduced to a written reprimand after a grievance proceeding.

Discussion and Conclusions of Law:

Respondent asserts that the ALJ incorrectly found that it violated 10(1)(c) of PERA by awarding only 5 performance points to Cherry in 2001 because of his protected concerted activity. Respondent alleges that by basing his finding primarily on the fact that Respondent failed to produce credible evidence of a legal motive for its actions, the ALJ improperly shifted the burden to Respondent when Charging Parties had not established a *prima facie* case. We agree.

In order to establish a *prima facie* case of discrimination under 10(1)(c), a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. Nonetheless, the charging party bears the ultimate burden of proof. See *MESPA v Evart Pub Schs*, 125 Mich App 65 (1983); *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6; *Wright Line, Division of Wright Line, Inc*, 251 NLRB 1083 (1980, *enf'd* 662 F2d 899 (CA 1, 1981) *cert den*, 455 US 989 (1982).

Respondent asserts, and we agree, that Charging Parties have failed to establish a *prima facie* case of unlawful discrimination. While the record indicates that Cherry was active in the Union, held Union office, and filed grievances, Charging Parties have not established a nexus between this activity and the Sheriff's allotment of Cherry's performance points. The ALJ dismissed most of Cherry's other allegations against the Employer, including Cherry's being bypassed for promotion, because Charging Parties failed to establish that the Employer's actions were based on Cherry's concerted activity or motivated by anti-union animus. We reach the same conclusion here. Charging Parties assert that the conversation overheard by Cherry between Captain Compeau and Jail Administrator Emigh in which they referred to certain employees as "shit stirrers" established union animus. We disagree. Employment relationships are often filled with turmoil, and mere negative opinions expressed about unions or union members during a private conversation without additional threats or coercive actions do not establish anti-union animus. *City of Southfield*, 1987 MERC Lab Op 126, 141; *City of Detroit, Lake Huron Water Treatment Plant*, 1999 MERC Lab Op 211 (no exceptions); *Edwardsburg Pub Schs*, 1994 MERC Lab Op 870 (no

exceptions). Since we find that Charging Parties have failed to meet their initial burden of establishing that the awarding of 5 performance points was motivated by Cherry's protected activity, we find that the burden does not shift to the Employer to demonstrate its rationale. *City of St Clair Shores*, 17 MPER ¶27 (2004). However, we note that the record establishes additional factors that independently explain the lower score, including the Cherry's intervening discipline between the performance evaluations and the fact that the outside evaluator on the evaluation panel also significantly reduced the points he awarded Cherry from 13.5 in 1999 to only 7.5 in 2001. We conclude that Charging Parties have not established a violation of Section 10(1)(c) of PERA.

Respondent also argues that the ALJ erred in finding that the discipline issued to Cherry and Potoczny was based on protected concerted activity. The ALJ found that Cherry was given a 3-day suspension for "discussing union matters with Potoczny." According to the Notice of Disciplinary Action, the discipline issued to Cherry by the Employer was for making an untruthful statement and repeating this statement to others. The arbitrator agreed that Cherry's statement was untruthful, although she reduced the penalty for his actions. We find that the Employer disciplined Cherry for what it perceived to be misconduct. We do not agree that his discipline related to union matters or that his comments constituted protected concerted activity and, therefore, dismiss this allegation. *Macomb Twp (Fire Dept)*, 2002 MERC Lab Op 64; *Meridian Twp*, 1997 MERC Lab Op 457.

We reach a different conclusion with respect to the discipline of Deputy Potoczny for telling Fielder that she was a token appointment. His remark occurred during a grievance meeting. We have long held that an employee's conduct or comments during grievance meetings are protected even though they may be insulting or offensive. *Baldwin Cmty Schs*, 1986 MERC Lab Op 513, 524. The issue, therefore, is whether the conduct is so egregious as to remove it from the protections of PERA. While Potoczny's remark to Fielder may be considered offensive, it did not amount to the type of conduct so severe as to render it unprotected. *City of Detroit (Water & Sewerage)*, 1988 MERC Lab Op 1039; *Baldwin Cmty Schs.* We affirm the ALJ's finding that Respondent violated Section 10(1)(a) of PERA by disciplining Potoczny for calling Fielder a token appointment during a grievance meeting.

Finally, Respondent excepts to the ALJ's holding that it violated PERA when it disciplined Germaine for saying "chicken shit" in reference to the report she was instructed to write. The ALJ found that Germaine's comment constituted protected activity under Section 10(1)(a) because it occurred "during her conversation with her sergeant about possible discipline." We disagree with the ALJ regarding the context in which Germaine's remark was made. We find that Germaine reacted inappropriately and used foul language when asked to complete a report and was disciplined for it. We find no violation of PERA in the Employer's action in disciplining Germaine for insubordination. We also note that the resulting discipline was properly submitted to the grievance procedure and the penalty was reduced by the Sheriff.

Respondent has not excepted to the ALJ's finding that it violated PERA when Captain Compeau included a statement in McIntyre's evaluation that McIntyre had perjured his testimony in a MERC hearing. Although we agree with the ALJ that such a statement violated Section 10(1)(d) of PERA, we limit the remedy to eliminating only that portion of the evaluation. *New Haven Cmty Schs*, 1990 MERC Lab Op 167. We have carefully examined the remaining issues raised by the parties and find them to be without merit. In accordance with the conclusions of law set forth above, we issue the following Order:

ORDER

Respondent Genesee County Sheriff's Department, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 9 of PERA.

2. Take the following affirmative action to effectuate the policies of PERA:

   a. Expunge Deputy Michael Potoczny's personnel record of any reference to his June 20, 2000 thirty-day suspension for a statement he made during a grievance meeting regarding Tina Fielder and make him whole for any loss of pay, plus interest at the statutory rate, which he may have suffered because of the Genesee County Sheriff's Department's unlawful action.

   b. Remove any reference to Wayne McIntyre's testimony in a MERC hearing from his October 1, 2001 performance evaluation.

   c. Post the attached notice in all areas where employee notices are normally posted for thirty days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION AFTER A PUBLIC HEARING IN WHICH IT WAS FOUND THAT THE GENESEE COUNTY SHERIFF'S DEPARTMENT COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN EMPLOYMENT RELATIONS ACT, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights guaranteed by Section 9 of the Public Employment Relations Act.

WE WILL expunge Deputy Michael Potoczny's personnel records of any reference to his June 20, 2000, thirty-day suspension for a statement made to Tina Fielder during a grievance meeting and make him whole for any loss of pay, plus interest at the statutory rate, which he may have suffered because of the Genesee County Sheriff's Department's unlawful action.

WE WILL expunge from Deputy Wayne McIntyre's October 1, 2001 performance evaluation any reference to his testimony in a MERC hearing.

GENESEE COUNTY SHERIFF'S DEPARTMENT

By_____

Dated: _____

(This notice shall remain posted for a period of thirty consecutive days and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd., Suite 2-750, P.O. Box 02988, Detroit, MI, 48202-2988, (313) 456-3510.)

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MICHAEL CHERRY
An Individual Charging Party
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APPEARANCES:

Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C. by Frederick B. Schwarze, Esq. and Richard Fanning, Esq., for Respondent

Gregory, Moore, Jeakle, Heinen & Brooks, P.C. by Scott A. Brooks, Esq., for Charging Parties

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan by former Administrative Law Judge James P. Kurtz on August 21, 2000, and by Administrative Law Judge Roy L. Roulhac on September 11 and 17, 2001 and January 8 and 20, 2002 for the Michigan Employment Relations Commission. This matter was adjudicated pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 *et seq*. Based upon the record and post-hearing briefs filed on June 3, 2002, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA.

The Unfair Labor Practice Charge:

> Charging Party Michael S. Cherry filed the charge in Case No. C00 D-52 on April 7, 2000. He alleges that on September 8, 1999, Respondent Genesee County Sheriff's Department denied his wife's request for shift preference, without justification, and suspended her on January 12, 2000, because she filed a complaint with the American Civil Liberties Union (ACLU). The charge also alleges that Respondent's agents made derogatory statements about him and refused to promote him on December 11, 18, 19, and 20, 1999, because of his wife's complaint, his political activity and questions about his loyalty to the Department.

The charge was amended three times prior to the first day of hearing. A July 3, 2000 amended charge alleges that Respondent violated the Act by suspending him for three days, refusing to transfer him to a paramedic or road patrol position, and discriminating against and harassing his wife and him because of his union membership, his wife's protected activity, and for filing this unfair labor practice charge. A second amended charge, filed on October 16, 2000, alleges that Respondent discriminated against, harassed and disciplined various bargaining unit members, including Linda Germaine-Cherry, Wayne McIntyre and Michael Potoczny because of their protected concerted activity. The third amended charge, filed on January 7, 2002, alleges that Respondent has continued to discriminate against the above named employees and Christopher Love because of their protected activity. The amended charge also alleges that the employer discriminated against Wayne McIntyre for testifying in this proceeding.

The charge was also amended during the hearing to allege that Respondent discriminated against three bargaining unit members by removing them, without explanation, from the Honor Guard. The American Federation of State, County and Municipal Employees, Local 2259 was added as a Charging Party on August 17, 2000. AFSCME Council 25 was added as a Charging Party on December 6, 2001.[2]

PART I - FINDINGS OF FACT

A. Background

Charging Party AFSCME Council 25 and its Local 2259 and Respondent Genesee County Sheriff's Department are parties to a collective bargaining agreement that contains a five-step grievance procedure that ends in binding arbitration. Respondent employs approximately 220 deputies in two job classifications: corrections deputy and police deputy. Corrections deputies, the lowest classification, are responsible for maintaining order in the jail. Corrections deputies may be promoted to the police deputy classification in one of three divisions – road patrol, paramedics or courts. Employees promoted to the paramedics division are required to serve a twelve-month trial period and may be laterally transferred between divisions at the Sheriff's discretion. Employees who do not satisfactorily perform in their new positions may be demoted to their prior classification.

Promotions from police deputy to sergeant, a non-bargaining unit position, are a based on a written test, an oral board interview, performance points and seniority. The written test accounts for sixty points; the oral board interview, which is conducted by an outside law enforcement officer, a Sheriff Department representative and a representative from the Human Resources Department, accounts for twenty points; the sheriff may award up to twenty performance points; and each candidate is allowed up to ten points for seniority. This process produces a promotional list that remains in effect until it expires or is exhausted. When filling a vacancy, the Sheriff may use the "rule of three" and promote any police deputy from among the top three ranked applicants. A new

[2]Bruce A. Miller of Miller Cohen, P.L.C., filed an appearance on behalf of AFSCME Council 25 on December 6, 2001, but did not participate in the proceedings.

list is created when it contains less than three names. Employees remaining on the old list are ranked at the top of the new roster.

Robert Pickell was appointed Genesee County Sheriff on January 1, 1999. He replaced Sheriff Joe Wilson. Sheriff Pickell faced his first political election in the August 2000 primary. In March 2000, Local 2259 voted to support Pickell's opponent, Sergeant Chuck Melki, in the election.

B. Michael Cherry

Employment History: 1992-1999

Charging Party Deputy Michael S. Cherry was hired as a corrections deputy in April 1992. He was promoted to police deputy and assigned to the paramedics division in October 1993. After a one-day suspension in April 1994 for leaving his post without permission in violation of Section 4.3 of the Work Rules and a five-day suspension in May 1994 for various Work Rule violations, Cherry was demoted to the corrections division.

At about the same time, Cherry was ranked 5th on List A on a promotional roster for promotion from corrections deputy to police deputy in the paramedics division. In June 1994, Sheriff Wilson promoted Deputy Michael Brackrog, 4th on List A; he bypassed Cherry, and Lynda Germaine, 2nd on List B; and Deputy Larobardiere, 1st on List C. In September 1994, the parties settled grievances challenging Cherry's two suspensions and the Sheriff's failure to promote him. As part of the settlement, Cherry was promoted to the paramedics division.

In January 1995, Cherry was suspended for five days for using poor judgment, disregarding rules and regulations and endangering the public by crossing a double yellow line on a four-lane highway into oncoming traffic. After arbitration, his suspension was upheld. Six months later, in May or June 1995, Deputy Cherry was again demoted to the corrections division. A year later, during a grievance settlement, Cherry returned to the paramedics division subject to an extended trial period.

In a May performance evaluation, Cherry was described as a "marginal employee" with "little respect for authority," with a "sense of suspicion that there [was] a premeditated, underlying motive against him." Moreover, according to the evaluation, he did not "seem to bear in mind department or division goals and does not perform well under the team concept," "lacks judgment and control," and "has to have every little detail explained." Cherry was ranked 13th on a 1997 Sergeant Promotional Roster.

Cherry became a member of Local 2259's executive board in December 1997. Six months later, in June 1998, Cherry filed an informational report regarding "threats made by Dr. Janssen for 2nd time." He complained that Dr. Janssen, an emergency room doctor at Health Park, insulted and harassed him in front of his peers by questioning why he did not follow standard operating procedures for seizures while transporting a patient to the hospital, rather than calling him and asking for instructions. According to Cherry, Dr. Janssen told him that it was "really kind of silly; that's what we sent you to school for. Your [sic] going to make it easier for me to get you." Cherry wrote that Dr. Janssen's behavior could not be condoned and should be corrected immediately.

Three months later, in September 1998, Cherry was reassigned from the paramedics division to the court division. He testified that Lieutenant Michael Becker told him that the transfer was temporary and would last approximately ninety days. Lieutenant Becker, however, denied telling Cherry that the reassignment was temporary. He testified that Cherry was transferred from the paramedics division by former Sheriff Young because of complaints from the public and Cherry's interaction with physicians in the medical community.

Transfer Requests

> Cherry has made numerous unsuccessful requests to transfer from the court division. Former Sheriff Young denied his first request before he left office in December 1998. In January 1999, Cherry informed Sheriff Pickell that his transfer to the court division was supposed to be temporary and requested a transfer. Pickell also denied his request. Subsequently, Cherry regularly sought transfers to the paramedics and/or road patrol division and to work overtime in another division. According to Cherry, he made at least forty-three oral or written requests between January 1999 and July 2001, and all were denied without explanation. Cherry testified that twenty-eight deputies with no or less experience than him have been transferred or promoted.

Captain Compeau, who denied at least a half dozen of Cherry's requests, testified that he denied Cherry's requests because of Cherry's history of citizens' complaints and his disciplinary record and felt that the Department was best served if Cherry remained in his current position. Compeau explained that a citizen's complaint in 1995 led to a five-day suspension; a citizen complained in 1994 or 1995 that Cherry, while driving a vehicle gave her a hand gesture and called her a bitch; and a written complaint filed by Dr. Janssen led to Cherry's transfer from the paramedics division.

In the meantime, on February 21, 1999, Deputy Cherry received his annual employee performance appraisal. Lt. G. Fotenakes commented that: "Overall Mike is a good employee despite a couple of minor problems with organizational procedures. I believe his true talent lies in the E.M.S area of our department and I think he believes this as well. He is well deserving of any step increase due at this time."

Circuit Court Judge Discussion and Cherry's and Michael Potoczny's Suspensions

On March 19, 1999, while Cherry and some bargaining unit members were discussing the Department's plan to reduce staffing, a judge asked Cherry about the Department's security staffing plans. Cherry told her that staffing would be reduced during certain hours. On March 29, Cherry received a written reprimand for discussing staffing levels with a person outside the department. During the disciplinary meeting, which Cherry secretly tape-recorded, Cherry was told that he could not "let something like this happen again, because if it does, then we go to another level."

A couple of months later, in May 1999, Local 2259's membership, at the urging of its president and lead negotiator Tina Felder, ratified a new collective bargaining agreement. Shortly thereafter, she was promoted; with a substantial pay raise, to administrative assistant to the sheriff, a non-bargaining unit position. According to Deputy Cherry, who was elected vice president after Felder's promotion, the membership discussed the possibility of a conflict of interest because of Felder's role in negotiating and urging members to ratify the contract, her promotion and her inability to pass promotional examinations and the police academy.

Cherry testified that in September 1999, he overheard a conversation between Captain Compeau and Jail Administrator Emigh. Cherry testified that he heard Captain Compeau say to Emigh, "it's guys like Cherry that just like to stir the shit around here. I don't know what we're going to do about him," to which Emigh replied, "Yeah, I know."[3] Cherry confronted Compeau and Emigh and told them that he did not appreciate his name being slandered. Cherry filed a formal complaint alleging that Captain Compeau violated an August 27, 1999 Special Order prohibiting the use of obscene language. After an investigation, Undersheriff James Gage concluded that Deputy Cherry's name was never mentioned. Compeau and Emigh acknowledged in interview statements that a "shit-stirrer" comment was made, but that no names were mentioned.

During an October 1999 meeting to discuss various union matters, Cherry told Undersheriff Gage that Felder's promotion was inappropriate because she had been the union's leader in negotiating a successor contract shortly before her promotion and she was not qualified. Deputy Cherry testified that Undersheriff Gage told him that Felder was a "token" appointment to obtain the Black vote in the upcoming [August 2000] election." Later, Deputy Cherry spoke with Sheriff Pickell about his conversation with Gage and about Captain Compeau's alleged reference to him as a "shit-stirrer." According to Deputy Cherry, the Sheriff became visibly upset and accused him of insulting his integrity. Later, Cherry told several bargaining unit members, including Local 2259 executive board member Deputy Michel Potoczny, that Undersheriff Gage described Felder's promotion as a "token" appointment.

Several months later, during a March 2000 grievance hearing, Potoczny told Felder that she was a "token appointment." On June 20, 2000, after a complaint Felder filed with Respondent's affirmative action office was investigated, Cherry was suspended for three days for making an untruthful statement and Potoczny was suspended for thirty days for repeating the statement during a grievance meeting. Cherry testified that at the time, he had only one disciplinary action on his record, a suspension in 1995.[4]

Promotional Opportunities

Deputy Cherry was ranked 4^{h} on a June 23, 1999 sergeant's promotional eligibility list. After the Sheriff promoted the first three-ranked applicants, Cherry became first on the eligibility list.

On December 11, 1999, the Sheriff met with several members of his command staff – Undersheriff Gage, Corrections Administrator Emigh, Captain Compeau, and Lieutenants Smith, Rau and Fotenakes - to discuss future promotions. Lieutenant Rau testified that he told the Sheriff that Deputy Cherry demonstrated a lack of commitment to the Department, had several problems in his recent work history and had not shown improvement. According to Captain Compeau, he recommended that Deputy Cherry not be promoted because he was not loyal to the Department, was not trustworthy and had a history of using poor judgment. Undersheriff Gage's notes of the meeting indicate that the command staff recommended that Deputy Cherry not be promoted because he was "immature," uses "poor judgment," is "smart but takes up his own causes, is not a team player," and he would "not be loyal supervisor – lacks people skills."

[3] On cross-examination, Deputy Cherry testified that he was not certain who made the "shit-stirrer" comment.
[4] An arbitrator upheld Deputy Cherry's suspension on October 31, 2001.

Cherry testified that Lieutenant Fotenakes, whom Cherry described as a friend, told him that he would not be promoted. Subsequently, Cherry asked the Sheriff why he was being bypassed. According to Cherry, Sheriff Pickell told him that his decision was based on the command staff's recommendation, but he could still be promoted. Cherry testified that he then polled nine members of the staff and was told by six that they had not been contacted, some refused to comment and others said they did not know whether their recommendation would be considered. Deputy Cherry was bypassed for promotion on December 11, 18, 19 and 20. In each case, the number two-ranked applicant was promoted. In response to Local 2259's request for an explanation for Cherry being bypassed for promotion, Undersheriff Gage advised that the Sheriff exercised his option, in accordance with the contract, to promote any person from among the top three-ranked applicants. Five months later, on April 1, 2000, Deputy Cherry was again by-passed for promotion. A few days later, he filed the first of the two unfair labor practice charges.

> At the hearing, Cherry presented a list of what he claimed were all promotions during Sheriff's Pickell's administration to demonstrate that with few exceptions, the "rule of three" had never been followed and the highest-rank deputy was always promoted. However, Lieutenant Rau, a twenty-one year employee, examined Cherry's list and found several instances where the top-ranked employee had not been promoted; some were not first on the list as Cherry claimed; some who ranked-first were bypassed because of recent disciplinary problems or pending investigations; some had not completed the police academy when promotional opportunities arose; and at least one could not qualify for the academy.

A new sergeants eligibility list was created on August 23, 2001. Deputy Cherry was ranked 20th. Deputies Cherry tied with Deputy McIntyre for the highest written examination score. The Sheriff awarded Cherry five performance points, the lowest of any applicant except McIntyre, who also received five points. Cherry received seventeen performance points in 1999. His oral board score included thirteen points from Undersheriff Gage, the same number he was awarded in 1999, and 7.5 points from an outside officer.

B. Deputy Lynda Germaine-Deputy Cherry

American Civil Liberties Complaint

Respondent hired Deputy Lynda Germaine-Cherry (hereafter "Germaine") in 1992. She was promoted to the paramedics division in 1994. In April 1999, Respondent relocated the female deputies' locker from an office in the County jail to an interview room. Germaine voiced a number of complaints about the room, and Local 2259 filed a grievance alleging that the female deputies were forced to change clothes in unsecured and non-designated dressing areas. Sometime later, Germaine contacted the American Civil Liberties Union (ACLU) and complained that her work environment was hostile and that women were being treated unequally and harassed.

After the ACLU brought Germaine's complaint to Sheriff Pickell's attention in an August 5 letter, an internal investigation was conducted. Sheriff Pickell communicated the results to Deputy Germaine in an August 27, 1999 letter. Among other things, Germaine was told that her "actions by going to the American Civil Liberties Union first without giving me the benefit or courtesy of listening to your complaints was improper," and that a Special Order forbidding the use of obscene and other offensive behavior would be issued. The order was issued the same day.

Shift Preference Bid – Vienna Precinct

On September 9, 1999, Local 2259 filed a grievance claiming that Germaine was wrongfully denied shift preference in her bid to transfer to the Vienna Township precinct. The grievance was settled on October 22, 1999, and Germaine's request to transfer was approved.

Deputy Germaine testified that on October 7, 1999, when she reported for her first day of work at the Vienna precinct, Respondent posted a notice prohibiting employees from changing clothes in the locker room. According to Germaine, she was never told why the policy, which only applied to the Vienna Precinct, was changed. Deputy Cherry, Local 2259's vice president, testified that the day after his wife was transferred, Sergeant Jerry Wilhelm told him that the policy change only applied to the Vienna precinct "because your wife was the only one that complained." The October 7, 1999 memorandum states that the locker room would be used for storage of employees' equipment.

Germaine's One-Day Suspension

Germaine became vice president of Local 2259 in December 1999. On January 4, 2000, she was directed to pick up a car from the motor pool before 5:00 p.m. She testified that she did not get around to picking up the car until 10:30 p.m. because she left her District, without permission, to attend a Union executive board meeting where she was sworn in as vice president, and she had job duties to perform. On January 12, 2000, Germaine was suspended for one day for disobeying the order to pick up a vehicle; leaving her patrol district for two hours without prior approval; and saying "chicken shit" when a sergeant ordered her to write a report about these incidents.

According to Germaine, she did not know anyone who had been disciplined for picking up vehicles late; executive board members have always been allowed to attend union meetings outside their district, and she did not know of any other deputy who had been disciplined. A month after she was disciplined, during roll call, an announcement was made that prohibited employees from attending union meetings while on duty.

Germaine also testified that deputies frequently use profanity without being disciplined. She stated that while meeting with the Sheriff a week after she was disciplined for saying, "chicken shit," he said, "bullshit," and got upset and ended the meeting after she questioned him. A grievance protesting Germaine's suspension was settled and her one-day suspension was reduced to a written reprimand. Four months later, on July 6, 2000, Germaine received a written employee consultation for being out of her district on June 27.

C. Deputy Wayne McIntyre

Deputy McIntyre began his career as a Sheriff's deputy in 1996. He was assigned to the corrections division until September 1998, when he was promoted to the paramedics division. In June 1999, McIntyre received a written reprimand for having an accident with a Department vehicle. In his September 1999 annual performance evaluation, McIntyre was rated as a model employee.

Loyalty Lecture

On October 19, 1999, Undersheriff Gage met with McIntyre to discuss his loyalty to the Department after an anonymous source alleged that McIntyre made statements critical of the Sheriff and the Department. According to Gage, since loyalty was extremely important to him, he received Sheriff Pickell's permission to have his "Dutch uncle talk" with Deputy McIntyre. As an example of consequences that may result from criticizing your boss or agency, Gage gave McIntyre a 1990 item from *Mademoiselle* Magazine about a CBS anchorwoman who was fired for referring to CBS as "Cheap Broadcasting System." When McIntyre told Undersheriff Gage that he had made statements that were critical of the Department, Gage told him that if he had, it was not good for his career.

Involuntary Transfer to the Court Division

In November 1999, McIntyre became a member of Local 2259's executive board. He testified that he has interacted with representatives of the Sheriff and Human Resources Departments during step five of the grievance procedure.

On January 24, 2000, McIntyre was transferred from the paramedics division to the court division. According to McIntyre, he was not given a explanation for the transfer, but the transfer occurred a few days after a letter was sent to the AFL-CIO complaining about the Sheriff's "Gestapo-type" tactics. McIntyre testified that he was transferred, although he had more seniority than two deputies who were not union officers, and two deputies – Laurie Ninnis and Mark Goupil - volunteered to be transferred.

Deputy Goupil withdrew his name from consideration after learning that the transfer was not temporary and Deputy Ninnis conditioned her acceptance on going only to the District Court. According to Ninnis, Lieutenant Rau told her that he could not guarantee her that she would go to District Court, but it didn't matter because he was sending someone else.

Respondent provided conflicting reasons for Deputy McIntyre's transfer. On direct examination, Lieutenant Rau testified a paramedic position was needed to accommodate a paramedic who was returning from sick leave and when no one volunteered, he recommended to Sheriff Pickell that Deputy McIntyre was a good candidate because he was one of the lower seniority employees and had never worked in the courts. However, during cross-examination, after reviewing two transfer orders moving Deputy McIntyre to the court division and promoting a deputy to the paramedics division from the corrections division, Lieutenant Rau admitted that Deputy McIntyre was not transferred to accommodate a paramedic returning from sick leave. He also admitted that the paramedic did not return from sick leave until April 2000. At the next hearing a few weeks later, Captain Compeau testified that Deputy McIntyre was moved for budgetary reasons. In May 2000, McIntyre was selected to transfer to the Montross precinct in the road patrol division.

In the meantime, in March 2000, Local 2259 voted to endorse Sergeant Melki, one of Sheriff Pickell's opponents in the August 2000 primary election. According to McIntyre, he publicly supported Melki's campaign by participating in parades and attending speaking engagements and visiting churches, and several times he saw several members of management.

Weapons Training Instructor and Containment Team Reassignment

Deputy McIntyre, a State-certified weapons instructor was a member of a containment team. In April 2000, Captain Compeau replaced all of the weapon instructors who were deputies, including McIntyre, with supervisory personnel to, according to Compeau, maintain better accountability. He explained that record keeping was sloppy and a number of accidental discharges at the range had not been properly investigated.

McIntyre was also removed from the containment team. According to Captain Compeau's October 2001 performance evaluation of Deputy McIntyre, the only time that the containment team was used, Deputy McIntyre did not answer his Department-issued pager, had to be called to duty by telephone, and when he arrived he did not have the containment team's uniform.

Bereavement Leave Discipline and Employee Consultations

Over the next several months, Deputy McIntyre was either counseled or disciplined several times. On June 19, 2000, he received a written counseling for discussing a change in his work schedule with the Montross City Manager.

In July 2000, McIntyre was reprimanded for being untruthful for claiming a three-day bereavement leave and submitting a funeral home certificate stating that the deceased was his aunt, when in-fact, the deceased was his great-aunt. (The parties contract allows employees to take bereavement leave for the death of an aunt, not a great-aunt.) Deputy McIntyre testified that he knew of fourteen to eighteen employees who engaged in the same conduct but were not disciplined. He acknowledged that he had no first-hand knowledge of the circumstances surrounding their leave requests.

The Human Resources Department conducted an investigation of nine individuals on Deputy McIntyre's list. Five denied that they were granted leave improperly; two admitted that they were granted leave improperly under a prior administration and under a different contract; and two stated that they were granted leave in May and August 1999, although they revealed their relationship to the deceased. A grievance contesting Deputy McIntyre's reprimand has been advanced to arbitration.

In August 2000, Deputy McIntyre received a written employee consultation for missing a Buick Open overtime assignment. In October 18, 2000, he received an employee consultation for violating general orders by reporting to work mentally and physically unfit. According to Deputy McIntyre, on October 18, he worked from midnight to 8 a. m; overtime that morning; a special detail at the airport from 4:30 p.m., till 10:30, and the midnight shift an hour and a half later. A grievance filed by the Union was withdrawn after step 5.

2001 Promotional List and Performance Evaluation

Deputy McIntyre was ranked 24th on an August 2001 sergeants promotional list. He tied with Deputy Cherry for the highest score on the written test, but he and Cherry received the fewest performance points (five out of twenty), and he was awarded among the lowest scores on the oral boards. Two months later, on October 1, 2001, Deputy McIntyre received his annual evaluation. Sergeant Jerry Wilhelm described Deputy McIntyre as "good" in every category.

Three days later, Deputy McIntyre received an attachment to his October 1 evaluation. The evaluation, completed by Captain Compeau, was the opposite of Sergeant Wilhelm's. Captain Compeau noted that Deputy McIntyre "did not always follow applicable rules;" "interprets rules and regulations and union contract language to benefit himself and seldom accepts the Sheriff Administration interpretation, which continues to cause conflict;" "does not maintain a positive relationship with all coworkers;" and "makes inappropriate comments orally, and in writing, toward the Sheriff Administrative Staff." Captain Compeau also stated in his evaluation that Deputy McIntyre perjured his testimony on a number of issues during the September 17, 2001 MERC hearing. Captain Compeau noted that Deputy McIntyre needed "to realize that his daily activity as a police deputy, does not reflect his overall performance as an employee," and he "needs to realize that his interpretation of issues are [sic] not always correct."

D. Deputy Christopher Love

The Department hired Deputy Christopher Love in 1992. He was transferred from the corrections division to the paramedics division in 1994 or 1995. In 2000, Deputy Love received several awards, including the Department's Medal of Valor and the Michigan Sheriffs' Association Medal of Honor, the highest awarded in the State. In December 2000, Deputy Love was elected third shift union steward.

In May 2001, Love received a three-day suspension for conducting an authorized investigation based upon an off-duty conversation he overheard and for using the Department's LEIN system to determine if one of his "suspects" had a Genesee County address. Two months later, he received a five-day suspension for failing to respond to an emergency medical call. Grievances protesting both suspensions were filed.

Deputy Love was laterally transferred from the paramedics division to the court division on August 6, 2001. Lieutenant Bouchard told Love that he was being transferred "for the good of the Department."

E. Deputy Leon Lloyd

Deputy Leon Lloyd is a deputy in the corrections division. He was appointed to Local 2259's executive board in March 2001. Two months later, Love was transferred from a dispatcher assignment in the corrections division back to his regular jail functions. It is common for corrections deputies to serve as dispatchers for a few months before being reassigned to other duties.

F. The Honor Guard

The Department maintains an Honor Guard that represents it at various events, such as funerals and parades. On January 30, 2001, according to Deputy Cherry, three Union officers were

removed from the Guard. In a February 18, 2001 letter, Local 2259 requested an explanation for the executive board members' removal. Sheriff Pickell wrote that the reassignments were made for "availability reasons" because during the past year, Honor Guard members were not able to respond when they were needed.

G. The Information Request

On June 29, 2000, Acting Chief Steward Val Rose filed a request for all documents related to the investigation and discipline of Deputy Potoczny, including all files developed by the affirmative action office. Respondent provided a series of documents, including Potoczny's thirty-day suspension notice, a copy of his disciplinary record and six interview statements, on August 8, 2000. On August 26, a month after the second unfair labor practice charge was filed, Respondent sent Rose a letter asking him to identify any remaining documents that the Union wanted. Rose advised that he wanted interview statements given by Deputies McIntyre and Cherry. Several weeks later, Rose received these statements.

Rose testified that although Respondent provided the additional documents he identified, he wanted the interview statement of Barry Thurston, AFSCME's staff representative. According to Rose, Thurston told him that he had been interviewed and "believed" that his interview was recorded. According to Rose, during these proceedings he saw a transcribed copy of Thurston's interview statement, but it has not been provided to the Union.

PART II – CONCLUSIONS OF LAW

Section 9 of PERA grants public employees the right to organize and engage in "lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." Charging Party claims that Respondent violated Section 10(1)(a))(c)(d) and (e) of PERA.

A. Alleged Violations of Sections 10(1)(a) and (d)

Section (10(1)(a) makes it illegal for employers to interfere with, restrain, or coerce employees in the exercise of their Section 9 rights. Public employers are prohibited from engaging in conduct that is inherently destructive of employees' rights to engage in activities guaranteed by Section 9. Section 10(1)(a) does not require proof of union animus or unlawful motive. The test is whether the employer engaged in conduct that reasonably interferes with the free exercise of Section 9 rights.

Potoczny's Thirty-Day and Cherry's Three-Day Suspensions[5]

Charging Party first claims that Respondent violated Section 10(1)(a) by suspending Potoczny for thirty days for referring to Felder as a "token" appointment during a grievance meeting and suspending Cherry for three days for repeating a statement allegedly made by Undersheriff Gage to Potoczny. Respondent argues that Cherry's three-day suspension was for misconduct and was not casually related to his protected activity. Moreover, according to Respondent, an arbitrator has determined that Cherry did, in fact, falsely accuse Undersheriff Gage of referring to Felder's promotion as a "token" appointment.

[5]Respondent does not comment on Charging Party's claim that it violated Section 10(1)(a) by suspending Potoczny for thirty days.

The Commission has repeatedly found that conduct which is merely rude or insulting is protected when made in the course of otherwise protected activity. *Sanilac County Board of Commission*, 1967 MERC Lab Op 107; *Reese Public Schools*, 1967 MERC Lab Op 489; *Baldwin Community Schools*, 1986 MERC Lab Op 513; *University of Michigan,* 2000 MERC Lab Op 192; *City* of *Riverview*, 2001 MERC Lab Op 354. In *City of Detroit (Water & Sewerage),* 1988 MERC Lab Op 1039, no violation was found where an employee swore at his supervisor and called her a "minority" not qualified to do the job. I find in this case that Potoczny was engaged in protected conduct when he told Felder that she was a "token," and his suspension violated Section 10(1)(a) of PERA.

The Commission has also found that discussions between employees are also protected by PERA. In *Algonac Community Schools*, 1991 MERC Lab Op 192, a union officer, while on duty, had brief conversations with different employees about suspected contract violations. The Commission found that the employer's restrictions unlawfully interfered with the officer's exercise of his PERA rights by admonishing him to "punch out" before conducting union business. See also *Sixtieth District Court*, 1979 MERC Lab Op 558, aff'd, *Teamsters Local 214* v *60th District Court*, 417 Mich 285 (1983). See also *Brighton Area Schools*, 1982 MERC Lab Op 1607; *Dickinson County* Sheriff, 1982 MERC Lab Op 747; *University of Michigan*, 1981 MERC Lab Op 1.

In this case, I find that Cherry, Local 2259's vice president, and Potoczny, the chief steward, were engaged in protected activity when they discussed Cherry's conversation with Undersheriff Gage about Felder's promotion. Subjecting employees to disciplinary action for discussing union matters interferes with, restrains, and coerces them in the exercise of their concerted rights and has a chilling effect on their right to engage in protected activity. This finding is unaffected by an arbitrator's ruling that Cherry's statement to Potoczny was untruthful. The arbitrator was appointed to determine whether Cherry's statement to Potoczny violated a work rule or the parties' agreement. The issue before the Commission is whether Cherry and Potoczny were disciplined for engaging in conduct protected by Section 9 of PERA. Absent the agreement of the bargaining representative, the Commission has held that an employer must show a legitimate and substantial business justification for any rule that restricts the exercise of PERA rights. *Michigan State University,* 1998 MERC Lab Op 217; *Meridian Twp,* 1997 MERC Lab Op 457; *City of Southfield,* 1998 MERC Lab Op 66. Respondent violated Section 10(1)(a) of PERA by suspending Cherry and Potoczny for engaging in protected activity.

Germaine's ACLU Complaint

Charging Parties claim that Respondent violated Section 10(1)(a) by telling Germaine that her action in seeking the ACLU's assistance was "improper." This aspect of the charge is untimely. Section 16(a) of PERA requires that a charge be filed within six months of the date of the challenged action. The charge was filed on April 7, 2000, more than eight months after Sheriff Pickell's August 27, 1999 letter to Germaine. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582.

Deputy McIntyre's Performance Evaluation

Charging Parties claim that Respondent violated Section (1)(d) of PERA by giving McIntyre an unfavorable performance evaluation after he testified at a MERC hearing. Respondent asserts that McIntyre did, in fact, offer false testimony at the hearing and an attachment was added to his evaluation because of his misconduct – giving false testimony – and not because he participated in the hearing.

Section 10(1)(d) of PERA prohibits public employers from discriminating against a public employee because he or she testified or instituted proceedings under the act. The Commission has held that an employer violates Section 10(1)(d) by disciplining an employee for allegedly giving willfully false testimony, but not where, at worst, the employee may have testified incorrectly out of inadvertence, ignorance or misunderstanding. See *Huron School District*, 1990 MERC Lab Op 628, 641. Although in its brief Respondent points to testimony given by McIntyre that was contradicted and statements that it claims were false, it did not identify on the record, any of McIntyre's testimony that was perjured or false.

> I find that but for McIntyre's testimony in this proceeding, Respondent would not have given him an unsatisfactory performance evaluation. Respondent, therefore, violated Section 10(1)(d) of PERA.

B. Alleged Violations of Section 10(1)(c)

Section 10(1)(c) prohibits employers from discriminating in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization. To establish a *prima facie* case of discrimination under Section 10(1)(c) of PERA, Charging Party must establish: (1) union or other protected concerted activity; (2) employer knowledge; (3) union animus; and (4) evidence that the employer's alleged discriminatory actions were motivated by the employee's protected activity. *University of Michigan*, 1990 MERC Lab Op 272. If a charging party establishes a *prima facie* case, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have been taken even in the absence of protected conduct. The ultimate burden of proving a violation remains with the charging party. *Branch County Community Health Center*, 1999 MERC Lab Op 490.

Refusal to Promote Cherry

Charging Parties assert that Respondent violated Section (10(1)(c) of PERA by refusing to promote Cherry to sergeant. They claim that absent unusual circumstances that may temporarily delay a promotion, historically Respondent has promoted the highest-ranked deputy to sergeant (and corrections officer to police deputy), with the exception of bypassing Local 2259's president in 1995. They argue that Respondent's unexplained bypass of Cherry in December 1999 and April 2002, closely followed his protected activity in October 1999, when he discussed with Sheriff Pickell, Felder's promotion and Captain Compeau's "shit-stirrer" comment; and his wife's August 1999 complaint to the ACLU about working conditions.

The record supports a finding that Cherry engaged in protected activity. He served as Local 2259's vice president from June 1999 until December 1999, and had been an executive board member since December 1997. He also filed grievances and discussed union matters with Respondent's representatives. Respondent knew of that activity. The record contains ample evidence of union animus. Cherry was reprimanded for discussing staffing issues with a judge and

suspended for repeating a comment to Potoczny that he attributed to Captain Compeau about Felder's promotion. Additionally, Compeau's admission that he made a "shit stirrer" comment, but did not mention any name, leads to an inference that he was dissatisfied with the actions of union activists. Thus, the question for decision is whether Cherry's protected activity was a motivating factor in Respondent's decision not to promote him.

Charging Parties underline the claim that there is nothing in the record to demonstrate why Sheriff Pickell bypassed Cherry for promotion ten times. Charging Parties grossly misstate the record. The record shows that during Sheriff Pickell's term, Cherry was bypassed five times – four times in December 1999 and once in April 2000 – not ten. Moreover, after Lieutenant Fotenakes forewarned Cherry that he would not be promoted, Sheriff Pickell explained to Cherry that his decision was based on his command staff's recommendation. Local 2259 was also told, in response to its request for an explanation, that the Sheriff exercised his option under the contract to promote any person from among the top three-ranked candidates. The record clearly indicates that Respondent explained to Charging Parties why Cherry was not promoted.

Moreover, the record does not support Charging Parties' contention that Respondent has historically promoted the highest ranked deputy. The contract grants the Sheriff complete discretion to promote any of the top three-ranked candidates on promotional lists and the record reflects a long history of the sheriffs' use of the "rule of three." In 1994, former Sheriff Joe Young used the rule to bypass Cherry twice and promote two deputies, including Deputy Germaine. Similarly, Sheriff Pickell used the "rule of three" to bypass the highest ranked candidate on several occasions. I find that the use of this practice is not evidence of an improper motive. Compare *City of Battle Creek*, 1998 MERC Lab Op 727. I also find no merit to Charging Parties' argument that Cherry was not promoted because his wife filed a complaint with the ACLU. Respondent investigated the complaint, took corrective action and issued a Special Order prohibiting obscene and offensive conduct in the work place. Charging Parties failed to establish a connection between Germaine's ACLU complaint and the bypass of Cherry for promotion. I conclude that Charging Parties did not establish a *prima facie* case that Respondent did not promote Cherry because of his protected activity.

McIntyre's Transfer to the Court Division and Respondent's
Refusal to Transfer McIntyre and Cherry to the Paramedics Division

Charging Parties argue that Respondent violated PERA by transferring McIntyre to the court division. It asserts that McIntyre's transfer occurred a month after he was elected to Local 2259's executive board, immediately after a letter was sent to the AFL-CIO complaining about the Sheriff and just months after Undersheriff Gage's October 19, 1999 loyalty lecture.

Charging Parties, however, presented no evidence to show that Respondent knew that Local 2259 sent the AFL-CIO a letter complaining about the Sheriff's alleged "Gestapo tactics." Moreover, in October 1999 when McIntyre was transferred, he was not an executive board member and there is nothing on the record to establish that he had engaged in any protected activity. In fact, a month prior to the lecture, McIntyre received his annual evaluation and was rated as a good employee, although he had received a written reprimand in June 1999. I am unable to find anything on the record to casually connect Respondent's failure to transfer McIntyre to any protected activity. McIntyre testified that he interacted with representatives of the Sheriff and Human Resources Departments during step five of the grievance procedure. However, there is nothing on

the record to show when these interactions took place, who was involved, or how they affected the decision not to transfer him. I find, therefore, that Charging Parties failed to establish a *prima facie* case that Respondent discriminated against McIntyre because of his protected activity.

Charging Parties claim that Respondent's refusal to transfer Cherry from the court division is motivated by his protected activity. Charging Parties argue that Cherry's own supervisor, Lieutenant Fotemakes, states in Cherry's annual evaluation that "Cherry's service to the Department was best placed by returning to E.M.S.," and the Sheriff has failed to explain his reason for denying Cherry's requests to transfer to the paramedics division.

I also find that Charging Parties failed to demonstrate that Respondent's refusal to transfer Cherry from the Court Division was the result of an illegal motivation. The complaint filed by Cherry against Dr. Janssen is strong evidence that his relationship with some members of the medical community was not good. Moreover, prior to being transferred to the Court Division by former Sheriff Young, he was removed from the paramedics division at least twice. Further, there is nothing on the record to suggest that former Sheriff Young gave Cherry a reason for denying his request to transfer from the Court Division, although Cherry claims that his transfer was temporary.

I also conclude that Charging Parties failed to demonstrate that Respondent's refusal to approve Cherry's training requests was related to his protected activity. To infer that his training requests were denied because of union animus would be to engage in speculation and conjecture. *Detroit Symphony Orchestra, Inc.* 393 Mich 116 (1974).

Cherry's and McIntyre's 2001 Promotion Rankings

Charging Parties contend that because of Cherry's and McIntyre's protected activity, Sheriff Pickell, without explanation, assigned them the lowest number of performance points, five each, although they tied for the highest written score. Cherry's points were lowered from seventeen in June 1999 to five in August 2001, and on the oral board, of which Undersheriff Gage was a member, Cherry received the lowest number of points.

Respondent asserts that Cherry and McIntyre were given five performance points in 2001 because they were both disciplined for being dishonest and because the Sheriff has a contractual right to award points. Respondent points to Undersheriff Gage's testimony that he recommended to Sheriff Pickell that he give Cherry and McIntyre zero points because he felt they were disloyal, untruthful and could not be trusted to carry a supervisor's position properly. The record, however, shows that Gage, while claiming to encourage the Sheriff to award no performance points, awarded Cherry the same number of oral board points in 2001 as he did in 1999.

Although the contract permits Sheriff Pickell to award performance points, he may not adversely affect an employee's promotional opportunities for an illegal purpose. There is no competent evidence on the record to explain why Cherry and McIntyre received the lowest number of performance points or why Cherry's score was substantially lower than he received in 1999. Pickell, however, was not called as a witness. I, therefore, draw an adverse inference from Respondent's failure to call him to explain his decision. An adverse inference may be drawn regarding any factual question when a party fails to call a witness who "may reasonably be assumed to be favorably disposed to the party." *North Central Community Mental Health,* 1998 MERC Lab Op 427, 441; *Northpointe Behavior Healthcare Systems,* 1997 MERC Lab Op 530, 540.

I conclude that Charging Parties established a *prima facie* case to show that Cherry was assigned five performance points because of his protected activity and Respondent failed to produce credible evidence of a legal motive for its actions. However, as discussed above, I find no evidence on the record to conclude that McIntyre engaged in any protected activity that was casually connected to his score on the 2001 sergeants' promotions examination.

McIntyre's Discipline for Bereavement Leave

Charging Parties claim that McIntyre was reprimanded in July 2000 for taking bereavement leave to attend the funeral of his great-aunt in retaliation for his protected activity. They contend that McIntyre and other employees engaged in protected activity by campaigning for Sheriff Pickell's opponents during the August 2000 primary. To support this assertion, they cite *City of Detroit*, 1982 MERC Lab Op 1220 and *Motorola, Inc.*, 305 NLRB 580 (1991). These cases, however, have no application to the facts of this case. In *City of Detroit*, firefighters were unlawfully disciplined for campaigning against a proposal to change the department's promotion procedure. In *Motorola*, employees were involved in an effort to ban mandatory drug testing in the work place. In both cases, the employees' activity was directly related to their working conditions and, as found in *Motorola*, was within the scope of the mutual aid or protection clause and was, therefore, protected under Section 7 of the National Labor Relations Act.

In this case, McIntyre and other employees identified in Charging Parties' brief were engaged in a political campaign to elect a new sheriff. If as Charging Parties suggest, McIntyre and other employees were retaliated against because of their support of Sergeant Melki, their recourse is to seek relief under the Political Activities of Public Employees Act, MCL 15.401 *et seq.*, which grants public employees the right to be members of political parties, to be delegates to political conventions, to become candidates for office, and to engage in other political activities on behalf of a candidate or issue.

Even if Charging Parties established protected activity, knowledge and union animus, it would be speculation and conjecture to conclude that McIntyre was disciplined for engaging in conduct protected by Section 9 of PERA. *Detroit Symphony Orchestra, Inc. supra.* I conclude that Charging Parties failed to establish a prima *facie* case.

Rules Change at Germaine's Workplace

Charging Parties claim that Respondent retaliated against Germaine by issuing a directive, without explanation, prohibiting employees from changing clothes in the Vienna Precinct locker room. They assert that the directive was posted on October 7, 1999, the same day that Germaine reported to work and just weeks after her ACLU complaint. This assertion, however, misstates the facts and overlooks evidence that Germaine's request to transfer was not approved until October 22, 1999, two weeks after she claims to have reported to work there. Moreover, the October 7, 1999 directive, on its face, explains why – to store employees' equipment – the room's use was changed. There is no evidence on the record to conclude that the directive was issued to retaliate against Germaine for filing a complaint with the ACLU.

Germaine's Union Meeting Attendance

Charging Parties contend that Germaine was disciplined because she attended a Union executive board meeting while on duty on January 4, 2000. I find no merit to this claim. Charging Parties fail to mention that Germaine was disciplined not simply for attending a union meeting, but for leaving her district, without permission or informing anyone of her whereabouts; disobeying an order to take her vehicle in for service; and for saying "chicken shit" when ordered to write a report.

Although Charging Parties would have this tribunal believe that union officers are allowed to attend union meetings without obtaining permission, no evidence was offered to support this assertion. The record does, however, establish that employees have long been prohibited from leaving their district without permission. In April 1994, Cherry was suspended for one day, in part, for leaving his post without permission in violation of the same Work Rule – Section 4.3 – that Germaine was charged with violating. In June 2000, Germaine received an employee consultation for violating the same rule. I find no support for Charging Parties' assertion that Respondent violated PERA by disciplining Germaine for engaging in protected activity.

I do find, however, that Germaine was engaged in protected activity when she said "chicken shit" after she was ordered by a sergeant to write a report. Respondent violated Section 10(1)(a) of PERA to the extent that Germaine's one-day suspension (reduced to a written reprimand as part of a grievance settlement) was for her conduct during her conversation with her sergeant about possible discipline.

Deputy Christopher Love's Transfer to Courts

According to Charging Parties, Love and other bargaining unit members who agreed to serve as union representatives, found themselves suddenly faced with retaliation. Charging Parties claim that Respondent violated PERA by retaliating against union steward Love by transferring him to the court division from paramedics. They suggest that Love was involuntarily transferred eight months after he became a union officer and was only told that it was for the "betterment of the Department." Charging Parties, however, fail to address Love's disciplinary record in the two months preceding his August 5, 2001 transfer. He was suspended twice for misconduct – in May 2001 for three days and in July 2001 for five days.

Moreover, other than Love's election as a steward in December 2000, there is nothing in the record to demonstrate that he engaged in any protected activity. An employee's status as a union officer does not insulate him from discipline for misconduct. *City of Detroit (Dept. of Public Works)*, 1998 MERC Lab Op 703, 708. I recommend that this aspect of Charging Parties' charge be dismissed.

Deputy Leon Lloyd

Charging Parties also claim that Deputy Lloyd was retaliated against because of his protected activity. Lloyd, a corrections deputy, was transferred in May 2001, two months after he became an executive board member, from a dispatcher assignment to another position within the corrections division. Except for Lloyd's appointment as a union officer, Charging Parties offered no evidence that Love engaged in protected activity, that Respondent knew that he was an executive board member or any evidence of union animus toward him.

Assuming that Charging Parties established a *prima facie* case, the undisputed evidence indicates that dispatchers are reassigned every few months to different assignments within the corrections division. Respondent did not violate the Act by reassigning Lloyd from his dispatcher assignment. I recommend that this portion of the charge be dismissed.

Loss of Honor Guard Positions

Charging Parties argue that in January 2001, three bargaining unit members suddenly, without a valid explanation, lost their positions as Honor Guards. There is nothing in the record or in Charging Parties' brief to demonstrate that the members engaged in any union activity or that their reassignments were in any way casually related to their protected activity or resulted from union animus. The record shows that in a February 18, 2001 letter to Local 2259, Sheriff Pickell explained that Honor Guard members were removed because they had not been available to respond when they were needed during the past year. I find that Respondent did not violate the Act by removing three bargaining unit members from the Honor Guard.

Duty to Provide Information

In Case No. C00 H-153, the Unions contend that Respondent violated PERA by failing to timely and fully respond to its information request. The Commission has held that a collective bargaining representative is entitled to receive within a reasonable time information requested that is relevant to its responsibility as a bargaining agent. *City of Battle Creek (Police Department),* 1998 MERC Lab Op 684, 687; *Detroit Board of Education,* 1992 MERC Lab Op 572, 576.

Local 2259 requested documents related to the investigation and discipline of Deputy Potoczny. Notwithstanding Commission precedent in *City of Battle Creek, supra,* that internal investigative disciplinary reports are exempt from disclosure to the union, Respondent provided Charging Parties with all information specifically identified in its information request. However, at the hearing, Charging Parties claim that Respondent violated the Act because it did not provide the transcript of an interview statement given by its staff representative that Deputy Rose claims that he saw during these proceedings. Even if the statement exists, Respondent did not violate Section 10(1)(e) by failing to disclose it.

Based on the above findings of fact and conclusions of law, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The Genesee County Sheriff's Department, its officers, agents and assigns shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 9 of PERA.

2. Cease and desist from lowering employees' scores on promotional examinations or in any manner discriminating against employees because they engage in protected activity for purpose of collective bargaining or other mutual aid and protection.

3. Take the following affirmative action to effectuate the policies of PERA:

a. Expunge Deputy Michael Cherry's personnel records of any reference to his June 20, 2000, three-day suspension for discussing union matters with Deputy Potoczny and make him whole for any loss of pay, plus interest at the statutory rate, which he may have suffered because of the Genesee County Sheriff Department's unlawful activity.

b. Expunge Deputy Michael Potoczny's personnel record of any reference to his June 20, 2000, thirty-day suspension for a statement he made during a grievance meeting about Deputy Felder's promotion and make him whole for any loss of pay, plus interest at the statutory rate, which he may have suffered because of the Genesee County Sheriff's Department's unlawful activity.

c. Remove from Deputy Wayne McIntyre's personnel records the attachment to his October 1, 2001, performance evaluation.

d. Expunge Deputy Lynda Germaine-Cherry's personnel records of any reference to a one-day suspension and/or written reprimand she received for using profanity while discussing possible discipline with a supervisor.

e. Post the attached notice in all areas where employee notices are normally posted for thirty days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSIONS

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION AFTER A PUBLIC HEARING IN WHICH IT WAS FOUND THAT THE GENESEE COUNTY SHERIFF'S DEPARTMENT COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights guaranteed by Section 9 of Public Employment Relations Act.

WE WILL NOT lower employees' scores on promotional examinations or in any manner discriminate against them because they engage in protected activity for the purpose of collective bargaining or other mutual aid and protection.

WE WILL expunge Deputy Michael Cherry's personnel records of any reference to his June 20, 2000, three-day suspension for discussing union matters with Deputy Michael Potoczny and make him whole for any loss of pay, plus interest at the statutory rate, which he may have suffered because of the Genesee County Sheriff Department's unlawful activity.

WE WILL expunge Deputies Deputy Michael Potoczny's personnel records of any reference to his June 20, 2000, thirty-day suspension for a statement he made during a grievance meeting about Deputy Tina Felder's promotion and make him whole for any loss of pay, plus interest at the statutory rate, which he may have suffered because of the Genesee County Sheriff's Department's unlawful activity.

WE WILL expunge Deputy Wayne McIntyre's personnel records of the attachment to his October 1, 2001 performance evaluation.

WE WILL expunge Deputy Lynda Germaine-Cherry's personnel records of any reference to a one-day suspension and/or written reprimand she received for using profanity while discussing possible discipline with a supervisor.

WE WILL post this notice in all areas where notices to employees are generally posted for thirty days.

GENESEE COUNTY SHERIFF'S DEPARTMENT

By _____

Dated: _____

(This notice shall remain posted for a period of thirty consecutive days and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P. O. Box 02988, Detroit, MI 48202-2988, (313) 456-3510).