STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF GRAND RAPIDS,
Public Employer - Respondent,

-and- Case Nos. C03 C-053 & C03 C-054

GRAND RAPIDS EMPLOYEES
INDEPENDENT UNION,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Nantz, Litowich, Smith & Girard, by John H. Gretzinger, Esq., for Respondent

Kalniz, Iorio & Feldstein Co., L.P.A., by Fillipe S. Iorio, Esq., for Charging Party

DECISION AND ORDER

On May 19, 2005, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent City of Grand Rapids violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e). The ALJ found that Respondent failed to bargain in good faith by unilaterally removing positions from the bargaining unit represented by Charging Party Grand Rapids Employees Independent Union (GREIU). However, because the ALJ concluded that the disputed positions possessed supervisory authority, she did not recommend that we order their return to the bargaining unit.

The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On June 13, 2005, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support. Respondent filed timely cross-exceptions on June 23, 2005. On July 1, 2005, Charging Party filed a timely response to Respondent's cross-exceptions.[1] In its exceptions, Charging Party asserts that the ALJ erred in holding that the positions

[1]Charging Party filed a motion to file a reply to Respondent's cross-exceptions and brief in support on July 1, 2005 and filed its reply that same date. A motion for leave to reply to cross exceptions is unnecessary. Pursuant to Commission Rule 176, a response [or reply] to cross exceptions may be filed within 10 days of service of cross exceptions. On July 18, 2005, Respondent filed an untimely motion to strike Charging Party's reply to Respondent's cross exceptions. For the aforementioned reasons, that motion is denied. On July 18, 2005, Respondent also filed a motion to reply to Charging Party's response to the cross exceptions. The Commission's Rules do not provide for a reply to a response to exceptions or cross exceptions. Accordingly, Respondent's motion is denied.

removed from its bargaining unit possess supervisory authority and requests that the Order be revised accordingly. Respondent counters that it had a legal obligation to remove supervisory positions from the non-supervisory bargaining unit and seeks dismissal of the charges. Upon reviewing the record carefully and thoroughly, we find that the ALJ's Order should be affirmed in part and reversed in part.

Factual Summary:

The GREIU represents a bargaining unit of non-supervisory employees within the City of Grand Rapids. There are approximately 155 classifications in the unit, including lead worker positions, which oversee the work of other bargaining unit employees and perform evaluations for merit increases of those employees. The semi-annual or annual evaluations performed by lead workers are subject to management's review. Lead workers also review vacation requests for conflicts with the department work schedule before passing them on to their supervisor for approval. Lead workers have no authority to discipline, but are responsible for reporting any deficiencies in employee performance to management.

In October 2001, in preparation for contract negotiations, Charging Party distributed position classification questionnaires to bargaining unit members who had inquired about reclassification of their positions. Included in that group were Ruth Haner and Christine Barfuss, both of whom filled out classification questionnaires and submitted them to Charging Party. In March 2002, while at the bargaining table, the GREIU proposed upgrading the salary levels of approximately thirty positions, including those of Haner and Barfuss. With respect to both positions, Charging Party pointed to the increased duties subsequently considered by the Employer when reclassifying the positions. At the bargaining table, Respondent would not agree to any pay increases for individual positions within a classification. The parties eventually agreed to a one-year contract without reaching an agreement on any of the pay upgrades that Charging Party had proposed.

In late 2002 and early 2003, Respondent reclassified the positions of Haner and Barfuss. Upon their reclassification, Respondent removed both employees from the bargaining unit, left Haner unrepresented, and placed Barfuss in a bargaining unit of supervisory and non-supervisory administrative employees represented by the Administrative Professional Association (APA).[2]

Ruth Haner's Position

Prior to the 2002 reclassification, Ruth Haner worked as an office assistant III. The job description for office assistant III states that the position is responsible for performing complex clerical work that requires understanding complex policies, processes, or technical systems. Her responsibilities largely included overseeing payroll changes. In 1999, Haner's duties increased when Respondent acquired a more complex computerized system to administer payroll, and Haner

[2] The APA was notified of the charges filed by the GREIU and was given an opportunity to participate in this matter but chose not to do so.

was made responsible for ensuring its compatibility with Respondent's payroll requirements. In August 2001, Haner requested that her job be reclassified to reflect her additional duties.

Respondent evaluated Haner's position and reclassified it as a personnel assistant, effective December 4, 2002. Haner was placed in a different salary scale and received an immediate salary increase of about $3,000. The personnel assistant is an existing classification in the human resources department. Personnel assistants have not historically been included in any bargaining unit.[3] The position is not classified as supervisory, and the job description does not indicate that the position has supervisory authority.[4]

On December 31, 2002, Respondent notified Charging Party of the reclassification of Haner's position and its intent to remove her position from the bargaining unit. Charging Party wrote to Respondent objecting to the removal of Haner's position from the unit.

In April 2003, after she was reclassified as a personnel assistant, Respondent told Haner that she would be supervising an office assistant II position. Haner assigns work to the office assistant II and approves the employee's time and leave requests. She also expects to participate in performing the employee's evaluations although she had not yet done so at the time of the hearing. She has not been told that she has the authority to discipline and has not formally disciplined or recommended discipline, but she assumes she has the same authority to recommend discipline as other supervisors. At the hearing, the head of the human resources department testified that Haner has the authority to discipline.

Christine Barfuss' Position

In 1995, Christine Barfuss became the right of way agent in Respondent's engineering department. The right of way agent deals with real estate matters, including preparatory work and negotiations in acquiring property rights in land and easements for public use. Barfuss' duties included organizing and heading teams to perform functions such as property transfers, acquisitions, and negotiations with governmental units. Over time, Barfuss became responsible for a greater number of property matters, worked on matters of increased complexity, and acted as the team leader with respect to various ventures. In July of 2001, Barfuss requested that Respondent reclassify her position to reflect her increased responsibilities.

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[3] In its brief in support of its cross exceptions, Respondent states that the position has been excluded from the APA bargaining unit based on confidential duties. However, the duties performed by Haner are not confidential and her position cannot be excluded from bargaining unit membership on that basis.

[4] The job description provides in relevant part:

> This is responsible paraprofessional work. The employee performs a variety of paraprofessional tasks relating to the administration of the City's employee benefit programs, personnel records and other personnel services.
>
> The work is performed under the supervision of a Personnel Analyst. The employee is expected to exercise considerable independent judgment and discretion in the performance of job duties. The employee provides guidance and training to clerical support staff.

Respondent reclassified Barfuss as an administrative analyst I in January of 2003, a position in the APA's bargaining unit. She was placed on the E step of salary grade 11 in the APA contract and received an immediate salary increase of approximately $4,000. Charging Party did not learn that Respondent had reclassified the right of way agent position until February 2003 while in negotiations for a new contract.

Barfuss' new position, administrative analyst I, is considered by the Employer to be a broad based position encompassing a number of administrative responsibilities. Those responsibilities may, but do not necessarily, include supervision of subordinate staff. Before Barfuss' position was reclassified, she received assistance from draftspersons and engineering assistants, but had no formal responsibility for their work. After her position's reclassification, Respondent informed Barfuss that she and the design services supervisor would jointly supervise an engineering assistant. Barfuss was informed that she could assign some of the right-of-way work to the engineering assistant and that she would be evaluating him. She was given no other instruction as to the extent of her authority as a "supervisor".

Barfuss was never informed that she had the authority to discipline the engineering assistant. However, she assumed that she had the same authority as other supervisors to recommend formal discipline. She has never disciplined the engineering assistant. She testified that if she believed discipline was warranted, she would discuss it with the design services supervisor, and then the two of them would discuss the matter with the assistant director. If the design services supervisor did not want to be involved, she would go by herself to the assistant director to recommend discipline. However, Barfuss understands that neither the assistant director nor anyone else in her department has the authority to determine whether discipline should be issued. She does not know who has the authority to make the final decision with respect to discipline.

Barfuss has never approved the engineering assistant's requests for vacation time or sick leave and does not know if she has the authority to do so. Requests for sick leave or vacation time from the engineering assistant are approved by the design services supervisor. Barfuss has participated with other staff in evaluating the engineering assistant. However, she does not have the authority to determine whether he should receive a merit increase. If she believed he should be denied a merit increase, she would have to discuss it with the other evaluators.

Discussion and Conclusions of Law:

The ALJ concluded that Respondent violated its duty to bargain when it removed Haner and Barfuss from Charging Party's unit. Respondent concedes "an employer violates its duty to bargain in good faith if it removes a position from a bargaining unit without the union's agreement or an order from the Commission." However, Respondent contends that this constraint on the removal of a bargaining unit position applies only to the transfer of a nonsupervisory position from one nonsupervisory bargaining unit to another nonsupervisory bargaining unit. Permitting these positions to remain in the nonsupervisory unit, Respondent argues, would have constituted an unfair labor practice.

Respondent is correct in asserting that PERA prohibits supervisors from being included in a nonsupervisory bargaining unit with the employees whom they supervise. *City of Grand Rapids (Police Dep't),* 17 MPER 56 (2004); *Kalkaska Co and Sheriff,* 1994 MERC Lab Op 693, 698. However, an employer acts at its peril when it moves a position that it contends is supervisory from a nonsupervisory bargaining unit without the prior consent of the union or an order from this Commission. *Oakland Co Rd Comm,* 1983 MERC Lab Op 727. The employer takes the risk that its assessment of the position's supervisory status is erroneous.

Even if we were to agree with the ALJ that the positions were supervisory by the time of the hearing in this case, Respondent acted prematurely when it removed the positions from the bargaining unit. Both Haner and Barfuss were removed from the bargaining unit before they were told that they would be "supervising" other employees. In Haner's case, she was removed from the bargaining unit several months before she was told that she would be supervising the office assistant. At the time Respondent decided that the positions would be given supervisory authority, Respondent had the option of bargaining over the matter with Charging Party or filing a unit clarification petition with this Commission. Instead, Respondent acted unilaterally in removing the two positions from the bargaining unit. Accordingly, for the reasons stated in the ALJ's decision, we agree that Respondent violated its duty to bargain in good faith under Section 10(1)(e) of PERA by removing the positions held by Haner and Barfuss from Charging Party's bargaining unit.

Charging Party argues on exception that Respondent should be ordered to return the contested positions to its bargaining unit in order to remedy the illegal conduct. We agree. The evidence in the record is insufficient to establish that either Haner or Barfuss possess supervisory authority. A supervisor is one who possesses authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to effectively recommend such action. *Village of Paw Paw*, 2000 MERC Lab Op 370, 373; *Kalkaska Co and Sheriff*. To qualify as a supervisor under PERA, an individual's responsibility to exercise authority in the foregoing functions must involve the use of independent judgment, including effective authority in personnel matters, with the power to evaluate employees and recommend discipline. *Butman Twp*, 2000 MERC Lab Op 13, 16-17. Effective authority in personnel matters means that the employee's superiors generally accept his or her recommendation without an independent investigation. *Id.* at 16. See also *Village of Paw Paw*. A finding of supervisory status requires that an individual or classification exercise independent judgment and be identified or aligned with management in the performance of assigned duties. *Michigan Cmty Services, Inc*. 1994 MERC Lab Op 1055, 1060. See also *City of Lansing,* 1985 MERC Lab Op 93, 101.

An individual whose authority is limited to the routine direction of the daily work of other employees and/or making work assignments of a routine nature is not a supervisor under PERA. See *Berrien Co Sheriff,* 1999 MERC Lab Op 177, 187; *Kalkaska Co and Sheriff*. Similarly, an individual in charge of a particular project or function who determines how the work will be completed, decides which employees will do it, and ensures that it is completed properly, is not a supervisor unless the employee has an effective role in discipline and personnel matters. *Michigan Cmty Services, Inc*. See also *City of Grand Rapids (Police Dept).* Where higher management makes

the effective personnel decisions, the fact that an individual evaluates the performances of other employees is not sufficient to qualify that individual as a supervisor. *City of Grand Rapids (Police Dep't)*; *Village of Ortonville*, 17 MPER 46 (2004); *Berrien Co Sheriff*. Responsibilities such as maintaining time cards and granting time off are insufficient to establish supervisory status. *Village of Ortonville*. Also, the absence of authority to approve vacation and sick leave requests indicates an absence of supervisory authority. *Saginaw Co Probate Ct, Juvenile Div*, 1983 MERC Lab Op 954, 958. The fact that an employee has input into or makes recommendations concerning personnel decisions does not mean that the employee has effective authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees and is insufficient to establish supervisory authority. *Saginaw Valley State College*, 1988 MERC Lab Op 533, 536.

Respondent argues that the delegation of supervisory authority to Haner was real because she can evaluate performance and assign work. Although Haner had been in the new position for over a year by the time of the hearings in this matter, she had not yet participated in evaluating the office assistant II, and the record does not reflect the effect, if any, that the evaluation would have on personnel decisions. Although it has been asserted that Haner has disciplinary authority, she has not issued any discipline; Respondent did not tell Haner that she had disciplinary authority prior to the hearing in this matter and did not explain the parameters of that authority to her. Accordingly, we cannot find she has real authority to discipline or effectively recommend formal discipline. Although Haner approves the office assistant II's time and leave requests and oversees her daily work, that is insufficient to establish supervisory authority. See *Village of Ortonville*; *Kalkaska Co and Sheriff*.

Respondent is seeking to support the finding that Barfuss is a supervisor on the grounds that she has the ability to recommend discipline. However, Barfuss, like Haner, was not told of this authority before the hearing in this matter and it has not been established that she can effectively recommend discipline. Barfuss' supposed supervisory role is in conjunction with another supervisor, the design services supervisor, with whom she would be expected to consult before making any recommendation for discipline. After discussing proposed disciplinary action with the design services supervisor, Barfuss would then have to take her recommendation to their mutual supervisor, the assistant director. The assistant director cannot authorize discipline, but can only decide whether to take Barfuss' recommendation to the next level. Barfuss does not know who has the authority to ultimately authorize discipline, nor does the record establish the degree of inquiry to which any such recommendation would be subjected by the assistant director or any decision makers above him. As such, there is insufficient evidence in the record to find that Barfuss has the authority to effectively recommend discipline. See *Village of Ortonville*.

Although Barfuss has the authority to assign some of the work performed by the engineering assistant, that authority is limited to routine assignments related to right-of-way activities. Barfuss does not even have the authority to approve the engineering assistant's leave requests. Barfuss' responsibility for oversight and routine assignment of some of the day-to-day activities of a single employee is insufficient to establish supervisory authority. *City of Grand Rapids (Police Dep't)*; *Saginaw Valley State College*; *Saginaw Co Probate Ct, Juvenile Div*.

Based on the record before us, we find that the positions held by Haner and Barfuss do not possess sufficient indicia of supervisory authority to justify their removal from Charging Party's bargaining unit on that basis. We, therefore, reverse this portion of the ALJ's decision and Recommended Order. However, we agree with her conclusion that Respondent breached its duty to bargain when it unilaterally removed these positions from Charging Party's unit. As stated by the ALJ, when an employer seeks to remove an existing position from an established bargaining unit, the question is not whether the position now has a closer community of interest with another bargaining unit or group, but whether, because of the changes in duties, the position no longer shares a community of interest with the established unit. See *Northern Michigan Univ*, 1989 MERC Lab Op 139. We have indicated our reluctance to move positions from one unit to another, or to unrepresented status, without a significant change in the nature of the position. *Saginaw Valley State College*, 1988 MERC Lab Op 533. Based on the record, we find that the duties added to the two positions did not destroy their community of interest with the bargaining unit, which includes many positions with specialized training and skills. Accordingly, we conclude that by unilaterally removing the positions held by Haner and Barfuss from Charging Party's unit without its agreement or an order of this Commission, Respondent breached its bargaining obligation in violation of section 10(1)(e) of PERA.

In accordance with the findings of fact and conclusions of law set forth above, we issue the following Order:

ORDER

Respondent City of Grand Rapids, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain in good faith with Charging Party Grand Rapids Employees Independent Union.

2. Refrain from removing positions from Charging Party's bargaining unit through reclassification or other means without Charging Party's agreement or an order from this Commission.

3. Restore the position of the office assistant III/personnel assistant to the bargaining unit represented by Charging Party without reducing the compensation currently paid for that position, and upon demand, bargain with Charging Party over the terms and conditions of employment for said position.

4. Restore the position of the right-of-way agent/administrative analyst I to the bargaining unit represented by Charging Party without reducing the compensation paid for that position, and upon demand, bargain with Charging Party over the terms and conditions of employment for said position.

5. Make Charging Party whole for the loss of dues/fees resulting from Respondent's unlawful removal of the office assistant III/personnel assistant and

the right-of-way agent/administrative analyst I from the bargaining unit by paying Charging Party a sum equivalent to the dues that the employees in each of those positions would have paid from the dates each position was unlawfully removed from Charging Party's bargaining unit until such time as each position is returned to the bargaining unit and the employee in each position begins paying Charging Party either dues or agency fees.

6. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees in Charging Party's bargaining unit are normally posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of Grand Rapids 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 in good faith with Charging Party Grand Rapids Employees Independent Union in accord with Sections 11 and 15 of PERA.

WE WILL NOT remove positions from Charging Party's bargaining unit through reclassification or other means without Charging Party's agreement or an order from the Michigan Employment Relations Commission.

WE WILL restore the position of the office assistant III/personnel assistant to the bargaining unit represented by Charging Party without reducing the compensation currently paid for that position, and upon demand, we will bargain with Charging Party over the terms and conditions of employment for said position.

WE WILL restore the position of the right-of-way agent/administrative analyst I to the bargaining unit represented by Charging Party without reducing the compensation paid for that position, and upon demand, bargain with Charging Party over the terms and conditions of employment for said position.

WE WILL make Charging Party whole for the loss of dues/fees resulting from Respondent's unlawful removal of the office assistant III/personnel assistant and the right-of-way agent/administrative analyst I from the bargaining unit by paying Charging Party a sum equivalent to the dues that the employees in each of those positions would have paid from the dates each position was unlawfully removed from Charging Party's bargaining unit until such time as each position is returned to the bargaining unit and the employee in each position begins paying Charging Party either dues or agency fees.

CITY OF GRAND RAPIDS

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
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF GRAND RAPIDS,
Public Employer-Respondent,

Case Nos. C03 C-053
-And- C03 C-054

GRAND RAPIDS EMPLOYEES
INDEPENDENT UNION (GREIU),
Labor Organization-Charging Party.
_____/

APPEARANCES:

Nantz, Litowich, Smith & Girard, by John H. Gretzinger, Esq., for the Respondent

Kalniz, Iorio & Feldstein, Co., L.P.A., by Fillipe S. Iorio, 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, this case was heard at Lansing, Michigan on February 27, March 10, and September 8, 2004, by Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before November 1, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Grand Rapids Employees Independent Union filed these charges against the City of Grand Rapids on March 7, 2003. Charging Party represents a bargaining unit of certain nonsupervisory employees of Respondent. The charge in Case No. C03 C-053 involves the November 22, 2002 reclassification of a position held by Ruth Haner and the removal of that position from Charging Party's bargaining unit. Case No. C03 C-054 involves the January 13, 2003 reclassification of a position held by Christine Barfuss, and the placement of this position in a bargaining unit represented by another union. Charging Party alleges that Respondent violated Section 10(1) (e) of PERA by unlawfully removing these positions from its unit without its agreement or an order from this Commission.

Facts:

Charging Party's Unit

Charging Party's bargaining unit is defined in Article I, Section 2 of its contract:

> The bargaining unit consists of all employees, except those designated as excluded, holding positions in the classifications shown in Appendix A or which hereafter may be added thereto or changed as hereinafter provided, and excludes all supervisors and other employees not specifically included in Appendix A as it now exists or is changed in accordance with this agreement.

The unit includes approximately 155 classifications. There are twenty-six salary ranges in the parties' contract. Classifications in the higher ranges of the salary schedule include Air Pollution Control Officer, Civil Engineer, Financial Services Manager, Engineering Assistant II, Investment Analyst, and Real Property Appraiser.

Charging Party's bargaining unit includes some lead worker positions. Lead workers assign and supervise the work of other employees in the bargaining unit, and may approve leave requests. Lead workers also may participate in their subordinates' formal written evaluations.[5] If lead workers have a problem with their subordinates' work or conduct, they notify their supervisors. Lead workers do not have the authority to issue formal discipline.

Supervisory and nonsupervisory administrative employees of Respondent are in a bargaining unit represented by the Administrative Professional Association (APA).

The Collective Bargaining Agreement

Article XVII of Charging Party's contract, "New or Changed Jobs," reads as follows:

> Existing classifications and job descriptions shall not be changed without a negotiated agreement between the parties. The parties will negotiate as to the salary range for all new jobs established in the bargaining unit. If an agreement cannot be negotiated as to changes in classifications or job descriptions or as to the salary range for a new job, the matter shall be subject to an appeal filed directly with the Civil Service Board in Step 3.A of the grievance procedure. Disputes as to whether a new or changed job should be in or out of the bargaining unit shall be resolved by the Michigan Employment Relations Commission.

The pertinent portions of the contract's grievance procedure, Article IX, are as follows:

> **Section 2. Grievance Time Limits and Exclusive Remedy**

[5] In a formal evaluation, up to three supervisors and/or lead workers independently rate the employee. Their scores are averaged, and the employee receives a composite score based on a weighting of the evaluation factors.

. . .

b. If proceedings involving any matter which is or might be alleged as a grievance are instituted in any administrative action before a government board or agency, or in any court, then such administrative or judicial procedure shall be the sole remedy, and grounds for a grievance under this Agreement shall no longer exist.

c. Only grievances involving classification disputes may be presented to the Civil Service Board, who shall have exclusive jurisdiction on such matters. No other disputes subject to the grievance procedure may be submitted to the Civil Service Board.

. . .

Step 3.A Civil Service Board

Grievances involving classification may be presented to the Civil Service Board. The Civil Service Board shall hold a hearing on such grievance. Its decision, approved by a majority of the Board, shall be final and binding on Union and Management.[6]

Section 4. Election of Remedies

It is expressly understood and agreed that taking an appeal to the Arbitrator, or in cases of classification disputes to the Civil Service Board, constitutes an election of remedies and waiver of any rights of the appealing party and any person or persons he, or she, or it represents to litigate or otherwise contest the appealed subject matter in any court, administrative agency, or other forum.

Ruth Haner's Position

Since her hire in the mid-1980s, Ruth Haner has worked in the payroll area of Respondent's HR department. In 1990, the parties agreed to a process for reviewing bargaining unit classifications that included a comprehensive job classification study known as PAS. As a result of PAS, Haner's position was reclassified in 1994 from Clerk Typist II to Office Assistant III.

Charging Party's bargaining unit includes the classifications Office Assistant I through IV. Employees within the classification Office Assistant III perform more complex clerical work and often serve as lead workers. The Office Assistant III job description identifies the general duties and responsibilities of the classification:

[6] The Civil Service Board has the authority under its rules to order a study of a particular position and to determine whether or not an individual classification is correct. The Board has appointed Respondent's human resources (HR) director as its chief examiner. The HR Director reviews all requests for reclassification and makes a recommendation to the Board.

> This is responsible and varied clerical/administrative work of a difficult nature. The employee is responsible for performing complex clerical work requiring understanding of complex policies, processes or technical systems and operating with a high degree of independence over specified, standardized activity areas, and refers only highly unusual or technical problems to supervisors for decision.

As an Office Assistant III in the HR department, Haner entered all salary changes into the payroll system. Haner was responsible, together with the comptroller's office, for ensuring that pay increases for all employees were implemented at the proper time. Haner developed payroll procedures and forms, including the "advice" form for approving and recording payroll changes that is currently used, and an Excel spreadsheet for charting employee promotions. Haner's responsibilities for maintaining the City's master salary schedule included supervising the computation of all salary increases, and she was required to be familiar with the salary provisions of all of Respondent's many collective bargaining agreements. Her responsibilities also included sending out forms to supervisors when their subordinates were due for annual or other evaluations, making sure that the forms were returned, and auditing them for mathematical mistakes and compliance with evaluation procedures. Haner recorded information about certifications and licenses, such as a commercial driver's licenses, required for certain positions. In addition, Haner provided instruction to payroll clerks on the preparation of advices and answered their questions about how to enter time and compute leave or other monetary payoffs.

In 1999, Respondent acquired a new, more sophisticated, computerized payroll system called VISTA. Haner became responsible for setting up procedures to feed into the system and for the ongoing task of adapting the system to Respondent's needs. Shortly after the purchase of VISTA, the HR director told Haner that her job should be reclassified, but took no follow up action.

In early 2001, David Etheridge took over as the new HR director. In early August 2001, Haner submitted a request to have her job reclassified with a new title and higher rate of pay. On August 8, Etheridge directed Barbara King, his assistant director, to perform a classification review. Haner filled out a position classification questionnaire detailing her current job duties, and King performed a desk audit of her position. On January 10, 2002, King recommended that Haner's position be reclassified as Personnel Assistant, and that her compensation be adjusted accordingly.

Personnel Assistant is an existing classification in the HR department. Personnel Assistants have historically not been included in any bargaining unit. Personnel Assistant is not a supervisory classification, but some Personnel Assistants have been supervisors. The job description for the Personnel Assistant classification describes its work as follows:

> This is responsible paraprofessional work. The employee performs a variety of paraprofessional tasks relating to the administration of the City's employee benefit programs, personnel records and other personnel services.

In support of her recommendation to reclassify Haner's position, King cited differences in the position's job duties since the last position review requiring the incumbent to have broader knowledge and exercise greater initiative. On March 4, Etheridge recommended to the city manager

that the position be reclassified. The Civil Service Board approved the recommendation, and Haner was reclassified on December 4, 2002. Haner was placed on a different salary scale and received an immediate salary increase of about three thousand dollars. On December 31, 2002, Respondent' labor relations manager, Mari-Beth Jelks, sent Charging Party's president a memo notifying him of Haner's reclassification and of Respondent's intent to remove her from Charging Party's bargaining unit.

In October 2001, as part of its preparations for contract negotiations, Charging Party distributed position classification questionnaires to members who had expressed interest in having their current classifications reviewed. Haner filled out a classification questionnaire and gave it to Charging Party. In March 2002, Charging Party made a proposal at the bargaining table to upgrade the salary levels of approximately 30 positions. Charging Party proposed to make Haner's position a separate classification and to move it from salary grade 12A to salary grade 17A under the contract. In support of its proposal, Charging Party cited some of the same increased responsibilities noted by King. Respondent's position was that it would not agree to any pay increases for individual positions within a classification. The parties eventually agreed to a one-year contract without agreeing to any of the pay upgrades Charging Party had proposed.

Charging Party was not aware that Respondent was reviewing Haner's classification until it received Jelks' December 31, 2002 memo. On January 6, 2003, Charging Party wrote Jelks objecting to the removal of Haner's position from the unit.

Before her reclassification, Haner was assigned a seasonal employee to assist her. In April 2003, Etheridge told Haner that she would now be supervising an Office Assistant II. Haner assigns and supervises this employee's work. She approves the employee's time and her leave requests. Haner is also responsible for participating in the employee's evaluation, although when Haner testified in March 2004 she had not yet done so. Haner has never been told whether she has any authority to discipline. At the time of her testimony, Haner had not formally disciplined or recommended that the Office Assistant II be disciplined. Haner testified, however, that when Etheridge told her that she was the Office Assistant's supervisor, she assumed that she had the same authority to recommend that her subordinate be disciplined as other supervisors within the City. Etheridge confirmed that like other first-level supervisors, Haner has the authority to effectively recommend formal discipline.

Christine Barfuss' Position

In 1995, Christine Barfuss became the Right of Way Agent in Respondent's engineering department. Right of Way Agent was both a position and a separate classification in Charging Party's bargaining unit.

The Right of Way Agent participated in negotiations for easements and rights of way and performed a variety of technical duties related to the easement process. Until the 1980s, these were generally easements for City utility and street-widening projects. During the 1980s, the Right of Way Agent began to be assigned responsibility for the acquisition of land. A 1995 job description for the Right of Way position described its principal duties as follows:

This is professional real estate work, which includes preparatory and negotiation work in the acquisition of property rights of land and easements for public use.

Work involves studying plans and determining easements to be obtained or parcels to be purchased for public works projects. Contacting owners, obtaining appraisals, title abstracts and environmental assessments of parcels to be acquired. Prepares written acquisition plans, proposals, communications and makes presentations. Conducts negotiations and performs related real estate acquisition activities and coordinates necessary legal efforts to secure required purchase of easements or other land interests in conformance with established real estate law and practice.

Searches city, county, state and other source property records; orders, performs and/or reviews real estate appraisals to determine property values; secures legal descriptions, dates and types of instruments and other data affecting property titles and real estate interests; performs and/or reviews environmental assessments for properties which are to be acquired; acquires property interest in conformance with state and federal acquisition procedures.

Compiles and consolidates materials, secures lists of property owners, prepares acquisition plans, written proposals, communications, resolutions and presentations for City Commission action in preparation for negotiation.

Contacts property owners, conducts negotiations, makes final contacts, handles closings, and performs other related real estate acquisition activities with appropriate property interests, including residential and commercial property owners, mortgagees, tenants, neighborhood groups, planning commissions, etc. on properties to be purchased; assists in relocating residential and commercial interests as required.

Assists legal staff by acting as expert witness in court cases involving acquisition of real estate interest including condemnation cases.

Participates as a team member in writing, reviewing and negotiating agreements on behalf of City for developers, businesses, utility companies, other governmental agencies and residents regarding city utilities and public rights-of-way; advises city utility officials on real estate matters.

Conducts review and recommendation process for providing city consent to right-of way vacations, grants of easements, and releases of easement requests, makes contact with informs and coordinates with other departments, utility companies, legal offices and other affected parties to secure easements for construction of sewers, water mains, highways and sidewalks.

Between 1998 and 2003, the Right of Way Agent became involved in a number of large projects. The Michigan Department of Transportation rebuilt a large portion of the freeway system in downtown Grand Rapids. A building that was serving as a storage facility for items donated to the Grand Rapids Public Museum had to be torn down, and Respondent was legally obligated to provide

a functional replacement. Respondent built a new convention center, and extensively repaired and upgraded the flood walls along the Grand River within the City. These projects required Respondent to engage in complicated property transfers and acquisitions, to negotiate with different governmental entities, and to comply with a web of government regulations. Barfuss organized and headed teams to perform these functions, coordinated the work and assigned tasks.

Like Haner, Barfuss submitted a completed questionnaire describing her current job duties to Charging Party in the fall of 2001. Barfuss' position was among those that Charging Party sought to have upgraded in its March 2002 contract proposal. Charging Party proposed to move the Right of Way Agent classification from salary 20A to salary grade 21A, and to revise the job description to more accurately reflect the position's job duties. As noted above, the parties agreed to a contract without reaching agreement on any of the positions covered by this proposal.

In July 2001, Barfuss wrote Etheridge to request that her position be reclassified. In her position questionnaire, Barfuss stated that she was now responsible for preparing the legal descriptions for property rights to be acquired by the City. Barfuss also pointed out that rather than being simply a member of a team, she now had a leadership role in preparing and negotiating agreements. Barfuss listed other duties not mentioned in her job description, including acting as the City's agent in coordinating right of way issues between the City and the Michigan Department of Transportation; meeting with businesses, residents and representatives of units of government regarding proposals to rename streets; acting as the City's primary contact person with the Michigan Department of Consumer and Industry Services in connection with right of way vacations; and providing ongoing assistance to the Downtown Development Authority for property transaction matters.

On June 18, 2002, the city engineer sent Barfuss' position classification questionnaire to Ethridge with a recommendation that her position be reclassified. The city engineer wrote:

> The role of this position has evolved over the past few years to be a leadership position for not only right-of-way acquisitions for the City, but on behalf of the City for the DDA, as well as other Authorities and entities. Also, this position serves as the City's primary contact person for many other property transaction matters.

King and Etheridge interviewed various individuals in the engineering department regarding Barfuss' responsibilities. On November 11, 2002, Etheridge sent the city manager a memo stating:

> The Engineering Department requested the review of the Right-of-Way position that has provided supervision to key projects for the Downtown Development Authority, the Grand Rapids Building Authority and Grand/Rapids/Kent County Convention/arena Authority (CA/A0). In addition, this position supervises an existing Engineer Assistant I position.
>
> Based on the review of the proposed duties and comparing them with similar positions, it is recommended that an Administrative Analyst I (622) (Range 11) position replace a Right-of-Way Agent (902) (Range 20A) . . . position in the

Engineering Department.

The city manager approved Etheridge's request, and the Civil Service Board adopted his recommendation. Barfuss was reclassified as an Administrative Analyst I on January 13, 2003. Administrative Analyst I is a lower-level administrative classification included in the APA's bargaining unit. Employees in this classification do a number of different jobs in different departments. The job description for Administrative Analyst I contains this general description:

> This is responsible professional work providing a variety of administrative support services to a department head or other administrative position. The work includes providing staff liaison to the various departmental divisions and programs, outside agencies and the media. The work is performed under the general supervision of a department head or administrative position. The employees may supervise subordinate support staff.

Barfuss was placed on the E step of salary grade 11 in the APA contract. She received an immediate salary increase of about $4,000.

Charging Party was not aware that Respondent had initiated a classification review of the Right of Way Agent position until February 2003, when Charging Party's president learned in a negotiation session for the new contract that the position title had been eliminated and the job reclassified.

Before Barfuss' reclassification, engineering assistants and draftspersons were assigned to assist her with right of way work on an as-needed basis. She trained them and checked their work when they performed right of way duties. Barfuss testified that before her reclassification she was not formally responsible for the work of any other employee. Shortly after Barfuss' reclassification, the city engineer told her that she and the design services supervisor would be jointly supervising an Engineering Assistant I. Barfuss and the design services supervisor both assign work to the engineering assistant, and both supervise his work when he works in their areas. Both participated in his formal evaluation. Barfuss has never been told whether or not she has any authority to discipline the engineering assistant. However, she testified that because she was told she was the engineering assistant's supervisor, she assumed that she had the same authority as any other supervisor employed by the City to recommend formal disciplinary action. Barfuss has never had the occasion to recommend that the engineering assistant be disciplined.

Discussion and Conclusions of Law:

The composition of a bargaining unit is a permissive subject of bargaining. Because the composition of the bargaining unit is not a mandatory subject of bargaining, an employer cannot bargain a unit placement issue to impasse. Under Section 13 of PERA, bargaining unit placement is to be decided by the Commission when the parties do not agree. *Detroit Fire Fighters Ass'n, Local 344 v Detroit*, 96 Mich App 543, 546 (1980); *Wayne Co,* 2001 MERC Lab Op 339, 344; *Michigan State Univ,* 1992 MERC Lab Op 120. An employer violates its duty to bargain in good faith if it removes a position from a bargaining unit without the union's agreement or an order from the Commission. *Livonia Pub Schs,* 1996 MERC Lab Op 479; *Northern Michigan Univ,* 1989 MERC

Lab Op 139. An employer does not have the right to reclassify a position and unilaterally remove it from a bargaining unit without a change in the position's job duties. *Ingham Co,* 1993 MERC Lab Op 808, 812. If the duties of the position have changed, and the parties cannot agree on the position's unit placement, the Commission determines whether the changes in job duties have affected the position's community of interest with its existing unit so that its placement in that unit is no longer appropriate. *Ingham Co,* at 813; *Northern Michigan Univ,* at 150.

Respondent argues that its actions in this case were lawful because it has a managerial right to "reclassify and reorganize positions." An employer's decision to eliminate unit positions and redistribute their work among positions outside the bargaining unit may be either a mandatory subject of bargaining or a matter of managerial prerogative, depending on whether the decision is part of a legitimate reorganization, whether the transfer of work has a significant adverse impact on unit employees, and whether the employer's decision is based at least in part on cost factors which could be affected by the bargaining process. See *Local 128, AFSCME v Ishpeming*, 155 Mich App 501 (1986) and *City of Detroit (Dep't of Water and Sewerage),* 1990 MERC Lab Op 34. None of these factors are relevant, however, when an employer takes an existing unit position and, without changing its duties, transfers it to another unit or declares it to be an unrepresented position. *Allendale Public Schs,* 1997 MERC Lab Op 450. Here, both Haner's and Barfuss' positions acquired new job duties over a period of years while remaining in Charging Party's unit. When Respondent reclassified the positions it did not reorganize their job duties, but simply removed the positions intact from Charging Party's unit. I conclude that Respondent had no inherent managerial right to remove Haner or Barfuss' positions from Charging Party's unit.

Respondent also argues that it did not remove the positions from Charging Party's unit. Rather, according to Respondent, the Civil Service Board exercised its discretion to determine that Haner and Barfuss were improperly classified given their job duties, and properly reclassified them within the existing classification scheme. According to Respondent, the parties' contract recognizes the Board's exclusive authority over the appropriate placement of any particular position within Respondent's civil service classification scheme. This authority includes, according to Respondent, the right to make reclassification decisions that change a position's bargaining unit placement.

While the definition of the bargaining unit is a subject over which the parties can bargain to agreement, "the parties cannot bargain meaningfully about wages, hours or conditions of employment unless they know the unit of bargaining." *City of Detroit (Fire Dep't),* 1979 MERC Lab Op 105, 108, quoting *Douds v Intl Longshoremen's Assoc,* 241 F2d 278 (CA2, 1957). Respondent cities no authority for its claim that a union can contractually waive its right to have the Commission decide disputes over unit placement. The Commission has read contract language giving employers the right to change classifications narrowly. For example, in *Michigan State Univ,* supra, the Commission held that a contract provision granting the employer the right to "establish, eliminate or change classifications" allowed the employer to unilaterally reclassify employees within the bargaining unit, but did not give it the right to remove positions from the unit. In *City of Warren,* 1994 MERC Lab Op 1019, the Commission held that a contract which gave the Employer the unilateral right to assign bargaining unit work to nonunit positions did not give it the right to create a "new" position outside the unit with the same duties as an abolished unit position.

Even if a union can waive its right to have the Commission determine unit placement

disputes, I do not see any indication that Charging Party did so in this case. Article XVII of the parties' contract plainly states that disputes over whether new or changed positions should be in the bargaining unit are to be resolved by the Commission. However, under the contract, the Civil Service Board, rather than an arbitrator, decides disputes over the proper classification of positions within the bargaining unit, i.e. disputes that do not involve unit placement issues. I find no merit in Respondent's argument that the parties' contract gave it or its Civil Service Board the right to remove positions from Charging Party's bargaining unit without its agreement or an order from the Commission.

When an employer seeks to remove an existing position from an established unit, the question is whether changes in the duties of the position have altered its community of interest so that it no longer shares a community of interest with this unit, not whether the position now has a closer community of interest with another bargaining unit or group. The Commission is reluctant to allow employees to be removed from an established bargaining unit without a radical change in their job duties or functions amounting to a change in the underlying nature of the position. *Saginaw Valley State College,* 1988 MERC Lab Op 533, 543. Here, both Haner and Barfuss testified extensively regarding their past and current job duties and how their jobs changed before they were reclassified. I find that while Haner's area of responsibility – payroll functions in the HR department – remained the same, her job became more complex between 1999 and 2002. I also find that while Barfuss continued to perform the traditional duties of the right of way agent, her job expanded during the same period to include the duties of a project manager. Neither position was the same in 2002 as it was in 1995. As both parties agree, the salaries of both positions deserved to be substantially increased. However, Charging Party's bargaining unit is a diverse unit that includes many positions with specialized training and skills. I am unable to conclude that either Haner's or Barfuss' new responsibilities destroyed their community of interest with Charging Party's bargaining unit.

Respondent also argues that Haner and Barfuss are supervisors within the meaning of the Commission's definition and, therefore, they cannot appropriately be included in Charging Party's unit. I note that neither Barfuss nor Haner had any supervisory authority before they were reclassified and removed from Charging Party's unit.[7] Whether Barfuss or Haner are now supervisors has no relevance to the issue of whether Respondent committed an unfair labor practice by removing their positions from Charging Party's bargaining unit when it did. I conclude, for the reasons set forth above, that Respondent violated its duty to bargain in good faith by removing Haner's and Barfuss' positions from Charging Party's bargaining unit without Charging Party's agreement.

If Haner or Barfuss are supervisors, however, their positions cannot be returned to Charging Party's unit. A supervisor is one who possesses authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to effectively recommend such action, as long as this authority requires the use of independent judgment and is not merely routine. *Riverview Comm Schs,* 16 MPER 51 (2003); *City of Holland,* 2002 MERC Lab Op 40, 41.

[7] In his reclassification recommendation, Etheridge stated that Barfuss was the supervisor of an engineering assistant. However, this appears to have been an error, since Barfuss testified that until she was reclassified she was not formally responsible for the work of any other employee and that she did not even have the authority to directly assign work to the engineering assistant.

"Effectively recommend" means that the supervisor's recommendations are generally accepted by his or her superiors without an independent investigation. *Port Austin Water & Sewer Authority*, 2001 MERC Lab Op 230; *Kalkaska Co and Sheriff*, 1994 MERC Lab Op 693. The authority to issue formal discipline or to effectively recommend formal discipline is an important indicator of supervisory authority. *City of Adrian*, 16 MPER 62 (2003); *City of Detroit (Dep't of Public Works)*, 1996 MERC Lab Op 282, 285-286. It is the delegation of supervisory authority, rather than the exercise thereof, which is indicative of supervisory status. *Village of Lawrence*, 1997 MERC Lab Op 319, That is, as long as his authority is real and not theoretical, the fact that the employee has had little or no occasion to exercise that authority is not relevant. *MEA v Clare-Gladwin Sch Dist*, 153 Mich App 792, 797 (1986).

After she was reclassified, Barfuss was told by the city engineer that she was to be the supervisor of an Engineering Assistant I. In April 2003, HR Director Etheridge informed Haner that she was to be the supervisor of an Office Assistant II. Both Barfuss and Haner participate in evaluating their subordinates and assign and direct their work. Neither Barfuss nor Haner was given specific information about their authority to discipline or recommend the discipline of their subordinates, and neither has had occasion to initiate a disciplinary action. However, both Barfuss and Haner testified that they understood when they were told that they had become supervisors that they had the same disciplinary authority as other first-line supervisors, i.e. the authority to effectively recommend to their supervisors that their subordinates be disciplined. Haner's supervisor, Etheridge, affirmed that she did have that authority. As noted, in determining supervisory status the issue is whether the employer has delegated real supervisory authority to the position, not whether the employee has exercised that authority. Respondent claims that it delegated supervisory authority to Barfuss in January 2003 and to Haner in April 2003, and there is no evidence to refute this claim. I conclude, therefore, that by the time of the hearings in this case both Barfuss and Haner had become supervisors within the Commission's definition.

I find that since both Haner's and Barfuss' positions are now supervisory, it would be inappropriate to order them to be returned to Charging Party's nonsupervisory unit. I will, therefore, recommend to the Commission that its remedial order in this case not include a directive to return Barfuss' or Haner's position to Charging Party's unit.

I conclude that Respondent violated its duty to bargain in good faith under Section 10(1) (e) of PERA by removing the positions held by Ruth Haner and Christine Barfuss from Charging Party's unit without Charging Party's agreement or an order from this Commission. In accord with this conclusion and the findings of fact and discussion above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent City of Grand Rapids, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain in good faith with Charging Party Grand Rapids Employees Independent Union in accord with Sections 11 and 15 of PERA.

2. Refrain from removing positions from Charging Party's bargaining unit through

reclassification or other means without Charging Party's agreement or an order from this Commission.

3. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices employees in Charging Party's bargaining unit are normally posted, for a period of thirty (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 Grand Rapids 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 in good faith with Charging Party Grand Rapids Employees Independent Union in accord with Sections 11 and 15 of PERA.

WE WILL NOT remove positions from Charging Party's bargaining unit through reclassification or other means without Charging Party's agreement or an order from the Michigan Employment Relations Commission.

CITY OF GRAND RAPIDS

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.