

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

CITY OF DETROIT (POLICE DEPARTMENT),
Respondent-Public Employer,

Case No. C04 A-001

-and-

DETROIT POLICE OFFICERS ASSOCIATION,
Charging Party-Labor Organization.

APPEARANCES:

City of Detroit Law Department, by Valerie Colbert-Osamuede, Esq., for the Public Employer

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by Scott A. Brooks, Esq., for the Labor Organization

DECISION AND ORDER

On January 13, 2005, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent City of Detroit (Police Department) violated Section 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a). The ALJ concluded that Respondent suspended Officer John Bennett, a member of the bargaining unit represented by Charging Party Detroit Police Officers Association (DPOA or Union), for engaging in protected concerted activity and recommended that Respondent be ordered to reinstate Bennett with back pay. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On February 7, 2005, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. After filing a timely request, Charging Party was granted an extension to file a response to the exceptions, and its timely brief in support of the ALJ's Decision and Recommended Order was filed on March 21, 2005.

In its exceptions, Respondent contends that the ALJ erred in finding Bennett's operation of the website www.firejerryo.com was protected concerted activity, arguing that Bennett was acting as a private citizen and that information on the website does not promote group action by members of the DPOA. Respondent maintains that the ALJ erred by failing to consider information that it submitted after the record closed regarding the Union's stipulation that the website was not a Union project. Respondent takes the position that such information negates Charging Party's argument that Bennett's activities were protected under PERA. Respondent also asserts that the operation of the website is not protected under PERA because statements on the website detracted from the effective and efficient operation of the Detroit police department or had the potential to adversely affect the operations of the department. Upon reviewing the

record carefully and thoroughly, we find Respondent's exceptions to be without merit and adopt the ALJ's recommended order.

Factual Summary:

We accept the factual findings of the ALJ and summarize them here as necessary. The DPOA represents certain police officers employed by Respondent. Officer Bennett had been employed as a police officer since 1996 and is a member of the bargaining unit represented by the DPOA. Around February 2002, Jerry Oliver was appointed as Respondent's Chief of Police.

In October 2002, Bennett created and registered a website that he operates, with his own funds, while off duty. The ALJ found that he created the website to provide a forum for Detroit police officers to express their concerns over issues within the police department, and to provide a source of information for the wider community regarding issues of leadership and accountability in the City of Detroit.

From late 2002 through August or September of 2003, the website contained a guest book that permitted visitors to log on and register their thoughts and opinions. Although individuals who made comments in the guest-book rarely identified themselves, two police officers included their names, and other website visitors gave information that led Bennett to assume that they were also police officers. Additionally, the website contained various announcements and articles about such matters as wage comparisons between Detroit police officers and police officers in other cities, complaints about equipment and staffing in the Detroit police department, and information about police officer grievances, arbitrations, and union elections. Another part of the website contained pages that Bennett said were created to provide comic relief through the use of satire, caricatures, and fictional characters and included a disclaimer indicating that the characters mentioned on those pages were fictional.¹

1 On October 22, 2003, Bennett was ordered to attend an interview conducted pursuant to *Garrity v New Jersey*, 385 US 493 (1967), during which he was compelled, under the threat of discharge, to answer questions concerning the website's content. He acknowledged posting articles on the website that criticized the Police Department's administration or made unflattering comments about the personal lives of members of the administration without first determining whether there was a factual basis for the articles. Bennett claimed that many of the reports he included on his website came to him through anonymous e-mails and contained information that he did not attempt to verify. He also admitted publishing an article about "Freedom days" which he described as "an opportunity for officers, supporters and citizens to share in our dissatisfaction with department leadership by taking the day off from work." During the interview, which occurred after his suspension, Bennett acknowledged posting items on the website which included:

- Reporting that the strike force trained to be the first responders in case of a terrorist attack had been disbanded, without knowing whether such information was truthful;
- Reporting that the police department was no more prepared for a terrorist attack than it had been on September 10, 2001, eleven months earlier;
- Questioning whether Oliver's children attended an unnamed pre-school in Grosse Pointe and reporting that Oliver worked out at a particular gym from 6:00 to 8:00 p.m. daily;

In December 2002, two months after the website was created, the *Detroit Free Press* and WXYZ Channel 7 News published stories about Chief Oliver's reaction to the site. On December 13, 2002, the Channel 7 News website featured an article about Bennett's website, in which a television news reporter quoted Chief Oliver as commenting that "it is a great site," and "it's great entertainment. . . . It's a spoof, I think." According to this report, admitted at the hearing without objection, Oliver said:

In reality, I'm not bothered by it at all. Some people have said to me it's libel or slanderous, it's supposed to be really negative, but to me it's encouraging. He who wrestles with me makes me stronger.

In a December 14, 2002 *Detroit Free Press* column, which was also admitted without objection, Oliver is quoted as saying "It is a very well-done site," and "Clearly the webmaster is a very talented person, technologically. I wish we had that kind of skill working on the official website of the police department."

On July 8, 2003, Oliver suspended Bennett with pay and told Bennett that the site contained racial slurs that were detrimental to the department and that if the site were still up the following morning, Bennett would be suspended without pay. Bennett continued to operate the site. On September 18, 2003, Bennett was suspended without pay.

Discussion and Conclusions of Law:

Although we have not previously dealt with statements posted on the internet by an off-duty employee from a location outside of the work place, we have had occasion to examine other forms of public comment by employees which resulted in discipline. In *Township of Redford*, 1984 MERC Lab Op 1056, we held that even when speaking to the press about a union-management dispute violates an otherwise legitimate rule of the employer, the employer must demonstrate a legitimate and substantial business justification for applying the rule to restrict the exercise of PERA rights. Where the concerted activity does not involve disclosure of confidential information or policy, and it is not shown that application of the rule is necessary to maintain order or discipline, we have found that discipline for speaking to the press regarding a union-management dispute violates PERA. *Township of Redford*.

By way of contrast, we held in *Ottawa Co Sheriff*, 1996 MERC Lab Op 221, that when crimes have been committed and an investigation is underway, a law enforcement agency has a legitimate interest in preserving confidentiality by requiring that rules regarding the release of information be strictly followed. In *Meridian Twp*, 1997 MERC Lab Op 457, we held that a

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- Describing a female police department employee as a "concubine prospect" and questioning whether Oliver took his family and his "concubine" on trips at taxpayers' expense;
 - Questioning whether a newly hired assistant chief is a "card-carrying Klansman" and questioning his qualifications for the position;
 - Alleging, without identifying him by name, that a police commander had been stopped for drunk driving while in a police department vehicle in Northville.

public statement that was false and had the potential of causing public alarm was not protected by PERA.

The DPOA's unfair labor practice charge alleges that the City violated Section 10(1)(a) of PERA by directing Bennett to shut down his website and by suspending Bennett when he failed to do so. The ALJ found that operation of the website was protected concerted activity because matters addressed on the website included work-related subjects such as wages, promotions, manpower, and discipline, even though subjects unrelated to working conditions also appeared. For reasons stated in the ALJ's Decision and Recommended Order, we agree.

In its exceptions, Respondent asserts that Bennett's conduct was not sanctioned by the DPOA or any other union and therefore not protected by PERA. Under Section 9 of PERA public employees have the right to engage in lawful concerted activities for the purpose of mutual aid and protection. Concerted activity, which includes activity undertaken by one employee on behalf of others, is protected by PERA even in the absence of the participation or authorization of a labor organization. See *City of Detroit, Water and Sewerage Dep't*, 1993 MERC Lab Op 157 (no exceptions). See also *NLRB v Washington Aluminum Co*, 370 US 9, 15 (1962); *Hugh H Wilson Corp v NLRB*, 414 F2d 1345, (CA 3, 1969); *Clairmont Resort & Spa*, 344 NLRB No. 105 (2005); *Cintas Corp*, 344 NLRB No. 118 (2005). Even if the website was also used for purposes that lacked a direct nexus to wages, hours, and working conditions, such ancillary activity did not deprive Bennett of the protection afforded by PERA, absent a showing that the operation of the website had an adverse impact on a legitimate employer interest. *City of Detroit, Water and Sewerage Dep't*.

Although Respondent argues that Bennett's statements have undermined public confidence in its police department and have had an adverse impact on its operations, no evidence was offered to support this argument. Similarly, Respondent maintains that certain statements published by Bennett violated police department rules and regulations regarding the conduct of police officers.² However, no rules or regulations were placed in evidence. While Bennett acknowledged that he posted some statements on the website without making efforts to determine their truth or falsity, Respondent offered no evidence to show that those statements were false or adversely affected a legitimate employer interest.

Respondent knew of Bennett's website months before it imposed any discipline. In his public comments about the site, Chief Oliver both praised the technical quality of the site and denied that he was offended by its commentary. Nothing in his December 2002 public comments about the website indicated that Oliver considered the site, or any of the statements made therein, to be in violation of the police department's rules or regulations. Oliver did not complain about the website or warn Bennett that his job was in jeopardy until July 8, 2003, when he suspended Bennett with pay for operating the website.

Respondent has characterized some statements posted on the website by Bennett as sexual harassment, racist in nature, or otherwise offensive. Although we do not condone such comments, no evidence was presented that Bennett posted these statements while on duty, nor

² In an October 22, 2003 interview of Bennett conducted by Respondent pursuant to *Garrity v New Jersey*, 385 US 493 (1967), and in disciplinary charges filed against Bennett in March 2004, Respondent identified certain statements on the website with which it took issue.

did Respondent offer any evidence that this activity affected others in the performance of their duties. In fact, Respondent offered no evidence that any of its employees were even aware of the allegedly offensive comments on the website.

At the time of Bennett's suspension, Chief Oliver gave Bennett only two options: shut down the website or be suspended without pay. Before it imposed discipline, Respondent did not give Bennett the opportunity to remove from the website the statements that it found objectionable. Bennett was suspended simply because he continued to operate the website.

We hold that Respondent's demand that Bennett shut down his entire website, and its discipline of Bennett for not doing so, constituted a violation of Bennett's rights under PERA to engage in protected concerted activity. We will not allow the suppression of PERA protected speech simply because it occurs in conjunction with speech that is not protected by PERA, where there has been no showing of actual harm or adverse impact flowing from that speech.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch, Commission Chairman

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

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APPEARANCES:

Valerie Colbert-Osamuede, Esq., City of Detroit Law Department, for the Public Employer

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by Scott A. Brooks, Esq., for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on May 7, 2004, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and 423.213. Based on the record, including post-hearing briefs filed by July 8, 2004, I make the following findings of facts and conclusions of law.

The Unfair Labor Practice Charge:

On January 7, 2004, the Detroit Police Officers Association filed an unfair labor practice charge alleging that the City of Detroit (Police Department) violated Section 10(1)(a) of PERA. The charge reads:

Since on or about July 8, 2003, and continuing to date, the City of Detroit, acting through its agent Police Chief Jerry Oliver, has violated the Act by: (1) Directing that the “firejerryo” website be shut down; and (2) Suspending Police Officer John Bennett for creating and operating the website.

Evidentiary Issue:

Charging Party objected to Respondent’s offer of the transcript of Officer Bennett’s October 22, 2003 interview that Respondent conducted pursuant to *Garrity v New Jersey*, 385 US 493 (1967). I received the transcript, but reserved admitting it subject to the parties’ written arguments. Except for arguing that the compelled nature of Officer Bennett’s interrogation is at

odds with policies underlying *Garrity*, Charging Party offered no support for its contention that the transcript is inadmissible.³

Findings of Fact:

Charging Party, Detroit Police Officers Association (DPOA), represents certain police officers employed by Respondent City of Detroit. Officer John Bennett had been employed as a police officer since 1996 and is a member of the DPOA. On or about February 2002, Jerry Oliver was appointed Chief of Police.

In October 2002, Officer Bennett, a Detroit Police officer and a member of the DPOA since 1996, created and registered www.firejerryo.com, a website that he operates with his own funds while off duty. He testified that he created the site to provide “a forum for police officers on [sic] the Police Department to express their concerns with some of the issues we had, we have on the Police Department, and also provide a source of information for the wider community, the citizens, of which I am one, to take a look at issues of leadership and accountability in the City of Detroit.” In describing his motivation for creating the site, Officer Bennett explained during the *Garrity* interrogation that:

... I am a lifelong Detroiter, born and raised, and I see a great lack of governmental leadership in our City, from the Mayor’s office all the way down. I saw what I thought were inconsistencies in what some of the things our present Chief acted on, and the latest thing is another example, and I felt it was important as a citizen, not only as a citizen, but a police officer, to provide people with information so they can make informed decisions about what was taking place in our City. As a taxpayer, I sat in my home and I began a website. It was my intent that any citizen of the City of Detroit would view the website, which now numbers at 154,000 hits. So that would seem to indicate that many people across the country have viewed the website.

For a time, the website consisted of three types of pages. Initially, it contained a guest book that permitted visitors to log on and print their thoughts and opinions on a variety of subjects. Some time after it was created, the guest book contained a disclaimer that advised visitors that certain things were unacceptable and would be deleted. Individuals who made comments in the guest book rarely identified themselves. Police officers Reggie Crawford and David Malhalab included their names. Some visitors, who Officer Bennett assumed were police officers, identified the precinct where they worked, made comments about events occurring at their precincts, criticized the DPOA and its leadership, and discussed the 2003 union election. The guest book was removed in August or September 2003.

³In *Garrity*, police officers being investigated by their police department and the State of New Jersey for alleged criminal conduct were given the option of submitting to an incriminating interview or being discharged. Subsequently, the prosecution in the criminal case used the officers’ compelled testimony to obtain convictions. The Supreme Court reversed, holding that the confessions were coerced and that the Fourteenth Amendment to the U.S. Constitution prohibited their use. In *Lingler v Fechko*, 312 F3d 237, 239 -240 (CA 6, 2002), the U. S. Court of Appeals for the Sixth Circuit held that the Fifth Amendment to the U.S. Constitution does not prohibit the use of *Garrity* interviews in other than criminal case proceedings. See also *Wiley v Mayor of Baltimore*, 48 F3d 773 (4th Cir, 1995), *cert denied*, 516 US 824, 116 S Ct 89, 133 L Ed 2d 45 (1995).

The website also contains various announcements and articles about such issues as a comparison of wages paid to Detroit police officers to wages earned by officers in other cities; complaints about an insufficient number of vehicles available during midnight shifts; criticism of the growth in the executive protection units of the Mayor and the Police Chief at a time when there was an insufficient number of officers on the street; the increase in the number of officers suspended without pay; information about grievances and arbitrations involving suspended officers; equipment failures; the elimination of the investigator's rank and the investigator's promotion to sergeant; the status of pending grievances; fundraisers for officers accused of criminal activity; and information on union elections. According to Officer Bennett, 95% of the articles on the site are informational and discussed union and/or work-related issues.

The third part of the website contains pages that Officer Bennett described as "edgy," which he created to provide comic relief through the use of satire, caricatures and fictional characters. According to Officer Bennett, information for articles on these pages is based on his personal knowledge and from e-mail sent to him anonymously. Among other things, articles on this portion of the site include complaints, criticisms, parodies about perceived favoritism in the chief's hiring practices, and questions about the qualifications and pay of executives hired. At some point after this section was created, Officer Bennett added a disclaimer, which stated: "Content on this page is not specific to any individual. Characters are fictional."

In December 2002, two months after the website was created, the *Detroit Free Press* and Channel 7 News published stories about Chief Oliver's reaction to the site. The *Free Press* quoted him as saying:⁴

"It is a very well-done site. Clearly, the webmaster is a very talented person, technologically. I wish that we had that kind of skill working on the official Website of the police department. We have no investigations going on. We see it as a right of people to express themselves, even though I think it is a small group of disgruntled employees.

Channel 7 News quoted Chief Officer's reaction as follows:

I appreciate quality. This is a quality site. Actually, I think it is a great site. Its [sic] technologically a very advanced site, and its [sic] great entertainment. I have gone there several times and taken a look at the information that's on there. It's a spoof, I think. In reality, I'm not bothered by it at all. Some people have said to me it's libel or slanderous, it's supposed to be really negative, but to me it's encouraging. He who wrestles with me makes me stronger. It's done so well that I wish we could capture some of those skills to help us with the website we have within the department so that we can really move our website to that of [sic] level of professionalism."

Seven months later, on July 8, 2003, Chief Oliver appeared at Officer Bennett's midnight shift roll call and suspended Officer Bennett with pay. Chief Oliver told Bennett that the site

⁴At one time, the site included a bulldog urinating on a picture of Chief Oliver. He told the *Free Press* that he did not take kindly to the image, which had been removed, and that a few personal attacks and lies about members of his staff offended him.

contained racial slurs that were detrimental to the department and that if the site were still up in the morning, he would be suspended without pay. Officer Bennett continued to operate the site. In a September 4, 2003 memorandum to the Board of Police Commissioners, Chief Oliver asked the Board to concur in his suspension of Officer Bennett without pay. Chief Oliver alleged that since November 24, 2002, numerous pages on the website violated several provisions of the Police Department's Code of Conduct.⁵

The next month, on October 22, 2003, Officer Bennett was ordered to attend a *Garrity* interview where he was compelled, under the threat of discharge, to answer questions concerning the website's content. The interrogation focused on Officer Bennett's motivation for creating the website and his familiarity with Department rules regarding the confidentiality of department information, sexual harassment and discrimination, and courtesy to department members, among other things. Officer Bennett was also questioned about the identity of fictional characters in some of the articles, the source of the information, why the articles were published, and whether they were designed to harass the chief or members of his staff.

In March 2004, Officer Bennett was formally charged with six counts of conduct unbecoming an officer and one count of neglect of duty. Each charge relates to pages on the website that made use of parody and satire that Chief Oliver described as spoofs.⁶

Conclusions of Law:

Section 10(1)(a) of PERA prohibits an employer from interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed by Section 9.⁷ The test of whether Section 10(1)(a), or its identical provision in the National Labor Relations Act (NLRA), 29 U.S.C. § 150, et al., has been violated is whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *NLRB v. Illinois Tool Works*, 153 F2d 811, 814 (7th Cir 1946); *St. Clair Co Intermediate Sch Dist*, 1999 MERC Lab Op 38, 45-46. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue was motivated by the employee's protected concerted activity. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v NLRB*, 755 NLRB 941 (DC Cir 1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882

⁵Specifically, Bennett allegedly: (1) created a hostile work environment by communicating and publishing racial and sexual statements; (2) advocated illegal employment action by aiding, abetting or suggesting the abstinence in whole or in part from the lawful and proper performance of the duties of employment, i.e., blue flu/work stoppage; (3) released confidential information by communicating or giving police information detrimental to the department concerning the Department's business; (4) made statements impugning the character of the Chief of Police and Department members; and (5) engaged in the unauthorized solicitation of funds.

⁶For example, Officer Bennett was charged with sexual harassment by publishing the following statements: "Hey Little Evans, since when do you have time to gossip about what inspector has kids by what former Chief? Tell me about your martial bliss (sic). Didn't you follow your boyfriend here?" "With the loot we're paying the morale booster we all should get a turn at having a morale boosted like the Juice does. Why is the Juice's shorty spending so much time at the Motor City Casino? Maybe the Juice is spending too much time with his new shorty, the morale booster, which would explain the kind of morale boosting the morale booster is performing."

⁷Section 9 of PERA guarantees employees the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(1982), affd sub nom *Prill v NLRB*, 835 F2d 1481 (DC Cir 1987). Union animus is not a necessary element for a violation of Section 10(1)(a). *City of Detroit Water & Sewerage Dept.*, 1993 MERC Lab Op 157, 167.

Although the Commission has never addressed the use of the Internet by employees to engage in concerted activity, the matter was addressed in *Frontier Telephone of Rochester, Inc.*, 2004 WL 1181275, (May 24, 2004). There, an NLRB administrative law judge found that an employee's use of the employer's internal electronic message board to discuss workplace conditions and unionization, with the employer's unrestricted authorization, was protected concerted activity, as was the employee's act of forwarding the message board's content to a Yahoo Group website that he operated. In commenting on the Internet's importance in today's workplace, he observed:

It bears repeating that in the modern age of telecommunications, the old forms of employee interchange and exchange – breakroom [sic] meetings, casual meetings on smoke breaks, bulletin boards – may be going the way of buckboards and buggy ships. Today, it is the Internet, its mailing lists, and chat rooms that are replacing the usual forms of employee get-togethers. Employees now may simply sit at their computers and screens and “assemble” to discuss matters of consequence about their jobs and unions.

See also *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997).

Respondent first contends that it suspended Officer Bennett because of concerns about web pages that he controlled and not because of entries in the guest book, which he did not control. The record does not support this assertion. It shows that when Chief Oliver suspended Officer Bennett on July 8, 2003, he made no distinction between entries in the guest book or other pages on the website. He only told Officer Bennett that the website contained racial slurs that were detrimental to the department and that if it were not shut down by morning, he would be suspended without pay.

Respondent also contends that Officer Bennett was not engaged in concerted activity because he never denied that he was the owner/operator of the website and because he maintained during the *Garrity* interview that he was acting as a private citizen and taxpayer, and not as a Detroit police officer. Respondent mischaracterizes the evidence. Officer Bennett explained during the *Garrity* interrogation that he “felt it was important as a citizen, not only as a citizen, but a police officer, to provide people with information so they can make informed decisions about what was taking place in our City. As a taxpayer, I sat in my home and I began a website.” Further, Officer Bennett testified during the hearing that he created the site to provide “a forum for police officers on [sic] the Police Department to express their concerns with some of the issues we had, we have on the Police Department.”

Respondent cites *Oakland Comm College*, 1990 MERC Lab Op 931, for the view that Officer Bennett was not engaged in concerted activity because he never discussed the website with the DPOA or its members, and the DPOA did not provide any equipment, supplies or money to operate the site. In *Oakland Comm College*, 1990 MERC Lab Op 931, the Commission found that an employee who complained about nepotism during a board of trustees meeting was not involved in concerted activity because his complaint was not a part of any concerted activity.

He was not acting as a union representative and had not collaborated or consulted with the designated representative who had spoken at the meeting on the same subject. The facts in *Oakland Comm College* are unlike those presented here. It does not stand for the view that an employee needs a union's involvement or approval to engage in concerted activity.⁸

Respondent also argues that Officer Bennett was not engaged in concerted activity because during his *Garrity* interview and his appearance before the Board of Police Commissioners, neither Officer Bennett, nor his attorney argued that he was engaged in concerted activity. First, there is nothing on the record about Officer Bennett's appearance before the Board of Commissioners. Moreover, a determination of whether an employee is engaged in concerted activity is not measured by whether the issue was raised in another forum, but by the employee's conduct.

I find ample evidence in the record to conclude that Officer Bennett's operation of the website was concerted activity. In addition to satirical articles about Chief Oliver and members of his staff to which Respondent objects, the website contains information about workplace conditions as well as information about union-related activities. Until August or September 2003, the site also included a guest book that allowed visitors to log on and express their concerns about their working conditions and their union. The website was created to provide a forum for police officers to express their concerns about workplace issues and to provide a source of information to the wider community. Although most visitors did not identify themselves, the evidence shows that at least two officers listed their names and others made comments and provided information that made it apparent that they were employees.

I also find that Respondent knew of the concerted nature of Officer Bennett's operation of the website. Respondent not only knew that the website contained a guest book that allowed officers to log in and share their opinions, but Chief Oliver is quoted as saying that he visited the site and thought that it was the work of a small group of disgruntled employees. The record also supports a conclusion that Respondent's suspension of Officer Bennett was motivated by his concerted activity. When Officer Bennett was suspended on July 8, 2003, he was specifically told that if the website was still operating the next morning, he would be suspended without pay.

The final issue to be addressed is whether certain articles on the website are of such an egregious nature, as Respondent contends, that they are not protected by the First Amendment. It is well settled that not all speech by an employee concerning working conditions is protected. *AFSCME, Michigan Council 25, Local 574-A v City of Troy*, 185 Mich App 739, 744-748 (1990), rev'g 1989 MERC Lab Op 291. The Commission has held that employers may restrain employees' speech that detracts from the effective and efficient operation of its business. In such cases, the employer must show a legitimate and substantial business justification to restrict the exercise of PERA rights. *Ottawa Co Sheriff*, 1996 MERC Lab Op 221. The Commission's inquiry in *Township of Redford*, 1984 MERC Lab Op 1056, focused on whether a police officer's concerted activity of making statements to the press involved the disclosure of

⁸On January 10, 2005, long after the record was closed, Respondent's counsel, inappropriately, sent me a copy of the December 15, 2004 arbitration opinion and award issued by arbitrator Ellen J. Alexander concerning a grievance filed by Charging Party. Respondent's alleged purpose was to direct my attention to footnote 6 on page 5, where the union stipulated that the website was not a union project. This document was not considered in my decision in this matter.

confidential information or policy and whether the employer demonstrated that the application of its rules to the conduct involved was necessary for the maintenance of order and discipline in the department. The record in this case is devoid of any evidence that addresses the principles set forth in these cases. Respondent did not call any witnesses nor present any evidence to demonstrate that Officer Bennett's operation of the website was so egregious that it lost the protection of Section 9. Absent such evidence, I find that Respondent violated Section 10(1)(a) of PERA by suspending Officer Bennett for engaging in protected concerted activity. I, therefore, recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is ordered that the City of Detroit (Police Department), its officers, agents, representatives, and successors shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 9 of PERA, including suspending police officers with or without pay for engaging in concerted activities by their operation of a website to discuss wages, hours, terms and conditions of employment and other matters of mutual concern to employees.
2. Restore Officer John Bennett to his previous assignment and make him whole, with interest at the statutory rate, for any losses he suffered because of his suspension.
3. Post copies of the attached Notice to Employees in conspicuous places on its premises, including all locations where Notices to Employees are customarily posted, for thirty consecutive days. The notice shall not be altered, defaced or covered with any other material.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated:

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, THE CITY OF DETROIT (POLICE DEPARTMENT) HAS BEEN FOUND TO COMMIT AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT. PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER:

WE HEREBY NOTIFY OUR EMPLOYEES THAT

WE WILL NOT interfere with, restrain or coerce our employees by suspending them with or without pay for exercising their right to engage in concerted, protected activities guaranteed by Section 9 of PERA by their operation of a website to discuss wages, hours, terms and conditions of employment and other matters of mutual concern to employees.

WE WILL restore Officer John Bennett to his previous assignment and make him whole, with interest at the statutory rate, for any losses he suffered because of his suspension.

WE WILL ensure that all employees are free to engage in lawful, concerted activity through representatives of their choice for the purpose of collective bargaining or other mutual aid or protection as provided in Section 9 of the Public Employment Relations Act.

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

CITY OF DETROIT (POLICE DEPARTMENT)

BY: _____

TITLE: _____

Dated: _____

This notice must remain posted for a period of thirty days. Questions about this notice shall be directed to the Michigan Employment Relations Commission, 3026 W. Grand Blvd, Ste. 2-750, Box 02988, Detroit, MI 48202. Phone (313) 456-3510.