STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INGHAM COUNTY and INGHAM COUNTY SHERIFF,
Respondents-Public Employers,

Case No. C04 D-102

-and-

MICHIGAN ASSOCIATION OF POLICE,
Charging Party-Labor Organization.
____/

APPEARANCES:

Cohl, Stoker, Toskey & McGlinchey, P.C., by Bonnie G. Toskey, Esq., for Respondents

Pierce, Duke Farrell, Mengel & Tafelski, P.L.C., by M. Catherine Farrell, Esq., for Charging Party

DECISION AND ORDER

On November 28, 2005, Administrative Law Judge David M Peltz issued his Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: ____________

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on September 3, 2004, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record, including the stipulation of facts, exhibits and briefs filed by the parties on or before November 12, 2004, I make the following conclusions of law and recommended order.

The Unfair Labor Practice Charge:

The Michigan Association of Police (MAP) represents a bargaining unit of non-supervisory police officers and detectives employed by Ingham County Sheriff in its field services division. The charge, which was filed by MAP on April 16, 2004, alleges that Respondents violated Sections 10(1)(a) and (e) of PERA by transferring deputy Jody Michels from her position as a certified police officer in the field services division to a position in the corrections division which is represented by another labor organization, Capitol City Lodge No. 141 of the Fraternal Order of Police (FOP).

Stipulated Facts:

The following facts are derived from a written stipulation entered into by the parties on September 3, 2004, as well as the exhibits attached thereto.

Background

Deputy sheriffs employed by Respondents are assigned to work in one of three divisions: (1) corrections; (2) field services; or (3) staff services. The field services division consists of police officers and detectives. The primary job function of police officers is to ensure the health, safety and well-being of the public. Their responsibilities include road patrol, responding to requests for service, and conducting investigations. They may also be called upon to perform duties such as prisoner transport and courthouse security. Detectives are expected to conduct investigations, take fingerprints and photographs, and act as security officers for the courts. Corrections officers are responsible for the health, safety and welfare of jail inmates, including maintaining custody and control of the inmates. Deputies assigned to staff services perform training for both corrections and field services.

For more than thirty years, nonsupervisory police officers and detectives employed in the field services division were part of a bargaining unit which also included deputies assigned to corrections and staff services. The broad unit was represented for purposes of collective bargaining by Capitol City Lodge No. 141 of the Fraternal Order of Police (FOP). The FOP and Respondents were parties to successive collective bargaining agreements, the most recent of which expired on December 31, 2002. Pursuant to Article 27, Section 6, of that agreement, the sheriff had the "exclusive right to assign personnel in the bargaining unit to any position in the bargaining unit and to determine assignments."

During the course of the bargaining relationship between the FOP and Respondents, the sheriff unilaterally transferred numerous deputized sheriffs between the field services, corrections and staff services divisions. The practice and policy of the sheriff with respect to job assignments and interdepartmental transfers was described by the ALJ in *Ingham County Board of Commissioners*, 2000 MERC Lab Op 50, 51-52 (no exceptions), a decision incorporated by reference into the stipulation of facts in the instant case:

> [T]he Sheriff has the sole discretion with regard thereto, no explanation or reasons need be advanced to the Union or to the employees, and there is no basis under the contract for a grievance. The Union has attempted, unsuccessfully over the years to modify this absolute right of the Sheriff, both in negotiations and in the grievance-arbitration procedure.

On March 13, 2003, the Michigan Association of Police filed a petition for representation election seeking to sever the police officers and detectives from the FOP's bargaining unit based upon the law enforcement officers' eligibility for compulsory arbitration under Act 312, 1969 PA 312, as amended by 1976 PA 203 and 1977 PA 303, MCL 423.231-247 (Case No. R03 C-048). The Commission issued an order directing an election on December 15, 2003. See *Ingham County Sheriff*, 16 MPER 71 (2003). On February 27, 2004, MAP was certified as the exclusive

bargaining representative for all nonsupervisory law enforcement officers employed by the Ingham County Sheriff, including police officers and detectives. The FOP continues to represent the employees in the corrections and staff services divisions.[1]

The first negotiation session between Charging Party and Respondents occurred on June 30, 2004. At that time, Charging Party presented to Respondents a bargaining demand and list of proposed changes to the expired FOP contract. "Road/Jail Transfers" was included on the list of bargaining proposals under the subheading, "Other areas of discussion."

Transfer of Jody Michels

Jody Michels has been employed by the Ingham County Sheriff Department as a deputy sheriff since March of 1996. At the time of her hiring, she had a degree in criminal justice and three years of prior law enforcement experience. While working for the department, Michels became certified in traffic reconstruction, a program which requires more than 370 hours of training.

On March 25, 2004, Michels was informed by two captains that she was being transferred from field services to corrections, effective May 15, 2004. Michels expressed concern about how the change might affect her wages, hours of work and other terms of conditions of employment given that she was now part of the newly-certified MAP unit. The captains advised Michels that following the transfer, she would no longer be eligible for overtime during Michigan State University football games or assigned traffic accident reconstruction duties. Michels was informed that she would be allowed to retain possession of her department-issued weapon, as she might be assigned to guard inmates who are hospitalized while in jail.

On or about May 15, 2004, Michels reported to corrections and participated in an eight week training program. She had her first opportunity to work overtime on or about August 23, 2004. Michel's wages have not been reduced as a result of her transfer from field services to corrections.

Positions of the Parties:

Charging Party contends that Respondents violated Sections 10(1)(a) and (e) of PERA by unilaterally transferring Michels from her position as a certified police officer in the field services division to a non-law enforcement position in corrections. According to Charging Party, the involuntary transfer of Michels to a non-unit position during the twelve-month period following MAP's certification by the Commission undermined the Union's status as the exclusive majority representative for the department's police officers and detectives. Charging Party argues that it had the right to be consulted before any actions were taken by Respondents

[1] On February 28, 2005, the FOP filed a petition seeking to once again represent the police officers and detectives (Case No. R05 B-034). MAP then filed an unfair labor practice charge, alleging that Ingham County and the Ingham County Sheriff failed to bargain in good faith on a new contract (Case No. C05 C-060). The petition and charge were consolidated and, on August 12, 2005, the Administrative Law Judge issued a Decision and a Recommended Order directing an election in the unit of police officers and detectives. The Commission adopted the ALJ's recommended decision on November 1, 2005, and an election is currently pending.

relative to the wages, hours and other terms and conditions of employment of the deputy sheriffs it represents.

Respondents assert that a longstanding past practice exists permitting the sheriff to unilaterally transfer deputies between positions in field services, staff services and corrections. According to Respondents, this practice has become part of the "status quo" which must be continued after contract expiration and maintained during the bargaining process for a successor agreement. Respondents maintain that it is Charging Party that is seeking a unilateral change to the preexisting terms and conditions of employment by seeking to require the sheriff to bargain over interdivisional transfers. Alternatively, Respondents contend that the charge must be dismissed because the right to assign law enforcement powers and duties is a matter exclusively within the discretion of the sheriff and may not be limited by the collective bargaining requirements of PERA.

Discussion and Conclusions of Law:

Under Section 15 of PERA, a public employer has a duty to collectively bargain in good faith with the union representative over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. Either party may insist on bargaining over a mandatory subject, and neither party may take unilateral action on such an issue prior to reaching an impasse in negotiations. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). Issues falling outside the scope of such classification are considered permissive or illegal subjects of bargaining. *Grand Rapids Cmty College Faculty Ass'n v Grand Rapids Cmty College*, 239 Mich App 650, 656-657 (2000). The Commission has held that changes in job assignments which do not exceed the compass of the employee's normal job duties do not require prior notice or bargaining with the union, but are part of the day-to-day operating decisions which are matters of managerial prerogative. *City of Westland*; 1988 MERC Lab Op 853; *Kalamazoo Public Library*, 1994 MERC Lab Op 486, 492. However, changes which significantly alter an employee's duties or hours of work constitute mandatory subjects of bargaining which the employer cannot alter without providing the union with notice and an opportunity to bargain. See e.g. *Oak Park Pub Schools*, 1995 MERC Lab Op 442, 446 and 1995 MERC Lab Op 648.

Respondents maintain that they had no duty to bargain with Charging Party before transferring Michels because the sheriff, under prior contracts with the FOP, regularly transferred deputies between divisions. Respondents contend that this established past practice with the predecessor union became part of the status quo which privileged the sheriff to act unilaterally in this case. I disagree. Generally, where the parties have a past practice of permitting unilateral action by the employer in a particular area, this practice may become part of the "status quo" which must be continued after contract expiration. See e.g. *Capac Community Schools*, 1984 MERC Lab Op 1195. However, the National Labor Relations Board has held that a past practice under a prior collective bargaining agreement with a predecessor union is not binding on a newly certified successor union. *Crittenton Hospital*, 342 NLRB No. 67 (2004); *Eugene Iovine, Inc*, 328 NLRB 294 (1999); *Porta-King Building Systems v NLRB*, 310 NLRB 539, 543 (1993); *Adair Standish Corp*, 292 NLRB 890, fn 1 (1989), enf'd in relevant part 912 F2d 854 (CA 6 1990). But see *Presbyterian University Hospital*, 325 NLRB 443 (1998). This same principle

has been applied to cases arising under PERA. *Saginaw Township*, 1989 MERC Lab Op 1158, 1162 (no exceptions). See also *Kalamazoo Public Library,* 1994 MERC Lab Op 486, 492-493 (no exceptions) (successor employer not bound by the contract or past practices of former employer).

Although past practice did not justify the involuntary transfer of Michels from a police officer position in field services to a position in the corrections division, I nevertheless conclude that the transfer was a permissible exercise of the authority granted exclusively to the sheriff by the Michigan Constitution. The office of the county sheriff was established as the chief law enforcement officer of the county by Const 1963, art 7, § 4, which provides, in part, "There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law." Among the powers provided to the county sheriff by statute is the authority to appoint one or more deputies and the power to revoke those appointments at any time. MCL 51.70. In *National Union of Police Officers, Local 502-M, AFL-CIO v Wayne Co Bd of Comm'rs*, 93 Mich App 76 (1979), the Court of Appeals considered the interrelationship between MCL 51.70 and the collective bargaining requirements of PERA, in particular § 15 thereof, and determined that authority "to delegate the law enforcement powers entrusted to him by the constitution is vested exclusively in the sheriff, and may not be bargained away or interfered with by any agency or individual."

In *National Union*, a deputy sheriff was transferred to a division in which he would be without law enforcement powers following a conviction for intentionally pointing a firearm at a person. The deputy filed a grievance pursuant to the collective bargaining agreement and the arbitrator ordered the deputy transferred back to his original division. When the county sheriff refused to reassign the deputy, the union filed a petition for a writ of mandamus. On appeal, the Court held that the arbitrator exceeded his authority under the contract in ordering the sheriff to restore the deputy's law enforcement powers. While recognizing that PERA is the dominant law regulating public employee relations, the Court held that a county sheriff's authority to demote a deputy to a position involving no law enforcement powers is beyond the scope of collective bargaining:

> [W]e posit – with some trepidation – the following principles which we deem applicable to the case before us. First, the sheriff's power to hire, fire and discipline is not absolute. Rather, his discretion is limited by PERA. Second, all terms and conditions of employment are subject to collective bargaining and to any agreement resulting therefrom, unless that bargaining or agreement infringes upon matters which are placed within the exclusive power of the sheriff by the constitution. Third, although the sheriff's power to hire, fire and discipline may be limited by the Legislature, the matter of which of his deputies shall be delegated the powers of law enforcement entrusted to him by the constitution is a matter exclusively within his discretion and inherent in the nature of his office, and may neither be infringed upon by the Legislature nor delegated to a third party.

> We therefore conclude that the legislative delegation of the executive police power to the sheriff may not be limited by a collective bargaining agreement as authorized by PERA, but remains vested exclusively in the sheriff.

National Union, supra, at 89-90 (citations omitted). See also *Fraternal Order of Police, Ionia Co Lodge No. 157 v Bensinger*, 122 Mich App 437, 441-446 (1983); *Labor Mediation Bd v Tuscola County Sheriff*, 25 Mich App 159, 164 (1970).

A similar conclusion was reached in *Ingham County and Ingham County Sheriff*, 1988 MERC Lab Op 170. In that case, the union was the bargaining representative of a supervisory unit in the county sheriff department. There were two divisions in the department, law enforcement and corrections. All of the supervisory officers in the unit were certified police officers and deputized by the sheriff. During contract negotiations, the union insisted to impasse on a clause requiring the sheriff to issue weapons to all employees in the bargaining unit, including employees in the correctional facility whose job function did not require carrying a gun. Citing *National Union*, the ALJ held that the contract clause in question was a permissive, not a mandatory subject of bargaining because "the clause would circumvent the statutory right of a sheriff to determine who will be deputized" as the issuance of firearms was dependent on the deputy or officer having law enforcement powers. *Id.* at 176-177. The ALJ concluded that the union violated Section 15 of PERA by insisting to impasse upon a permissive contract provision, and the Commission adopted the ALJ's findings on exception. *Id.* at 172.

The cases cited above stand squarely for the proposition that neither a collective bargaining agreement nor PERA itself can abrogate a county sheriff's authority to transfer a deputy to a position involving no law enforcement powers. Therefore, I conclude that the unilateral transfer of Michels from her position as a police officer in the field services division to a position in corrections did not constitute a violation of Respondents' bargaining duty under Section 15 of PERA.

For the foregoing reasons, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charge is herby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated: ____________