STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SEVENTEENTH DISTRICT COURT (REDFORD TWP),
Public Employer-Respondent in Case Nos. C05 E-113 and C05 I-233,
Employer in Case No. R05 F-088

- and -

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party in Case Nos. C05 E-113 and C05 I-233,
Incumbent Union in Case No. R05 F-088

-and-

MICHIGAN ASSOCIATION OF PUBLIC EMPLOYEES,
Labor Organization-Petitioner in Case No. R05 F-088.
_____/

APPEARANCES:

Kienbaum, Opperwall, Hardy and Pelton, PLC, by Thomas G. Kienbaum, Esq., and William B. Forrest III, Esq., for the Respondent-Employer

Rudell and O'Neill, P.C., by Wayne A. Rudell, Esq., for Teamsters Local 214

Pierce, Duke, Farrell, Mengel and Tafelski, PLC, by M. Catherine Farrell, Esq., for Michigan Association of Public Employees

DECISION AND ORDER

On April 7, 2006, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in these matters finding that Respondent, Seventeenth District Court (Employer or Court), breached its duty to bargain in good faith in violation of Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e). The ALJ held that Respondent bargained in bad faith by insisting on the settlement of a grievance as a condition of reaching a collective bargaining agreement with Charging Party, Teamsters Local 214 (Local 214). The ALJ further found that Respondent violated Section 10(1)(a) of PERA by impliedly threatening to discipline a union steward for exercising her Section 9 right to speak to other bargaining unit members about contract negotiations and by creating the impression that the steward's union activities were under

surveillance. The ALJ rejected Charging Party's contentions that Respondent violated its duty to bargain in good faith by insisting on adding language to the contract that would allow Respondent to unilaterally remove work and positions from the bargaining unit. The ALJ also found that the record did not support Charging Party's assertions that Respondent engaged in surface bargaining, that Respondent discriminated against Charging Party in favor of the Michigan Association of Public Employees (MAPE) and its representatives, or that Respondent unlawfully interfered with Charging Party's selection of its representative. However, the ALJ concluded that the Employer's bad faith bargaining was a cause of employee dissatisfaction that led to the representation petition filed by MAPE and, therefore, recommended that the petition be dismissed.

The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On May 1, 2006, the Employer filed exceptions to the ALJ's Decision and Recommended Order, in which it contends that the ALJ erred by finding that it bargained in bad faith. It also excepts to the ALJ's findings that it coerced and threatened employees in the exercise of their protected rights and that it unlawfully created an impression of surveillance. In addition, the Employer contends that the ALJ erred when she held that its bargaining approach disrupted the bargaining process and led to the filing of MAPE's petition. It alleges that there was no causal relationship between its actions and the filing of the petition.

On June 14, 2006, Local 214 filed cross-exceptions in which it contends that the ALJ erred by limiting the grounds for her finding that the Employer violated its duty to bargain in good faith. Local 214 also alleges that the ALJ erred by failing to find that the Employer discriminated against Local 214 and by not finding that the Employer attempted to interfere with Local 214's selection of a representative. On July 12, 2006, Respondent filed a response to Local 214' cross-exceptions. MAPE did not except to the ALJ's Decision and Recommended Order, and did not respond to the exceptions and cross-exceptions of the Employer and Local 214.

Upon reviewing the record carefully and thoroughly, we agree with certain findings and conclusions of the ALJ and, for the reasons stated below, we disagree with others.

Factual Summary

Local 214 represents a bargaining unit consisting of Court employees including lead clerks, senior clerks, clerks, and receptionists/telephone operators, but excluding the court administrator. Local 214 and the Employer are parties to a collective bargaining agreement that expired March 30, 2005. They commenced bargaining for a successor agreement on February 10, 2005. At the first bargaining session, the Employer proposed the following contract language, to which Local 214 objected:

> Section 4.3. Nothing contained in this Article, or this Agreement shall preclude court employees, including supervisory employees, who are not members of the bargaining unit, from performing work ordinarily performed by bargaining unit employees.

A second bargaining session was held on March 9, 2005, and a third session was scheduled for March 30, 2005, the expiration date of the contract. On March 28, the Employer sent a letter notifying Local 214 that if the parties failed to reach a tentative agreement on March 30, it would refuse to arbitrate grievances arising after the contract's expiration and would end the dues check-off system. The letter concluded with the following proposal:

> Last, based on recent developments the Court proposes to amend Article XI, Section 11.2-Step 3 of the contract as follows: Delete [the provision for binding arbitration] completely and replace with the following language:
>
> > STEP 3. The Chief Judge shall render his/her decision on the grievance within five working days of the Step 2 conference. The Chief Judge's decision shall be final and binding on the grievant and the parties hereto.

On March 30, Local 214 told the Employer that it might agree to eliminate arbitration and take disputes to court, but that it would never agree to allow the chief judge to be the final step of the grievance procedure. The Employer offered to drop its demand to eliminate arbitration if the parties settled the Borque grievance.[1] Local 214 then inquired as to whether the Employer would agree to continue the arbitration provision if Local 214 agreed to use a different attorney for grievances in the future. The Employer said it would consider the offer, adding that it was not trying to limit Local 214's choice of representative.

During the March 30 meeting, Local 214 gave the Employer a comprehensive written offer which included a proposal for the Employer to recognize it as the bargaining representative for a new supervisory position, a new wage proposal, and a proposal to continue the existing health care benefits. The Employer, expressing a belief that the parties were close to an agreement and that the only real issues involved the proposals regarding supervisors doing unit work and the arbitration clause, said that it would not eliminate the dues check-off after the contract expired.

The parties selected May 18 for their next negotiating session. Before that date, the Employer received approval from the Township supervisor to accept Local 214's wage and health care proposals, but did not notify Local 214 of the approval. Prior to the May 18 meeting, the parties continued their efforts to settle the Borque grievance, which was the subject of several telephone discussions.

At the May 18 meeting, the Employer made a proposal to settle the Borque grievance. When the parties failed to reach agreement on the grievance, the Employer accused Borque of holding up resolution of the contract and also of giving misinformation to members of the unit, stating that something would be done about it, or that the Employer knew how to handle the matter. After a heated exchange, the Employer said that since the grievance was not resolved, there would be no further negotiations "that day." On May 20, 2005, the Employer held a

[1] On October 22, 2004, the Employer suspended Wendy Borque, Local 214's steward, for four weeks and demoted her from lead clerk to senior clerk. The Union filed a grievance on her behalf and the grievance was advanced to arbitration.

meeting with bargaining unit employees to correct what it believed were misrepresentations about its bargaining position and the parties' May 18 meeting.

On May 21, 2005, Local 214 filed the unfair labor practice charge against the Employer in Case No. C05 E-113 alleging, *inter alia*, that the Employer violated Section 10(1)(e) by refusing to continue contract negotiations until Local 214 agreed to settle a pending grievance. The charge also alleged that the Employer violated Section 10(1)(a) of PERA by threatening to discipline Local 214's steward, Wendy Borque, because she had given inaccurate information about negotiations to members of Local 214's unit.

On June 9, MAPE filed its representation petition. The Employer refused to attend the mediation session scheduled with Local 214 after that date. Local 214 requested that the pending charge block the processing of the representation petition. This request was granted and the unfair labor practice charge and petition were consolidated for hearing. On September 23, 2005, Local 214 filed a second charge, which was consolidated with the pending cases. Local 214's second charge, Case No. C05 I-233, alleges that the Employer violated Sections 10(1)(a), (c) and (e) of PERA by: (1) failing or refusing to bargain in good faith over a successor collective bargaining agreement and over resolution of the grievance filed on Borque's behalf; (2) engaging in surface bargaining; (3) effectively failing and/or refusing to recognize Local 214 as the exclusive bargaining representative by "seeking to eliminate it from having any meaningful role to play" concerning this unit; (4) discriminating and retaliating against Borque because she exercised rights guaranteed by Section 9 of PERA; (5) attempting to interfere with Local 214's right to select its representatives for collective bargaining purposes; (6) engaging in conduct and making statements that had a reasonable tendency to and did interfere with, coerce, and restrain employees in the exercise of their Section 9 rights; and (6) favoring MAPE and employees represented by MAPE.

Discussion and Conclusions of Law

We accept the findings of the ALJ that the Employer did not refuse to meet with the Union after May 18 because of the parties' failure to settle the Borque grievance. The Employer's position was that there would be no further negotiations "that day," not that it would not meet again. The parties agreed to meet but set a date after June 9. MAPE filed its petition for a representation election on June 9.

When a valid representation petition is filed, an employer must maintain strict neutrality and must stop bargaining with an incumbent union until the representation dispute is resolved. This rule is based on *Midwest Piping and Supply Co, Inc*, 63 NLRB 1060 (1945). Although the NLRB abandoned this rule in *RCA Del Caribe*, 262 NLRB 963 (1982), we rejected the *RCA Del Caribe* rationale in *Paw Paw Pub Schs*, 1992 MERC Lab Op 375, and stated our intention to continue to apply the standard set forth in *Midwest Piping*.

The charge in Case No. C05 I-233 alleges that the Employer violated Section 10(1)(e) by insisting on adding language allowing the Employer to unilaterally remove both work and positions from the bargaining unit. We agree with the ALJ that the evidence does not support this charge. As the ALJ pointed out, although the Employer did not withdraw the proposal, it never insisted on the Union's acceptance of the language as proposed.

Local 214 argues that the Employer interfered with its right to select its representative for purposes of collective bargaining by insisting that the Union not use its attorney in any future arbitrations. However, the Employer did not insist that Local 214 replace its representative. Because it was Local 214's proposal to use a different representative in future arbitrations, we find that the Employer did not interfere with the Union's right to select its representatives.

Local 214 also argues that the Employer unlawfully insisted on a proposal to eliminate arbitration and preclude the Union from filing suit to enforce the contract by making the chief judge's decisions on grievances final and binding. Although we agree with the ALJ that the Employer did not insist on this proposal in order to "eliminate [the Union] from having any meaningful role to play with respect to this unit," we disagree with the ALJ's finding that the Employer used the proposal as a "cloak to unlawfully insist to impasse on the settlement of the Borque grievance." The ALJ found that the Employer effectively conditioned agreement to the contract on Local 214's acceptance of its proposal on arbitration and its proposal to permit a supervisor to do unit work, when the Employer suggested that those proposals were the only two "real issues." We disagree. Although the settlement of a grievance is merely a permissive subject of bargaining, the parties may voluntarily discuss the issue. Local 214 voluntarily participated in such discussions, and the Employer's willingness to drop its arbitration proposal in return for settlement of the Borque grievance did not constitute a demand to settle the grievance as a condition of reaching a contract.

In Case No. C05 E-113, Local 214 claims that the Employer violated its duty to bargain in April 2005 by reassigning work performed by a unit position, lead clerk, to a nonunit position without the parties having reached impasse on this issue. No exception has been taken to the ALJ's finding that the Employer had no duty to bargain over its decision because the transfer did not have a significant adverse impact on unit employees. We, therefore, adopt the ALJ's finding in this regard.

Local 214 alleges that in the May 18, 2005 meeting, the Employer unlawfully threatened to discipline Borque because she engaged in activity protected by PERA, i.e., making statements to unit employees regarding what had occurred in negotiating sessions. It also argues that the Employer's accusation, that Borque was giving misinformation to members of the bargaining unit, unlawfully created the impression that the Employer had Borque's union activities under surveillance. We disagree with the ALJ's conclusion that a statement to the effect that the Employer would "deal with" or "handle" Borque's miscommunications constituted a threat. Where an employer believes that its interests have been harmed by misinformation, it may respond lawfully. When it proposes to respond, we will not presume that the employer intends to do so unlawfully.

The ALJ found that, in the absence of any explanation from the Employer as to how it knew that Borque was providing misinformation to the unit, Borque reasonably could have assumed that the Employer was closely monitoring her communications with employees. We find that the record does not support the ALJ's conclusion. Again, we will not presume unlawful activity from circumstances that are equally consistent with lawful activity. There has been no showing that when Borque communicated with other members of the bargaining unit, she did so with an expectation of confidentiality.

Local 214 also alleges that the Employer unlawfully interfered with Borque's rights under Section 9 by meeting with unit employees on May 20, 2005. The Employer held the meeting to correct what it believed were misrepresentations about its bargaining position and the parties' May 18 meeting. An employer may factually report to employees on the progress of bargaining, as long as its proposals have been previously discussed with the bargaining agent. See *AFSCME Council 25*, 1995 MERC Lab Op 193, 195; *Huron Sch Dist*, 1990 MERC Lab Op 628, 634. We agree with the ALJ that the evidence fails to establish that the Employer singled Borque out, specifically accused her of misrepresenting its position, or made unlawful threats.

Based upon the above, the unfair labor practice charges are dismissed and the representation petition in Case No. R05 F-088 should be processed in accordance with our usual procedures. We, therefore, issue the following Order:

ORDER

The unfair labor practice charges in Case Nos. C05 E-113 and C05 I-233 are dismissed in their entireties. In Case No. R05 F-088, we find that a question concerning representation exists within the meaning of Section 12 of PERA. Accordingly, we direct an election in the following unit:

> All employees in the following classifications: Lead clerk, senior clerk, clerk, receptionist/telephone operator, but excluding: judges, court administrator, supervisors and all others.

Pursuant to the attached Direction of Election, the employees named in the above unit shall vote as to whether they wish to be represented by the Michigan Association of Public Employees, by Teamsters Local 214, or by neither organization.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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EMPLOYMENT RELATIONS COMMISSION
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SEVENTEENTH DISTRICT COURT (REDFORD TWP),
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TEAMSTERS LOCAL 214,
Labor Organization-Charging Party in Case Nos. C05 E-113 and C05 I-233,
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MICHIGAN ASSOCIATION OF PUBLIC EMPLOYEES,
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APPEARANCES:

Kienbaum, Opperwall, Hardy and Pelton, PLC, by Thomas G. Kienbaum, Esq., and William B. Forrest III, Esq., for the Respondent-Employer

Rudell and O'Neill, P.C., by Wayne A. Rudell, Esq., for Teamsters Local 214

Pierce, Duke, Farrell, Mengel and Tafelski, PLC, by M. Catherine Farrell, Esq., for Michigan Association of Public Employees

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case was heard at Detroit, Michigan on September 21 and October 28, 2005, by Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission, pursuant to Sections 10, 12, 13 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, 423.212, 423.213 and 423.16. Based upon the entire record, including post-hearing briefs filed by the parties on or before December 12, 2005, I make the following findings of fact, conclusions of law, and recommended order.

I. The Petition and Charges:

On June 9, 2005, the Michigan Association of Public Employees (MAPE) filed a petition for a representation election seeking to represent a bargaining unit consisting of employees of the 17th District Court (the Employer), including lead clerks, senior clerks, clerks, and receptionists/telephone operators, but excluding the court administrator. This unit is currently represented by Teamsters Local 214 (Local 214 or the Union). Local 214 contends that the petition should be dismissed because MAPE " is not the real entity that would be the bargaining representative." Alternatively, it asserts that MAPE should be disqualified from representing these employees because its executive director is the spouse of the Employer's court administrator.

The last collective bargaining agreement between Local 214 and the Employer expired on March 31, 2005, and they began negotiations for a successor agreement in February 2005. On May 21, 2005, Local 214 filed the unfair labor practice charge against the Employer in Case No. C05 E-113. This charge alleged that on or about the beginning of April 2005, the Employer violated its duty to bargain under Section 10(1)(e) of PERA by eliminating a unit position, lead clerk, creating a new position outside the bargaining unit, and assigning the work of the lead clerk to the new position at a time when the parties had not reached impasse on these issues. It also alleged that on and after May 18, 2005, the Employer violated Section 10(1)(e) by refusing to continue contract negotiations until Local 214 agreed to settle a pending grievance. The charge alleged, in addition, that on May 18, 2005, the Employer violated Section 10(1)(a) of PERA by threatening to discipline Local 214's steward, Wendy Borque, because she had communicated statements made by Employer representatives in negotiating sessions to members of Local 214's unit.

On June 28, 2005, Local 214 requested that the charge in Case No. C05 E-113 block the processing of the representation petition. Bureau of Employment Relations Director Ruthanne Okun granted this request on July 21, 2005, and the unfair labor practice charge and petition were consolidated for hearing.

On September 23, 2005, Local 214 filed a second charge, Case No. C05 I-233. As the Union contended that this charge should also serve to block the processing of the representation petition, I consolidated this charge with the pending cases. In Case No. C05 I-233, Local 214 alleged that the Employer violated Sections 10(1)(a) (c) and (e) of PERA by: (1) failing or refusing to bargain in good faith over a successor collective bargaining agreement and over the resolution of the grievance filed by Local 214 on Borque's behalf; (2) engaging in surface bargaining; (3) effectively failing and/or refusing to recognize Local 214 as the exclusive bargaining representative by "seeking to eliminate it from having any meaningful role to play" concerning this unit; (4) discriminating and retaliating against Borque because she exercised rights guaranteed by Section 9 of PERA; (5) attempting to interfere with Local 214's right to select its representatives for collective bargaining purposes; (6) engaging in conduct and making statements that had a reasonable tendency to and did interfere with, coerce and restrain employees in the exercise of their Section 9 rights; and (6) favoring MAPE and employees represented by MAPE.

II. MAPE's Alleged Conflict of Interest:

A. Facts:

Fred Timpner is the executive director of MAPE. MAPE is controlled by an executive board that includes a president, vice-president, treasurer and secretary. Timpner reports to the board and, under the board's direction, oversees the operations of the organization. He is also the executive director of and performs similar functions for the Michigan Association of Police (MAP) and the Michigan Association of Firefighters (MAFF), organizations affiliated with MAPE. Fred Timpner has contracts with MAPE, MAFF, and MAP to provide negotiation, grievance handling and other representational services for these three entities through his company, PT & Associates. PT & Associates employs business representatives, including Timpner himself, who provide services under these contracts. MAPE currently represents a unit of probation officers employed by the Employer. Ronald Palmquist, an employee of PT & Associates, was the chief negotiator in the 2005 contract negotiations between MAPE and the Employer. Fred Timpner himself has never represented MAPE in its dealings with the Employer for its unit of probation officers, but the business representatives who do so are under his control.

Judith Timpner is Fred Timpner's spouse. Judith Timpner has been the Employer's court administrator since June 1997. She reports directly to the chief judge and is the immediate supervisor of all other employees of the Employer. Judith Timpner is responsible for initiating and implementing all discipline of employees in Local 214's bargaining unit and represents the Employer at the first step of the grievance procedure in the contract between the Employer and the Union. She has the authority to settle grievances subject to the approval of the chief judge. Judith Timpner participates in contract negotiations for both Local 214's unit and MAPE's unit, and she signs both contracts along with the chief judge. Letters of understanding between the Employer and its union are negotiated and signed by both Timpner and one of the Employer's two judges.

B. Discussion and Conclusions of Law:

Local 214 asserts that MAPE is not "the real entity that would be the bargaining representative" because the business representatives who service MAPE's units are not its employees. There is no merit to this argument. Both the business representatives and Fred Timpner act as MAPE's agents when they negotiate contracts or provide other representational services.

The Union also argues that MAPE should be disqualified from representing the Employer's employees because of the relationship between Fred and Judith Timpner. The Commission has repeatedly rejected claims that labor organizations should be disqualified from representing certain groups of employees because their representation of other employees creates a conflict of interest. See *Kalamazoo Pub Schs*, 1989 MERC Lab Op 813 and cases discussed therein at 817. As the Commission noted in *Kalamazoo*, employees are generally the best judges of whether a particular labor organization can adequately represent their interests. Local 214 cites a number of National Labor Relations Board (NLRB or Board) decisions in support of its claim that the Timpners' relationship creates a conflict of interest that disqualifies MAPE from

representing these employees. The cases cited fall into two categories. In the first, the unions or their agents had financial interests adverse to the employer's. See, e.g., *Bausch & Lomb Optical Co,* 108 NLRB 1555 (1954); *Garrison Nursing Home,* 293 NLRB 122 (1989). Cf. *Quality Inn Waikiki,* 272 NLRB 1 (1984); *NLRB v David Buttrick Co,* 399 F2d 505 (CA 1, 1968). Cases in the second category involve individuals "wearing two hats," i.e., exercising decision-making authority for both the union and the employer. See, e.g., *Child Day Care Center,* 252 NLRB 1177 (1980); *Teamsters Local 668 Insurance and Welfare Fund,* 298 NLRB 1085 (1990).

The instant case falls into neither of these two categories. Neither Fred Timpner nor MAPE has any financial relationship with the Employer. Moreover, the Timpners are not one person. MAPE's certification would not require either of them to serve both the interests of the Employer and the interests of MAPE simultaneously. The Union is presumably correct when it asserts that both Timpners have an interest in the other's professional success. I conclude, however, that the employees would be the best judges of whether this interest would affect MAPE's representation of their interests. I conclude that MAPE's petition should not be dismissed based on Timpner's alleged conflict of interest.

III. The Unfair Labor Practice Allegations:

A. Facts:

1. Background – Borque's Discipline and Grievance

Local 214's unit includes two lead clerk positions. Prior to October 22, 2004, Wendy Borque, Local 214's steward, held the position of lead clerk in the civil division. On October 22, the Employer suspended Borque with pay for two weeks and without pay for another two weeks and demoted her from lead clerk to senior clerk. Among the offenses cited in Borque's discipline was her alleged failure to perform certain duties the Employer considered essential for a lead clerk. After October 2004, Borque's lead clerk position was posted and filled with another unit employee. The Union filed a grievance on her behalf and the grievance was advanced to arbitration. The arbitration hearing began on March 18, 2005. Thomas Kienbaum, the Employer's attorney, represented the Employer's case, while Local 214's attorney, Wayne Rudell, represented the Union. According to the Employer, the hearing was difficult due to Rudell's behavior, although the Employer did not provide any specific examples. In the fall of 2005, there had been two days of hearing in the arbitration and a third day had been scheduled.

2. Early Contract Negotiations

Before their contract negotiations began in February 2005, the Employer sent Local 214 a letter stating that it would not agree to extend its contract beyond its March 30 expiration date. The Employer's bargaining team consisted of its chief spokesman, Kienbaum, chief judge Karen Khalil, and court administrator Judith Timpner. Les Barrett, business agent and recording secretary for Local 214, headed the Union's bargaining team. The Union team also included steward Wendy Borque and alternate steward Pat Leach.

At the first bargaining session between Local 214 and the Employer on February 10, both parties presented lists of proposed changes to the expiring contract. The Employer's list included

the elimination of the lead clerk position. The Employer also proposed to add the following language to Article IV of the contract:

> Section 4.3. Nothing contained in this Article, or this Agreement shall preclude court employees, including supervisory employees, who are not members of the bargaining unit, from performing work ordinarily performed by bargaining unit employees.

The Employer explained that it was proposing to replace the two lead clerks with a supervisor outside the unit who had the authority to hire, fire and discipline the clerks. It stated that it needed to abolish the lead clerk positions and demote the lead clerks to senior clerk in order to fund the supervisory position, and that it wanted the supervisor also to do the regular day-to-day work of a clerk. Local 214 said that it could not stop the Employer from creating supervisory positions, but that it objected to taking work out of the unit and giving it to nonunit positions. At either this meeting or the March 9 meeting, the parties agreed that if they reached accord on the elimination of the positions, the former lead clerks' wage rate would remain the same until the senior clerks' rate caught up to their rate. There is no indication that the parties discussed the specific language of the proposed new Section 4.3.

The second bargaining session was held on March 9. Tom Sesko, human resources representative for the Employer's funding unit, Redford Township (the Township), attended this meeting. The Employer and the Township have an agreement that the Township must approve all the economic items in the Employer's union contracts. The Employer's employees have traditionally received the same health care benefits as the Township's own employees. At the March 9 meeting, Sesko announced that the Township had a proposal on the table in negotiations with its general employees unit to eliminate traditional and HMO options from its health care plan. Sesko stated that the Township was considering offering only preferred provider (PPO) coverage. He also explained that the plan the Township was considering increasing the premiums most employees paid and their co-pays for office visits and prescriptions. Neither the Employer nor the Union had proposed on February 10 to change employees' existing health care benefits. However, they understood that if the Township decided to change health care coverage for its employees, it might refuse to approve the existing benefits for Local 214's unit.

3. <u>The Employer's March 28, 2005 Letter</u>

The parties scheduled their third negotiating session for March 30, 2005, the expiration date of the contract. On March 28, Kienbaum sent Barrett a letter notifying him that if the parties failed to reach a tentative agreement on March 30, the Employer would refuse to arbitrate grievances arising after the expiration of the contract and would end dues checkoff. In addition, Kienbaum told Barrett that the Employer would simply demote the lead clerks to senior clerk if the parties did not reach a new contract within a reasonable time. Kienbaum's letter concluded with the following:

> Last, based on recent developments the Court proposes to amend Article XI, Section 11/2-Step 3 of the contract as follows: Delete [the provision for binding arbitration] completely and replace with the following language:

> Step 3. The Chief Judge shall render his/her decision on the grievance within five working days of the Step 2 conference. The Chief Judge's decision shall be final and binding on the grievant and the parties hereto.
>
> I am prepared to explain the reason for this proposal further when we meet. The Court would always prefer to make final decisions with respect to matters otherwise arbitrable, but in the past has agreed to binding arbitration based on the assumption that this would involve a reasonable alternative. The Court's experience demonstrates that it is not. It is the Court's conclusion that it cannot, in the future, subject its personnel to the type of process the Court was recently exposed to.

4. The March 30 Meeting

When the parties met on March 30, Barrett told the Employer that Local 214 might agree to eliminate arbitration from the contract if it was allowed to take contract disputes to court, but that it would never agree to allow the chief judge to be the final step of the grievance procedure. The Employer said that Barrett's proposal was not acceptable. It stated, however, that the parties might be able to reach a resolution of this issue if the Borque grievance was resolved. In a sidebar involving Kienbaum and Barrett, Kienbaum said that because of Rudell's behavior in the March 18 arbitration hearing on Borque's grievance, the Employer had decided that it never wanted to have such a proceeding again. He told Barrett that the Employer had, therefore, concluded that it did not want to continue to have arbitration as part of the contract. Barrett stated again that Local 214 would never agree to allow the chief judge to make the final decision on grievances. According to Barrett's testimony, which I credit, Kienbaum then said that the Employer would drop its demand to eliminate arbitration if the parties settled the Borque grievance. Barrett asked if the Employer would agree to continue the arbitration provision if Local 214 agreed to use a different attorney on grievances in the future, and Kienbaum said he would discuss it with his client. Kienbaum told Barrett that he was not trying to limit Local 214's choice of representative, but that he "was simply responding to a situation with a demand that [he] felt was called for from that situation."

The parties also discussed the replacement of the lead clerk position with a supervisor. Local 214 proposed that the Employer recognize it as the collective bargaining representative for a unit consisting of the new supervisory position or positions. According to Barrett, he said that if the Employer agreed to recognize Local 214 as the supervisors' bargaining agent, the parties "could then explore freeing up work for [the supervisors] to perform." The Employer stated that it did not believe Local 214 should represent both the clerks and their supervisor.

Sometime during the March 30 meeting, Local 214 gave the Employer a comprehensive written offer on the contract. The offer included its proposal for the Employer to recognize it as the bargaining representative for the new supervisory position. It also included a new wage proposal, and a proposal to continue the existing health care benefits. Local 214 told the Employer that the Township had just agreed to a contract with the union representing its police officers that did not change their health benefits. It also said that the percentage wage increases it

was proposing were the same as those the Township had agreed to for its police officers. Kienbaum said that the Employer would have to get the approval of the Township before it could agree to the Union's wage or health care proposals. Timpner left the meeting to call the Township, but the Township supervisor was on vacation. Kienbaum and Timpner then told Local 214 that they felt that the parties were very close to reaching an agreement and that the only real issues from the Employer's perspective were supervisors doing unit work and whether there would continue to be an arbitration clause. They also said that since the parties seemed to be making progress, the Employer was not going to eliminate dues checkoff after the contract expired and that it would not immediately demote the lead clerks. At the end of the meeting, the parties selected May 18 as the date of their next negotiating session.

5. Events In April 2005

On April 6, the Employer gave Terry Painter, the chief judge's court reporter/assistant, temporary supervisory authority over employees in Local 214's bargaining unit. Painter continued to perform her duties as court reporter/assistant, but took over the responsibilities of the lead clerks for making job assignments, overseeing the clerks' work, approving leave requests, and training. The two lead clerks continued to have some oversight responsibilities, but both were assigned new duties that required them to spend most of their time in a courtroom away from the other clerks.

Around this same time, the Employer received approval from the Township supervisor to accept Local 214's wage and health care proposals. The Employer did not immediately convey this information to the Union. According to Timpner, she planned to do so at their next bargaining session.

6. The May 18 Meeting

Between March 30 and May 18, Barrett and Timpner had several telephone conversations about settling the Borque grievance, and Barrett and Kienbaum exchanged proposals by voicemail. Before the May 18 bargaining session, Kienbaum prepared a written settlement proposal. Kienbaum testified that he believed that he and Barrett had already informally agreed to these terms.

At the beginning of the May 18 meeting, Kienbaum handed Local 214's bargaining team the proposal to settle Borque's grievance. Borque asked what her grievance had to do with the negotiations. Kienbaum said that the Employer wanted to resolve the grievance and that it wanted to handle that first. Barrett did not object. Judge Khalil left the meeting to take the bench. Barrett and Borque caucused to discuss the Employer's offer and made a counterproposal. The Employer responded with another proposal, and Barrett and Borque caucused again. The parties' positions were very close. However, when Barrett and Borque returned from their caucus, Barrett told Kienbaum that the offer wasn't acceptable. According to Kienbaum, he was dumbfounded. He and Timpner said that the Employer couldn't move any further. Kienbaum told Borque, in an angry tone, that she was being unreasonable or selfish and was holding up resolution of the contract. He turned to Barrett and said that the second day of the arbitration hearing would have to be adjourned because he had to be in court on that date. By this time,

Barrett was also angry. Barrett replied that just because Kienbaum said something, that didn't mean it was going to happen.

After the above exchange, according to Barrett and Borque, Kienbaum said that Borque had been giving misinformation to the other members of the unit. Borque testified that Kienbaum said that "something was going to be done about it," while Barrett recalled that he said that the Employer "knew how to handle those kinds of matters and would take care of it itself." Kienbaum testified that he said that the Employer had a concern about "miscommunications to the employees." [2] Kienbaum testified that he said, "We are going to have to deal with that." Barrett asked Kienbaum what he meant, but Kienbaum did not elaborate. Borque, who was visibly upset, told Barrett that they should accept the Employer's proposal to settle the grievance. Barrett said that he would not. He told Kienbaum that they were equals at the table and that he was not going to tolerate Kienbaum's yelling. Kienbaum said that since the grievance wasn't resolved, there was nothing further to talk about and there would be no further negotiations "that day."[3] Barrett replied that this was not an appropriate response. He said that there were issues that needed to be discussed that did not have anything to do with the grievance. Barrett then said that he planned to file an unfair labor practice charge over the assignment of unit work to Painter and over the Employer's refusal to negotiate. He also suggested that the parties try to get a mediator at their next bargaining session. Kienbaum told him that he could do anything he wanted. Both parties then left the meeting.

Although Timpner had come to the May 18 meeting prepared to tell Local 214 that the Township had approved their economic proposals, she decided not to do so at that meeting but to wait until the mediation session. After May 18, Barrett called the mediator assigned by the Commission and asked him for his open dates. Barrett then called Timpner, who agreed to check these dates with members of the Employer's bargaining team. The parties eventually agreed on a mediation date. Mediation did not take place, however, because MAPE filed its representation petition before the scheduled date.

7. <u>The May 20 Employee Meeting</u>

On or about May 20, Khalil called a meeting of all the employees in Local 214's bargaining unit. Timpner was also present. Khalil told employees that she had called the meeting to clear up some misinformation about the status of negotiations. She told employees there were not that many issues left at the table, and that employees should not be worried about their health care.[4] Khalil told employees that she felt there were only two issues to be resolved, the

[2] Kienbaum admitted that he was referring to misinformation Borque had allegedly given to unit employees about the Employer's position on the health care plan changes. He testified that Judge Khalil had asked him to address this issue with the Union.

[3] Barrett testified three times during his testimony that Kienbaum specifically used the phrase "that day."

[4] Khalil testified that before this meeting, employees had come to her upset and even crying about the prospect of having their health benefits reduced. She testified that she thought that this was "ridiculous" since the Township had agreed to continue the existing health plans. Khalil knew by May 20 that the Township had given the Employer approval to continue the existing plans. Khalil could not recall, however, whether she specifically said this to employees on May 20. As noted above, Khalil was not present for most of the May 18 meeting. It was unclear whether Khalil knew that Timpner and Kienbaum had not yet told Local 214 that the Township had agreed to continue the existing health care benefits for employees in its unit.

arbitration clause and the creation of the supervisory position. Khalil also said that the Employer had not refused to negotiate at the May 18 meeting. Local Alternate Steward Pat Leach told employees that this was not true, that the May 18 meeting was supposed to be a negotiating session, but that the parties had only talked about the Borque grievance. Khalil replied that the parties were continuing to try to settle the grievance. Leach also said something to the effect that no further negotiations were going to be held. An employee asked Khalil when the next bargaining session would be, and Khalil told them to ask the Union. Borque told employees that Khalil's statement that there were no other issues remaining was not correct. She said that Local 214 had made wage and health care proposals at the March 30 meeting that matched what the Township had agreed to for its police officers, but that the Employer had not yet agreed to these proposals. Borque also mentioned a union proposal related to buying time for pension purposes. Khalil said that if there had been ongoing discussions about the buying of time, she would have known about it. Employees asked about the status of Local 214's health care proposal. According to Leach, Timpner said that the Employer still had to check with the Township to get approval. Timpner could not recall whether she said this, but testified that she did not want to tell employees that the Township had approved Local 214's wage and health care proposals before the Employer met with Local 214 in mediation.

8. Elimination of Dues Checkoff and the Filing of the Representation Petition

On June 1, Judge Khalil sent the Township a letter requesting that dues checkoff for Local 214 be terminated immediately. On June 9, Khalil sent members of Local 214's unit a letter assuring them that that, despite alleged statements by Borque to the contrary, they would not be terminated if they chose not to pay dues. On June 9, MAPE filed its representation petition. The Employer told Local 214 that it would not be lawful for it to continue to negotiate since MAPE had filed a representation petition, and it refused to attend the mediation session scheduled with Local 214 after that date.

9. Contract Negotiations Between the Employer and MAPE

MAPE represents a bargaining unit consisting of three probation officers employed by the Employer. The collective bargaining agreement for this unit, like Local 214's contract, expired on March 31, 2005. MAPE and the Employer began negotiations for a successor collective bargaining agreement in February 2005. The Employer proposed to add to MAPE's contract the same language concerning the performance of bargaining unit work that it proposed as an addition to Article IV of Local 214's contract. The Employer accepted MAPE's counterproposal to add the words "in an emergency situation" to the end of the unit work language, and this provision became part of their final agreement. Like Local 214, MAPE also proposed to continue the employees' existing health care benefits and was informed that the Township was considering changing the plans. The Employer did not propose to create a new position with supervisory authority over the probation officers and did not propose to eliminate arbitration from the MAPE agreement.

On May 9, 2005, the Employer and MAPE met for a scheduled bargaining session. At this meeting, the Employer told MAPE for the first time that the Township had agreed to continue the existing health care plans. The Employer and MAPE reached a tentative contract

agreement at this meeting that was later ratified by the probation officers. The agreement included continuation of the employees' existing health care benefits and a wage package identical to that proposed by Local 214 on March 30.

B. Discussion and Conclusions of Law on the Unfair Labor Practice Allegations:

Section 10(1)(e) Allegations

1. Alleged Refusal to Meet

Local 214 asserts that the Employer unlawfully refused to meet with it after May 18, even though the parties were not at impasse. I find that the Employer did not refuse to meet with the Union between May 18 and June 9. On May 18, after the parties' failed attempts to settle the Borque grievance, Barrett suggested that they return to discussing the open contract issues. By that time, both Kienbaum and Barrett were angry. Kienbaum told Barrett that there would be no further negotiations "that day." He did not say that the Employer would not meet again, even after Barrett suggested that they get a mediator for their next meeting. When Barrett contacted Timpner after the May 18 meeting to arrange a session with a mediator, Timpner provided him with dates. However, the parties could not arrange a meeting until after June 9.

Local 214 also asserts that the Employer violated its duty to bargain by refusing to engage in contract negotiations after MAPE filed its petition on June 9. The Commission has consistently held that when a valid representation petition is filed, an employer has an obligation to maintain strict neutrality and must stop bargaining with an incumbent union until the representation dispute is resolved. This rule was originally based on the National Labor Relations Board's decision in *Midwest Piping and Supply Co, Inc,* 63 NLRB 1060 (1945). In *RCA Del Caribe,* 262 NLRB 963 (1982), the NLRB abandoned *Midwest Piping* and held that the mere filing of a representation petition did not require an employer to refrain from bargaining or even executing a contract with an incumbent union. However, in *Paw Paw Pub Schs,* 1992 MERC Lab Op 375, the Commission rejected the rationale of *RCA Del Caribe* and stated its intention to continue to follow the *Midwest Piping* rule. Since the Commission's holding in *Paw Paw* is binding on me, I will not address Local 214's arguments against the rule.

2. Proposal to Allow the Employer to Unilaterally Remove Work from the Unit

The charge in Case No. C05 I-233 alleges that the employer sought to "eliminate [the Union] from having any meaningful role to play" concerning this unit. Local 214 asserts that the Employer violated Section 10(1)(e) by insisting on adding language to Article IV of the contract allowing the Employer to unilaterally remove both work and positions from the bargaining unit.[5] According to the Union, the language the Employer proposed would allow the Employer to unilaterally eliminate the bargaining unit by assigning all of its work to employees, including nonsupervisors, outside the unit. It maintains that by this proposal, the Employer was effectively proposing that Local 214 give up its right to represent the unit and waive the rights of unit members to continued representation.

[5] As indicated in the facts, the proposal stated that the contract "shall not preclude court employees . . . who are not members of the bargaining unit from performing work ordinarily performed by bargaining unit employees."

I see no evidence that the Employer insisted on, or even intended to propose, such a broad waiver. At the parties' first bargaining session on February 10, 2005, the Employer proposed to add the new language to Article IV and also to eliminate the lead clerk position. The Employer explained that it wanted to replace the lead clerk with a working supervisor. The parties bargained over the creation of the working supervisor position, but, insofar as the record discloses, never discussed the implications of the proposed new contract language. In any case, the Union did not specifically object to the wording of the proposal or tell the Employer that it believed that it did more than allow a supervisor to do bargaining unit work. I find that although the Employer never withdrew it proposal to add the new language to the contract, it never insisted on the Union's acceptance of the language as proposed.

3. Interfering with the Union's Choice of Representative/ Proposal to Eliminate the Arbitration Clause/Bargaining in Bad Faith over Settlement of the Borque Grievance

Local 214 argues that the Employer interfered with its right to select its representative for purposes of collective bargaining by insisting that the Union not use its attorney, Wayne Rudell, in any future arbitrations. In the absence of special circumstances, an employer violates its duty to bargain by insisting that the union use or not use a particular individual for purposes related to collective bargaining. *Benton Twp*, 1966 MERC Lab Op 466 (no exceptions); *City of Detroit*, 1990 MERC Lab Op 454 (no exceptions); *Oates Bros*, 135 NLRB 1295, 1297 (1962); *Proctor and Gamble Mfg. Co*, 237 NLRB 747, 751 (1978). In order to justify its refusal to meet and bargain with a particular individual, an employer must present persuasive evidence that the presence of that individual would result in "a clear and present danger to the collective bargaining process," or that the presence of the objected to party would create ill will and make bargaining impossible. *KDEN Broadcasting Co*, 225 NLRB 25, 35 (1976); *King Soopers, Inc*, 338 NLRB 269 (2002); *People Care Inc*, 327 NLRB 814, 824 (1999). However, I conclude that the Employer did not insist that Local 214 replace Rudell as its representative. On March 30, 2005, Kienbaum told Barrett that because of Rudell's behavior in Borque's arbitration hearing, the Employer had decided that it never wanted to have such a proceeding again. He told Barrett that the Employer had, therefore, concluded that it did not want to have arbitration as part of the contract. However, it was Barrett, not Kienbaum, who proposed that Local 214 use a different representative in future arbitrations. Although Kienbaum said he would discuss this proposal with his client, he denied any intent to interfere with the Union's right to select its own representatives. Moreover, Barrett's proposal did not cause the Employer to change its position on the arbitration clause. I conclude that the Employer did not unlawfully interfere with the Union's right to select its representatives for purposes of collective bargaining.

Local 214 also argues that the Employer unlawfully insisted on an arbitration proposal that not only eliminated binding arbitration, but precluded the Union from filing suit to enforce the terms of the contract by making the chief judge's decision on grievance issues final and binding on both parties. It maintains that the proposal was evidence of the Employer's bad faith because unit employees would be better of with no contract than with a contract containing the proposed provision.

It is well established that binding arbitration is a mandatory subject of bargaining under PERA. See *Gibraltar School Dist v Gibraltar MESPA-Transportation* 443 Mich. 326, 337 (1993); *Pontiac Police Officers Ass'n v Pontiac (After Remand)*, 397 Mich 674 (1976). There is a line of cases arising under the National Labor Relations Act (NLRA), 29 USC 151 et seq.

holding that an employer acts in bad faith when, during negotiations, it simultaneously insists on a broad management-rights clause, a no-strike provision, and no effective grievance and arbitration procedure. *Target Rock Corp,* 324 NLRB 373, 386, (1997); *San Isabel Electric Services*, 225 NLRB 1073, 1079 fn. 7 (1976). The theory of this violation is that these three proposals, when made together, are evidence of the employer's bad faith since accepting them would leave the employees and their representative with less than they would enjoy by simply relying on the union's certification, without a contract. *In re Public Service Co of Oklahoma (PSO),* 334 NLRB 487, 489 (2002); *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), *aff'd* 987 F2d 1376 (CA 8, 1993); *NLRB v A-1 King Size Sandwiches,* 732 F2d 872, 874 (CA 11, 1984). Whether or not the Employer's arbitration proposal eliminated all means for the Union to enforce the terms of the contract, it did not propose that the Union waive its right to bargain over all changes in terms and conditions of employment. I find that the Employer did not insist on its arbitration proposal in order to "eliminate [the Union] from having any meaningful role to play with respect to this unit."

I conclude, however, that the Employer used its arbitration proposal as a cloak to unlawfully insist to impasse on the settlement of the Borque grievance. I find that when the Employer stated on March 30 that its arbitration proposal and the supervisor doing unit work were the only two "real issues," it was effectively conditioning its agreement to a contract on the Union's acceptance of these two proposals. As noted above, arbitration is a mandatory subject of bargaining and an employer can lawfully insist to impasse on the elimination of an arbitration clause. However, settlement of a grievance is a permissive subject of bargaining; i.e., a party may raise this issue in contract negotiations, but may not insist on a settlement as a condition of agreement on other mandatory bargaining subjects. *Good GMC, Inc*, 267 NLRB 583, 588 (1983). See also *Detroit Fire Fighters, Local 344 v Detroit,* 126 Mich App 543 (1981). In this case, the Employer summarily rejected Barrett's March 30 counterproposal to eliminate arbitration but allow the Union to enforce the terms of the contract in court. At the same time, it repeatedly indicated its willingness to drop its arbitration proposal entirely if the Union agreed to settle the Borque grievance. I conclude that the Employer's action indicates that it was, in fact, insisting that the Union settle the grievance as a condition of reaching agreement on a contract.

Because the settlement of a grievance is a permissive subject of bargaining in contract negotiations, the parties may voluntarily discuss the issue. As the Employer points out in its brief, Barrett voluntarily participated in discussions to settle the Borque grievance. Barrett had several conversations with Kienbaum and Timpner about settling the grievance after the first day of the grievance hearing, but they did not discuss the grievance in any of their contract negotiation sessions. Although the May 18 meeting was to be a bargaining session, it turned into a settlement discussion. I do not see any evidence that Barrett ever agreed to make settlement of the grievance an issue in the parties' contract negotiations. I conclude that it was the Employer that brought the grievance into the negotiations under the cloak of its arbitration proposal, and that it was the Employer that unlawfully insisted that the grievance be settled as a condition of agreement on the contract.

4. Surface Bargaining and Favoring the Bargaining Unit Represented by MAPE

As discussed in the section above, I have concluded that the Employer unlawfully insisted to impasse on a nonmandatory subject of bargaining, the settlement of the Borque

grievance. However, I do not find evidence indicating that the Employer engaged in surface bargaining. In support of this claim, the Union cites the Employer's alleged insistence on the language amendment to Article IV and its arbitration proposal, the Employer's failure to give the Union a response to its March 30 comprehensive contract proposal, and the Employer's failure to inform the Union that the Township had approved its wage and health care proposals. I have discussed the Employer's two proposals above. As for the Employer's failure to give the Union a counteroffer after March 30, the Employer stated at the end of the March 30 meeting that the "only real issues" were supervisors doing unit work and the arbitration clause. I find that the Employer's failure to make a counterproposal was not evidence of surface bargaining. Rather, the Employer was waiting to settle the Borque grievance and for movement from the Union on the issue of supervisors doing unit work before it made any further proposals. Finally, Timpner testified that she was waiting for a bargaining session after the Employer learned that the Township had approved its economic proposals to inform MAPE of this fact. I see no reason not to credit her testimony on this point.

The Union also argues that while both MAPE and Local 214 were engaged in bargaining new contracts for their respective units over the same period, the Employer unlawfully gave MAPE more favorable treatment at the bargaining table. Assuming that, if true, this would violate Section 10(1)(e) of PERA, I find no evidence that the Employer deliberately favored MAPE. Contrary to Local 214's claim, the Employer presented MAPE with the same proposal regarding bargaining unit work that it gave Local 214. Otherwise, the issues in the two negotiations were different. I also find no unlawful favoritism in the Employer's decision to cease dues checkoff for Local 214's unit. There is no dispute that an Employer is not obligated to continue to check off dues for a union after its contract expires. Both MAPE's contract and Local 214's expired on March 30, 2005. While the Employer never stopped checking off dues and fees for MAPE, it did not do so for Local 214 until June 2005. By that time, MAPE and the Employer had entered into a new agreement.

5. Unilateral Transfer of Unit Work

In Case No. C05 E-113, Local 214 alleged that the Employer violated its duty to bargain in April 2005 by reassigning work performed by a unit position, lead clerk, to a nonunit position without the parties' having reached impasse on this issue.

A public employer has the right under PERA to reassign some of the work performed by a bargaining unit position to a nonunit position pursuant to a legitimate reorganization. *Ishpeming Supervisory Employees, Local 128, AFSCME v City of Ishpeming*, 155 Mich App 501 (1986); *United Teachers of Flint v Flint School Dist*, 158 Mich App 138 (1986). The Commission has held that an employer has a duty to bargain over the nondiscriminatory transfer of some of the work performed by a unit position or positions only when certain conditions are met. The transferred work must have been performed exclusively by members of the bargaining unit, the transfer must have a significant adverse impact on unit employees, and the transfer dispute must be amenable to resolution through the collective bargaining process. In order for there to be a significant adverse impact, the record must show that unit employees were laid off, demoted, not recalled or lost a significant amount of overtime, i.e. that they suffered some financial detriment as a result of the employer's action. The mere loss of unit positions or

promotional opportunities within the unit does not constitute a significant adverse impact. To be amenable to resolution through the collective bargaining process, the decision to transfer work must be based at least in part on labor costs or general enterprise costs which could be affected by the bargaining process. *City of Detroit (Dep't of Water & Sewerage),* 1990 MERC Lab Op 34, 40-41.

In April 2005, the Employer gave Painter supervisory authority over the clerks. It also transferred to Painter some of the duties lead clerks within the bargaining unit had performed. The transferred duties were "lead" responsibilities, such as assigning and overseeing the clerks' work, approving leave requests, and training. Contrary to Local 214's claim, the record indicates that Painter did not take over the other duties of a clerk, but continued to perform her duties as Judge Khalil's court reporter/assistant. The Employer considered Painter's appointment a temporary measure until it could secure the Union's agreement on the creation of a working supervisory position. The lead clerks were not demoted and their pay was not reduced as a result of the transfer of their work to Painter, and the Employer continued to express its willingness to bargain over the creation of a permanent supervisory position that would assume all the duties of the lead clerks and the impact of this action on employees in the unit. I conclude that since the transfer did not have a significant adverse impact on unit employees, the Employer had no duty to bargain over its decision to transfer unit work to Painter in April 2005.

Section 10(1)(a) Allegations

6. Alleged Unlawful Coercion at the May 18 Meeting

Local 214 alleges that in the May 18, 2005 meeting, Kienbaum unlawfully threatened to discipline Borque because she engaged in activity protected by PERA, i.e., making statements to unit employees regarding what had occurred in negotiating sessions. It also argues that Kienbaum's statement that Borque was giving misinformation to members of the bargaining unit unlawfully created the impression that the Employer was keeping Borque's union activities under surveillance.

The record shows that Kienbaum became angry after the Union rejected the Employer's offer to settle the grievance on May 18. Apparently blaming Borque for this decision, Kienbaum angrily accused her of being self-centered or selfish and holding up resolution of the contract. Barrett and Kienbaum exchanged angry words. Barrett and Borque testified that Kienbaum then accused Borque of giving misinformation to the other members of the unit. Although Kienbaum testified that he said that the Employer had "a concern about miscommunications to the employees," he did not deny that he directed this comment at Borque or that he meant it as an accusation. Borque, Barrett and Kienbaum all testified that Kienbaum stated that the Employer would take some action, without specifying what this would be.[6] Although Barrett asked Kienbaum to explain, Kienbaum did not do so.

[6] Borque testified that Kienbaum said that "something was going to be done about it." According to Barrett, Kienbaum said that the Employer, "knew how to handle those kinds of matters and would take care of it itself." Kienbaum testified that he said, "We are going to have to deal with that."

The Employer denies that a threat was made. It argues that there was no illegal coercion in Kienbaum's statement that Borque was being unreasonable or selfish by not agreeing to settle the grievance or in his statement that she was upsetting the workforce by spreading misinformation about the status of the negotiations. According to the Employer, Kienbaum did not coerce Borque in the exercise of her PERA rights when he told her that the Employer was going to deal with the misinformation by telling employees the truth. Whatever Kienbaum may have intended, according to the testimony he made a vaguely worded statement that the Employer would "deal with," "handle," or "do something" about Borque's unspecified miscommunications. When Kienbaum said this, he was clearly angry with Borque for the parties' failure to settle her grievance, and he refused to explain either what she was supposed to have said or what the Employer intended to do. I conclude that, in context, Kienbaum's vague statement that the Employer would "deal with" Borque's miscommunications constituted an implied threat to discipline Borque for exercising her Section 9 right to speak to other unit employees about the negotiations.

As the Union correctly notes, in determining whether an employer has created an impression of surveillance, the test is whether the employee would reasonably assume from the statement in question that his or her union activities had been placed under surveillance. *Univ of Michigan*, 1985 MERC Lab Op 332, 335(no exceptions); *Bessemer Sch Dist*, 1980 MERC Lab Op 1046, 1055-56 (no exceptions); *United Charter Service*, 306 NLRB 150 (1992). The employer's words need not indicate that the employer acquired its knowledge of the employee's activities by unlawful means. *Mountaineer Steel, Inc*. 326 NLRB 787 (1998) (supervisor's statement to a union adherent after the supervisor accidentally heard a conversation about the union, "I thought you was a union radical and now I know you are," created an impression of surveillance.) Cf. *In re SKD Jonesville Div LP*, 340 NLRB 101, 107-108 (2003) (a supervisor's statement to a known union adherent that he "had heard" that the employee was trying to organize a union did not imply that the supervisor was eavesdropping on or closely monitoring the employee's union activities.) I agree with the Union that in the absence of any explanation from Kienbaum as to how the Employer knew that Borque was giving misinformation to the unit, Borque could have reasonably assumed from Kienbaum's statements at the May 18 meeting that the Employer was closely monitoring her communications with employees. I also conclude, therefore, that the Employer unlawfully created an impression of surveillance at the May 18 meeting.

7. Alleged Unlawful Coercion at the May 20 Meeting

Local 214 also alleges that the Employer unlawfully interfered with Borque's rights under Section 9 by calling a meeting of unit employees on May 20, 2005 to accuse her of deliberately misrepresenting the Employer's bargaining position. The record indicates that the Employer held the May 20 meeting to correct what it felt were misrepresentations made about its bargaining position and what had taken place at the parties' May 18 meeting. An employer has the right to factually report to employees on the progress of bargaining, as long as its proposals have been previously discussed with the bargaining agent. See *Bloomfield Twp,* 2001 MERC Lab Op 187, 193, and cases cited therein. Contrary to the Union's claim, there is no evidence that the Employer singled Borque out at the May 20 meeting or specifically accused her of misrepresenting its position. Rather, after Khalil described what she believed the remaining

issues to be, Borque spoke up and corrected her. Leach also took issue with some of what Khalil had said. I find no evidence of unlawful threats or coercion at the May 20 meeting.

C. Remedy

Local 214 asserts that the representation petition should be dismissed because the Employer's unfair labor practices have had a coercive effect on employees and that a free and fair election cannot be conducted until these unfair labor practices have been remedied.

In determining whether to dismiss a representation petition because of an employer's unfair labor practices, the National Labor Relations Board (NLRB) looks at whether there is a causal connection between the employer's unlawful act and the incumbent union's subsequent loss of majority support or employee dissatisfaction. When there has been a general refusal to recognize and bargain with the incumbent union, a causal relationship is presumed. *Overnite Trans Co,* 333 NLRB 1392 (2001). However, when the case involves other types of unfair labor practices, the NLRB looks at a several factors to determine whether a causal relationship exists. These factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition or filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp,* 271 NLRB 78 (1984).

I have found that the Employer unlawfully coerced Borque on May 18, 2005 by threatening her with discipline and creating the impression that it was surveilling her union activities. I have also found that the Employer, under the cloak of an arbitration proposal, unlawfully insisted on the settlement of the Borque grievance as a condition of reaching a contract with the Union. Both the unlawful coercion and the unlawful refusal to bargain took place shortly before MAPE filed its petition. However, the threats were directed solely at Borque. Aside from Borque's fellow bargaining team member Pat Leach, there was no evidence that other unit members either witnessed or heard about them. I conclude that there was no causal relationship between the isolated coercive conduct and the employee dissatisfaction with the Union leading to the filing of the MAPE petition. However, the Employer's unlawful insistence on a nonmandatory subject of bargaining disrupted the bargaining process and prevented the Union from reaching either a contract or a good faith impasse with the Employer. I conclude that the Employer's bad faith bargaining was a cause of the employee dissatisfaction that lead to MAPE's petition. I will, therefore, recommend to the Commission that the representation petition in Case No. R05 F-088 be dismissed.

RECOMMENDED ORDER

The Respondent Employer 17th Judicial Circuit Court, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 9 of the Act by threatening to discipline employees for engaging in activity protected by the Act and creating the

impression that it is monitoring or keeping their protected activities under surveillance.

2. Cease and desist from violating its duty to bargain in good faith with Teamsters Local 214 by insisting on a nonmandatory subject of bargaining, the settlement of a grievance, as a condition of reaching a contract with that labor organization.

3. On demand, meet and bargain in good faith with Teamsters Local 214 over the terms of a contract to replace the agreement that expired on March 30, 2005.

4. Post the attached notice to employees in conspicuous places on the Employer's premises, including all places where notices to employees are customarily posted, for a period of thirty consecutive days.

The petition in Case No. R05 F-088 is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____