STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OAK PARK PUBLIC SAFETY OFFICERS ASSOCIATION,
Labor Organization - Respondent,

Case No. CU03 A-005

-and-

CITY OF OAK PARK,
Public Employer - Charging Party.
_____/

APPEARANCES:

Keller Thoma P.C., by Dennis B. DuBay, Esq., for Charging Party

Frank A. Guido, Esq., General Counsel, Police Officers Association of Michigan, for Respondent

DECISION AND ORDER

On May 17, 2005, Administrative Law Judge (ALJ) David Peltz issued his Decision and Recommended Order in the above matter finding that Respondent, Oak Park Public Safety Officers Association (Union) breached its duty to bargain in good faith when it submitted non-mandatory subjects of bargaining to Act 312 arbitration. The ALJ found that Respondent had violated Section 10(3)(c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(3)(c), and recommended that Respondent be ordered to cease and desist from insisting to the point of impasse on, or submitting to arbitration under Act 312, proposals which constitute permissive subjects of bargaining. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. After requesting and receiving an extension of time to file exceptions, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions on July 6, 2005. Charging Party was granted an extension until August 18, 2005 to file a response to the exceptions; it filed its response and a brief in support of the ALJ's Decision and Recommended Order on August 22, 2005.

In its exceptions, Respondent contends that the ALJ erred in finding that it violated PERA by presenting issues of minimum staffing and layoff and recall in the proposals it presented to the Act 312 arbitration panel. Respondent asserts that the ALJ applied an incorrect legal standard in finding that issues of staffing must be "inextricably intertwined with safety" to constitute mandatory subjects of bargaining. For the reasons discussed below, we agree with the ALJ's conclusion that Respondent's proposals concerned non-

mandatory subjects of bargaining and its attempts to pursue such proposals in Act 312 arbitration violated Section 10(3)(c) of PERA.

Facts:

The Oak Park Public Safety Officers Association represents sworn public safety officers (PSOs) employed by the City of Oak Park (City). Command officers and civilian dispatchers are in separate bargaining units. Prior to the expiration of the parties' collective bargaining agreement covering the period from July 1, 1997 to June 30, 2001, the City notified the Union that the City would no longer recognize or negotiate the following contract provisions related to manning:

> Article VIII Hours of Work, Section 8.1:
>
> C. There will be 4 platoons of 10 employees working 12 hour shifts from 7am to 7pm and 7pm to 7am. In addition, there will be an 8 hour shift of 5 employees with the hours of work to be determined by the City but posted for employee selection with the annual sign up. Upon mutual agreement between the parties, the hours of work for the 8 hour shifts may be modified on a temporary basis. The 12 hour shift must be completely staffed before any employees may work an 8 hour shift.
>
> D. There will be a minimum of 7 Officers working per shift unless an Officer is assigned to dispatch duties then there will be a minimum of 8 Officers assigned to operations.
>
> Article XXX Two Person Patrol Cars, Section 30.1:
>
> There shall be at least one two-person car on duty during the night shift. Said car shall contain two sworn uniformed officers, PSO I or PSO II's. Any additional two person cars shall be at the discretion of management. A back-up car shall be dispatched whenever circumstances require that a one person patrol car be dispatched to a crime in progress. Members of the department, including stand-by personnel, may be assigned to the patrol function at the discretion of the director, except for permanently promoted detectives unless in cases of national emergencies or civil unrest.
>
> Article XXXVII Minimum Manpower, Section 37.1:
>
> The Department shall maintain no less than 45 sworn bargaining unit members assigned to [the] operations division. Said numbers do not include civilian dispatchers. The City will fill all budgeted positions as soon as possible, without delay.

On February 13, 2002, the Union petitioned for compulsory arbitration under MCL 423.231 et seq. (Act 312). Its last settlement offer proposed to raise minimum shift strength to eight officers per shift. On January 28, 2003, the City filed the instant charge

alleging that the Union violated Section 10(3)(c) of PERA by bargaining to impasse on non-mandatory subjects of bargaining and submitting them to the Act 312 arbitration panel. The City continued to assert before the Act 312 panel that Article VIII, Sections 8.1 (C) and (D), Article XXX, Section 30.1 and Article XXXVII, Section 37.1 of the expired contract should not be included in a new agreement. In addition, the City took the position that Article XXXIII, Layoffs, Sections 33.4 and 33.5 of the parties' contract should be eliminated as well. Those sections provided:

> 33.4 No layoffs of Public Safety Officers shall occur until all non-Public Safety Officers or civilians who perform police and fire duties are laid off first. Said duties are to be defined as work presently or previously performed by Public Safety Officers.
>
> 33.5 Public Safety Officers who have been laid off shall be rehired before non-Public Safety Officers or civilians who perform police and fire duties.

On March 21, 2003, the City amended its charge to add a claim that the Union violated PERA by bargaining to impasse on Sections 33.4 and 33.5 of the expired agreement, and by submitting them to the Act 312 arbitration panel.

On August 20, 2003, the Union filed an amended petition under Act 312 in which it agreed to the exclusion of: Article VIII, Section 8.1 (C) and (D), Article XXX, Section 30.1, and Article XXXVII, Section 37.1, the four contract provisions that were the subject of the City's initial unfair labor practice charge. The Union also withdrew its proposal to increase the shift staffing levels to eight officers per shift. In place of these provisions, the Union proposed the following language:

> To the extent the City of Oak Park continues to operate a public safety department, providing joint fire and police protection, the City shall maintain on duty, at all times, assigned to the operations division (excluding non-operations personnel which includes, the detective bureau, administrative officer, fire inspector, community relations/civil defense coordinator and training officer) a safety/staffing level of seven (7) public safety officers, of which a minimum of five (5) public safety officers shall be fire certified, in addition to possessing law enforcement certification. A minimum of five (5) fire certified public safety officers shall be deployed for a structural fire, including one (1) fire certified public safety officer to operate fire apparatus including pumping equipment, and no less than four (4) fire certified public safety officers to suppress the structural fire, of which no less than two (2) fire certified public safety officers shall be required to physically enter the hazardous area of a structural fire, with two (2) fire certified safety officers outside the hazardous area available for assistance, rescue and operation of additional fire equipment and apparatus. When a fire incident arises, a minimum of two (2) public safety officers shall be deployed as primary and back-up to perform law enforcement responsibilities.

> The Employer shall maintain the safety/staffing level of seven (7) public safety officers on duty in operations at all times by hold-over or call-in of necessary personnel. In the event of such hold-over or call-in, the affected employees shall be paid at the overtime rate. The procedure for hold-over or call-in, as well as payment of overtime, shall be in accordance with provisions of the collective bargaining agreement.

On September 10, 2003, the first day of hearing in this matter, the City again amended its unfair labor practice charge by adding an allegation that the Union had unlawfully demanded to bargain over the following non-mandatory topics:

> A. A proposal which seeks to require minimum daily staffing in the Operations Division of seven Public Safety Officers.
>
> B. A proposal which seeks to require a minimum number of personnel to respond to any structure fire, whether or not they are needed at the scene.
>
> C. A proposal which seeks to restrict and/or prohibit the utilization of other on-duty and off-duty bargaining unit personnel, other on-duty and off-duty members of the Public Safety Department and staff members of the communities in applicable mutual aid pacts from performing police and fire functions on behalf of the City of Oak Park.

Discussion and Conclusions of Law:

Relying on *Jackson Fire Fighters Ass'n*, 1996 MERC Lab Op 125, aff'd *Jackson Fire Fighters Ass'n, Local 1306 v City of Jackson*, 227 Mich App 520; 575 NW2d 823 (1998), the ALJ found that the Union violated Section 10(3)(c) of PERA by submitting to the Act 312 panel its proposals to assign a minimum of seven PSOs per shift and to deploy a minimum of five PSOs to a structural fire. The ALJ found that the evidence did not establish that the minimum staffing proposal was "inextricably intertwined" with employee safety and, thus, was a permissive subject of bargaining not appropriately submitted to an Act 312 panel. Citing *Local 1227 AFSCME v Center Line*, 414 Mich 642; 327 NW2d 822 (1982), the ALJ also held that the Union violated PERA by insisting to impasse and submitting to arbitration its proposal to prohibit the City from laying off bargaining unit members until all nonmembers performing police or fire fighting work are laid off. Although the Union ultimately withdrew from the Act 312 panel's consideration its proposals to maintain two-person patrol cars during the night shift and a minimum operations division staff of 45 bargaining unit members, the ALJ concluded that the submissions violated PERA notwithstanding their subsequent withdrawal.

The Union has taken exception to the ALJ's conclusions regarding its proposals for a minimum number of officers per shift, a minimum number of officers to be deployed to a structural fire and the protection of bargaining unit members from layoff. The Union takes no exception to the ALJ's conclusion regarding the proposals that it withdrew from the Act 312 panel's consideration. For the reasons that follow, we adopt the ALJ's recommendations.

In *Jackson Fire Fighters Ass'n,* the Commission held that a union's proposal to retain a contract provision mandating a minimum complement of fifteen fire fighters on each twenty-four hour shift was a permissive subject not properly submitted to Act 312 arbitration because a reduction in minimum daily shift would not have a significant impact on fire fighter safety. The Court of Appeals affirmed MERC's decision, finding it to be based on "sufficient evidence," following the precedent established in *Sault Ste Marie v Fraternal Order of Police,* 163 Mich App 350, 356; 414 NW2d 168 (1987) and *Local 1227 AFSCME v Center Line*, 414 Mich 642; 327 NW2d 822 (1982), that a claim that a manpower proposal affects safety must be supported by "some evidence." The Court declined to address the distinction between "related to safety" and "inextricably intertwined with safety" because it found that the Commission's decision was correct under either standard. *Jackson Fire Fighters Ass'n, Local 1306 v City of Jackson*, 227 Mich App 520, 526-27; 575 NW2d 823 (1998).

The Union asserts that "related to" safety is a sufficient test or standard to apply to determine whether a manning proposal constitutes a mandatory subject of bargaining. While we agree that "inextricably intertwined" may be an awkward standard to apply, we find an equivalent standard to be that utilized by the Commission in *Jackson*, that is, there must be a *significant* impact on fire fighter safety. While we agree that the previous case law, reviewed at length by the ALJ, is not totally consistent, what can be gleaned from prior decisions is that a manning proposal is a mandatory subject of bargaining when there is competent evidence of the proposal's demonstrable and significant relationship to the safety of employees. That is, there must be competent evidence that a manning proposal has an impact upon the risk of injury or harm to a member or members of the bargaining unit.

The Union's latest proposal has two elements: a minimum daily shift of 7 PSOs, and a minimum staffing level to be deployed to a fire, including how many PSOs will be deployed and how they will be utilized. We find that whether the first part of this proposal is a mandatory subject of bargaining has been answered by *Jackson*, where the Court of Appeals analyzed a similar proposal as follows:

> It is important to note that [the union proposal] governs the number of fire fighters on duty per shift, *not* the number actually assembled at a fire scene. The number at the scene determines what action may safely be undertaken to combat a blaze and may include not only on-duty personnel but also off-duty fire fighters called in, volunteers, and those responding pursuant to mutual assistance pacts with other fire departments. Consequently, the evidence in this case fails to demonstrate a causal nexus between the city's proposed reduction in daily staffing and fire fighter safety, and the union's contention that reducing the number of fire fighters on duty would adversely affect safety is without merit. Even if a reduction in the daily staff would delay response to a fire, *that affects the level of fire protection offered the citizens of Jackson and does not raise a safety issue with respect to the fire fighters.* [Emphasis added]

We agree that it is the number of fire fighters or personnel at the fire scene, not the number per shift, that impacts safety. The fire crews assembled at the scene may include fire fighters from several sources, including fire fighters on duty, fire fighters called back, and fire fighters furnished by mutual aid from other departments. To mandate bargaining as to the number of officers per shift would be to mandate bargaining as to the total size of the work force, a determination clearly reserved to management. Consequently, we adopt the ALJ's recommendation as to this issue.

The second element of the Union's proposal refers to the number of PSOs sent to the fire scene and how they will be utilized in operating fire equipment and performing fire suppression tasks. The Union has proposed that the City's current practice of sending five fire fighters to the scene of a structure fire be preserved, with the proviso that they be fire certified PSOs. The ALJ found that the Union's proposal is almost identical to the City's current practice. The record reflects that this is consistent with the City's practice and complies with safety standards promulgated by MIOSHA. The utilization of personnel at the fire scene has an impact upon the risk of injury or harm to members of the bargaining unit, and we find this type of manning proposal would ordinarily constitute a mandatory subject of bargaining. However, in this case, because the Union's proposal additionally seeks to limit the personnel at the scene to PSOs, we reach a different conclusion.

A union has a legitimate interest in whether and when the work of its members may be assigned outside of the bargaining unit, and employers generally have a duty to bargain the diversion of work to nonunit employees and the subcontracting of work to others. *Plymouth Fire Fighters Ass'n, Local 1811 v Plymouth*, 156 Mich App 220; 401 NW2d 281 (1986); *Lansing Fire Fighters Union, Local 421 v Lansing*, 133 Mich App 56; 349 NW 2d 253 (1984). However, when the work at issue historically has been performed by members of more than one bargaining unit, assignment of that work to other bargaining units whose members already perform that work is not a mandatory subject of bargaining. *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168; 445 NW2d 98 (1989); *City of Detroit Water and Sewerage*, 1990 MERC Lab Op 34. Here, the work sought to be preserved has been performed by members of the Union's bargaining unit, by members of a command officers bargaining unit, and by personnel furnished through mutual aid from other communities with whose employees the City has no collective bargaining relationship. Because the work sought to be preserved has also historically been performed by City employees belonging to another bargaining unit, we hold that the Union violated PERA by submitting its proposal to compulsory arbitration under Act 312.

Exception has been taken to the ALJ's conclusion that the City has no duty to bargain the Union's proposal that a minimum of two PSOs be deployed as primary and backup to perform law enforcement responsibilities when a fire incident arises. It is not disputed that backup is a safety measure, but the ALJ considered the availability of mutual aid to be sufficient. We agree that backup protection in law enforcement is a matter directly impacting safety. We also find that the Union's proposal seeks to protect the work of the unit. However, we adopt the recommendation of the ALJ as to this issue for the reason that the Union's proposal, as submitted, would mandate the level of service that the City provides. Whether to provide manpower to perform law enforcement responsibilities when a fire incident arises is a permissive subject of bargaining.

The ALJ also concluded that the Union violated PERA by submitting to the Act 312 panel a proposal to prohibit bargaining unit members from being laid off until all nonmembers performing police work are laid off. The ALJ relied upon *Local 1227 AFSCME v Center Line*, where the Court held that a contract provision allowing police officers to be laid off "only in conjunction with layoffs and cutbacks in other departments" involved a non-mandatory subject of bargaining because the number of employees in other departments was unrelated to safety. Here, the Union's proposal affects only those City employees who perform public safety duties. However, the proposal would require that "all non-Public Safety Officers or civilians who perform police and fire duties" be laid off first and defines police and fire duties as "work presently or previously performed by Public Safety Officers." The proposal directly impacts employees in other bargaining units, including command officers and civilian dispatchers. As such, the proposal involves a non-mandatory subject of bargaining and the Union violated PERA by submitting the proposal to the Act 312 arbitration panel.

Because it is unnecessary for us to do so in order to reach the conclusions governing our decision in this matter, we decline to rule on the admissibility of the National Fire Association materials offered in evidence by the Union. Since the Union has not taken exception to the ALJ's finding regarding its two-man car proposal and its proposal to maintain a minimum staff of forty-five sworn bargaining unit members assigned to the Public Safety Department's operations division, we adopt the ALJ's Decision and Recommended Order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.[1]

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

Dated: _____

[1] Commissioner Eugene Lumberg did not participate in this case.

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF OAK PARK,
Charging Party-Public Employer,

Case No. CU03 A-005

-and-

OAK PARK PUBLIC SAFETY OFFICERS ASSOCIATION,
Respondent-Labor Organization.
_____/

APPEARANCES:

Keller Thoma P.C., by Dennis B. DuBay, Esq., for Charging Party

Frank A. Guido, Esq., General Counsel, Police Officers Association of Michigan, for Respondent

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 10, September 11, September 16, September 30, and October 30, 2003, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. The proceeding was based upon an unfair labor practice charge filed by the City of Oak Park on January 28, 2003, and amended on March 21, 2003 and September 10, 2003. The charge alleges that the Oak Park Public Safety Officers Association violated Section 10(1)(3) of PERA by demanding bargaining over, and taking to impasse, various permissive subjects of bargaining. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before January 14, 2004, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge and Procedural Background:

The Oak Park Public Safety Officers Association (Respondent or the Union) represents a bargaining unit consisting of all sworn public safety officers (PSO's) employed by the City of Oak Park (Charging Party or the City), excluding all command officers and the Director of Public Safety. Command officers and civilian dispatchers are in separate bargaining units. The most recent contract between the Union and the City covered the period from July 1, 1997 to June 30, 2001. Prior to the expiration of that agreement, in a letter dated April 24, 2001, then assistant city manager James D. Hock notified the Union president, Officer Kevin Loftis, that effective July 1, 2002, the City would no longer recognize the following provisions of the contract: Article VIII, Section 8.1(C) and (D); Article XXX, Section 30.1; and Article XXXVII, Section 37.1. Hock indicated that such provisions covered non-mandatory subjects of bargaining, and he advised the

Union that the City would not negotiate the issues set forth in those provisions as part of any subsequent labor agreement. Hock also notified the Union that any memorandum of understanding, grievance decision or settlement relating to those issues would not be honored following the expiration of the agreement.

One of the contract provisions identified by Hock in the April 24, 2001, letter, Section 8.1, governs the hours of work of bargaining unit members. That provision states, in pertinent part:

> C. There will be 4 platoons of 10 employees working 12 hour shifts from 7am to 7pm and 7pm to 7am. In addition, there will be an 8 hour shift of 5 employees with the hours of work to be determined by the City but posted for employee selection with the annual sign up. Upon mutual agreement between the parties, the hours of work for the 8 hour shift may be modified on a temporary basis. The 12 hour shift must be completely staffed before any employees may work an 8 hour shift.
>
> D. There will be a minimum of 7 Officers working per shift unless an Officer is assigned to dispatch duties then there will be a minimum of 8 Officers assigned to operations.

Article XXX, Section 30.1, of the contract, which is entitled "Two Person Patrol Cars" provides:

> There shall be at least one two-person car on duty during the night shift. Said car shall contain two sworn uniformed officers, PSO I or PSO II's. Any additional two person cars shall be at the discretion of management. A back-up car shall be dispatched whenever circumstances require that a one person patrol car be dispatched to a crime in progress. Members of the department, including stand-by personnel, may be assigned to the patrol function at the discretion of the director, except for permanently promoted detectives unless in cases of national emergencies or civil unrest.

The final provision identified in Hock's April 24, 2001, letter sets forth minimum manpower requirements for the City's public safety department. That provision, Article XXXVII, Section 37.1, states as follows:

> The Department shall maintain no less than 45 sworn bargaining unit members assigned to [the] operations division. Said numbers do not include civilian dispatchers. The City will fill all budgeted positions as soon as possible without delay.

The parties engaged in collective bargaining and mediation but failed to reach agreement on a successor contract. The final mediation session was on January 22, 2002. On that date, Hock wrote to the Union and reiterated the City's position that Sections 8.1, 30.1 and 37.1 of the expired contract involved non-mandatory subjects of bargaining. In a letter to Hock dated January 30, 2002, the Union took the position that Sections 8.1 and 37.1 of the contract covered mandatory subjects of bargaining, and that such language must remain in full force and effect until a new agreement is negotiated. The Union further indicated that it would file an unfair labor practice charge if the City altered those sections of the contract.

On February 13, 2002, the Union filed a petition for compulsory arbitration under MCL 423.231 et seq. (Act 312), MERC Case No. D01 D-0557. Attached to the Act 312 petition was the Union's last settlement offer, dated September 19, 2001. Paragraph 9 of the settlement offer stated, "Minimum Manning: Raise minimum shift strength to 8 Officers working per shift." In its answer to the petition, dated March 4, 2002, the City objected to paragraph 9, arguing that minimum manning is a permissive subject of bargaining and, therefore, an issue over which the Act 312 arbitration panel lacks jurisdiction to decide.

On August 29, 2002, the Commission appointed Edward Rosenbaum as impartial arbitrator and chairperson of the Act 312 panel. Chairperson Rosenbaum conducted a prehearing conference on December 13, 2002, at which time the Union demanded that the Act 312 panel make a determination as to whether the aforementioned contractual provisions concerned mandatory or permissive subjects of bargaining. Rosenbaum directed the parties to file briefs with respect to the minimum manning issues.

On January 28, 2003, the City filed the instant charge with the Commission, alleging that the Union violated Section 10(3)(c) of PERA by demanding bargaining over, and taking to impasse, certain permissive subjects of bargaining, namely Sections 8.1(C) and (D), 30.1 and 37.1 of the expired agreement, and by submitting such issues to the Act 312 arbitration panel for inclusion in a new contract. In its February 24, 2003, answer to the charge, the Union conceded to having made a demand to bargain involving minimum manning, but argued that such matters "are in their entirety mandatory subjects as they are issues related to and/or inextricably intertwined with safety."

The first hearing before the Act 312 panel was scheduled for September 16, 2003. The parties submitted their respective briefs on the minimum manning issue to Chairperson Rosenbaum on or before February 25, 2003. In a letter to the parties dated March 6, 2003, Rosenbaum indicated that he would postpone a decision on the matter until the fall in the hope that the unfair labor practice proceeding would be resolved in the meantime.

On March 17, 2003, the parties exchanged lists of proposed "comparable communities" and position statements. Once again, the Union listed minimum manning as an issue to be decided by the Act 312 panel and proposed an increase in staffing levels to eight officers per shift. In its position statement, the Employer continued to assert that Sections 8.1(D) and (C), 30.1 and 37.1 of the expired contract should not be included in the new agreement. In addition, the Employer took the position that Sections 33.4 and 33.5 of the parties' contract should be eliminated as well. Those provisions, which were first negotiated in 1984, provide:

> 33.4 No layoffs of Public Safety Officers shall occur until all non-Public Safety Offices or civilians who perform police and fire duties are laid off first. Said duties are to be defined as work presently or previously performed by Public Safety Officers.
>
> 33.5 Public Safety Officers who have been laid off shall be rehired before non-Public Safety Officers or civilians who perform police and fire duties.

On March 21, 2003, the City amended its unfair labor practice charge to include an allegation that the Union violated Section 10(3)(c) of PERA by demanding bargaining over, and taking to impasse, Sections 33.4 and 33.5 of the expired agreement, and by submitting such issues to the Act 312 arbitration panel for inclusion in a new contract. In its April 21, 2003, answer to the amended charge, the Union asserted that the provisions pertaining to layoffs involve mandatory subjects of bargaining since they "reflect the impact of management's decision to layoff" bargaining unit members.

On August 20, 2003, the Union filed an amended petition for compulsory arbitration under Act 312 and, at the same time, submitted a revised position statement to Chairperson Rosenbaum. The Union agreed to the exclusion of the four contract provisions which were the subject of the City's initial unfair labor practice charge: Section 8.1 (D) and (C); Section 30.1; and Section 37.1. In addition, the Union withdrew its proposal to increase the staffing levels to eight officers per shift. In place of the eliminated provisions, the Union proposed the following contract language:

> To the extent the City of Oak Park continues to operate a public safety department, providing joint fire and police protection, the City shall maintain on duty, at all times, assigned to the operations division (excluding non-operations personnel which includes, the detective bureau, administrative officer, fire inspector, community relations/civil defense coordinator and training officer) a safety/staffing level of seven (7) public safety officers, of which a minimum of five (5) public safety officers shall be fire certified, in addition to possessing law enforcement certification. A minimum of five (5) fire certified public safety officers shall be deployed for a structural fire, including one (1) fire certified public safety officer to operate fire apparatus including pumping equipment, and no less than four (4) fire certified public safety officers to suppress the structural fire, of which no less than two (2) fire certified public safety officers shall be required to physically enter the hazardous area of a structural fire, with two (2) fire certified safety officers outside the hazardous area available for assistance, rescue and operation of additional fire equipment and apparatus. When a fire incident arises, a minimum of two (2) public safety officers shall be deployed as primary and back-up to perform law enforcement responsibilities.
>
> The Employer shall maintain the safety/staffing level of seven (7) public safety officers on duty in operations at all times by hold-over or call-in of necessary personnel. In the event of such hold-over or call-in, the affected employees shall be paid at the overtime rate. The procedure for hold-over or call-in, as well as payment of overtime, shall be in accordance with provisions of the collective bargaining agreement.

On September 10, 2003, the first day of hearing in this matter, the Employer once again amended its unfair labor practice charge to include an allegation that the Union had unlawfully demanded to bargain over the following permissive topics:

> A. A proposal which seeks to require minimum daily staffing in the Operations Division of seven Public Safety Officers.

B. A proposal which seeks to require a minimum number of personnel to respond to any structure fire, whether or not they are needed at the scene.

C. A proposal which seeks to restrict and/or prohibit the utilization of other on-duty and off-duty bargaining unit personnel, other on-duty and off-duty members of the Public Safety Department and staff members of the communities in applicable mutual aid pacts from performing police and fire functions on behalf of the City of Oak Park.

The Union responded to the City's second amended charge on the record at the start of the hearing in this matter, arguing that the Employer had grossly misrepresented its latest proposal. According to the Union, the August 20, 2003, proposal does not seek a fixed staffing number per shift, but rather a minimum staffing level with respect to the performance of police and fire work involving operation of fire equipment and apparatus and the performance of fire suppression tasks. Based upon this distinction, the Union asserted that its amended proposal involved a mandatory, rather than permissive, subject of bargaining.

II. Facts:

A. BACKGROUND

The City of Oak Park consists of approximately 5.5 square miles and has a population of about 30,000 residents. A variety of structures are located within the City, including single and multiple family dwellings, retail and office buildings and light industry, as well as schools, government buildings and medical facilities. No hospitals are located within the City limits. The size and population of the City has increased as a result of the recent annexation of property from adjacent Royal Oak Township, including an office building and a multi-story apartment complex occupied by approximately 500 to 700 residents.

In 1954, the City of Oak Park consolidated its separate police and fire departments into a single public safety department. All sworn personnel employed by the City's public safety department are required to be dually trained and certified as both law enforcement officers and fire fighters. They are also trained and licensed as medical first responders, which is classified as the lowest level of medical response below Emergency Medical Technician (EMT) and Paramedic. None of the officers work in either a dedicated law enforcement or firefighting capacity. Sworn personnel employed by the department of public safety include the director, deputy director, command officers (lieutenants and sergeants) and public safety officers.

The public safety department operates one fire station, which is located near the center of the City. The department maintains four fire suppression vehicles consisting of two "pumper" or "engine" trucks and two 50-foot "Telesquirt" trucks with ladders. The department also maintains eleven police cruisers, seven of which are licensed by the State as medical first responder vehicles and carry equipment such as backboards, oxygen, defibrillators and other medical supplies and a self-contained breathing apparatus (SCBA). Officers assigned to the police cruisers carry with them their personal fire gear, including coat, pants, boots, helmet, and SCBA face piece.

At the time of the hearing in this matter, there were fifty individuals working for the department in the Public Safety Officer (PSO) classification, including forty PSO I's and ten PSO

II's. The PSO I job description, which has been in existence for many years, states that the primary function of the position is "To protect life and property through the enforcement of laws and ordinances and the performance of general fire fighting work; to perform specialized duties under emergency conditions; to perform a variety of housekeeping and maintenance chores; and to perform work as required." Specific firefighting duties set forth in the PSO I job description include responding to fire alarms, laying and connecting hose lines, pumping water, driving fire fighting apparatus, operating and utilizing equipment in controlling and extinguishing fires and conducting fire prevention inspections. Law enforcement duties and responsibilities of the PSO I classification include receiving requests for assistance and handling complaints made by the public, investigating accidents, transporting prisoners, interviewing suspects, prisoners, witnesses and complainants, searching for and preserving evidence, directing traffic and writing tickets.

The PSO II classification, which is set forth in the parties' collective bargaining agreement, is covered by the PSO I job description described above. PSO II's are expected to perform the same duties as PSO I's, plus additional duties specifically associated with their respective assignments. At the time of the hearing, there were ten individuals employed in the classification of PSO II: seven investigators, a fire inspector, an administrative assistant and a community service coordinator. They are compensated at a rate eight percent higher than PSO I's. PSO II's are appointed by the director of the public safety department based upon job performance and supervisor recommendations. A PSO II assignment typically lasts between two and five years, following which time the officer is returned to his or her position as a PSO I. PSO II's are generally scheduled to work Monday through Friday, from 8:00 or 8:30 a.m. to 5:00 p.m. However, the hours of the community service coordinator position are somewhat irregular and often include weekends and nights.

PSO I and II's employed by the City of Oak Park are required to attend a State-approved fire academy and pass a competency examination before they can be utilized to fight a structural fire. At the time of hearing, all PSO's employed by the department of public safety had either obtained the requisite fire fighter certification, were newly-hired and in the process of achieving such certification, or had worked in the capacity of full-time fire fighter prior to 1988 and, therefore, were not subject to the State of Michigan certification requirements. Most of the individuals falling in the latter category attended the University of Michigan fire training program, an 80-hour course in basic fire skills. With respect to law enforcement duties, all PSO's employed by the department are subject to the State certification process pursuant to which officers are required to attend a police academy and pass a competency exam.

Individuals hired by the department of public safety as PSO's are immediately sent to what the parties refer to as "Oak Park University," where they receive three weeks of basic training, including an orientation consisting of a review of department manuals, rules and regulations, and a broad operational overview. Thereafter, the newly hired officers are required to attend field officer training recruit school (FTO), a highly structured 12-14 week orientation program to prepare them to work on the road and fulfill police and basic fire fighting responsibilities. Upon passage of an oral examination administered at the conclusion of the FTO course, officers are assigned by the department to a patrol unit to perform police work and limited fire fighting duties pending completion of their fire academy coursework and fire fighter certification.

In addition to the PSO's, the department employs fifteen command officers in the classifications of Public Safety Lieutenant and Public Safety Sergeant. Command officers, who

are represented for purposes of collective bargaining in a separate unit, are required to possess the same fire fighter and law enforcement certifications as the PSO's. In addition, command officers receive additional training specific to their supervisory duties, including incident command training. At the time of hearing, all lieutenants and sergeants employed by the department, other than newly promoted command officers, had received specialized fire officer training. Lieutenants and sergeants assigned to patrol platoons work the same schedule as the PSO's in the units to which they are assigned, as described more fully below. Command officers who are not assigned to patrol operations typically work Monday through Friday, from 8:00 or 8:30 a.m. to 5:00 p.m.

All sworn officers employed by the department of public safety, including PSO's, lieutenants and sergeants, are trained and licensed by the State as medical first responders, which involves a two-week course typically conducted at a regional training academy. Several members of the department, including a sergeant and four PSO's, have also received training as hazardous materials technicians and have been assigned to the Eastern Oakland County Regional Response Team. Other officers have received training in specialized areas such as high-angle rescue and weapons of mass destruction incident command.

B. ORGANIZATIONAL STRUCTURE

G. Robert Siefert is the Director of Public Safety for the City of Oak Park. Siefert is the chief administrative officer for the Department of Public Safety and is directly responsible for the overall management of the department. Siefert is assisted in that capacity by a deputy director and a civilian administrative secretary. Below the director and deputy director, the Public Safety Department is divided into four patrol platoons, a fire bureau and an investigations bureau.

1. Patrol Platoons

The four patrol platoons, which are designated Platoons A, B, C & D, work as individual units performing police, fire and first response medical services throughout the City on rotating shifts. Each platoon is supervised by a lieutenant, who is directly responsible for all actions associated with the operation of the platoon. When the department is operating at full-strength, there are 10 PSO I's and one sergeant assigned to each patrol. However, at the time of the hearing in this matter, there were nine PSO I's assigned to Platoons A and D, while Platoons B and C were comprised of eight PSO I's per unit. Four newly-hired PSO I's were undergoing training at the time of hearing and had not yet been assigned to a specific platoon. In addition, one PSO I was on military leave, while another officer was off work for medical reasons.

The department operates on a twelve hour schedule with two shifts, one beginning at 7 a.m., the other at 7 p.m. Two platoons are assigned to each shift. At the time of the hearing in this matter, Platoons A and C were assigned to work the day shift and Platoons B and D were scheduled to work nights. When Platoons A and B are working, Platoons C and D are off-duty, and vice versa. Personnel assigned to patrol operations work repeating 14-day cycles consisting of two days on, two days off, three days on, three days off, two days on, and two days off.

2. Fire Bureau

The fire bureau is commanded by Lieutenant Chris Petrides, who serves as the department's fire marshal. Petrides is responsible for fire operations, prevention, education, and

inspection, as well coordinating fire suppression and maintenance of fire apparatus. He also oversees administration of the department's communications and records sections. The classifications under Lieutenant Petrides' supervision include sergeant, fire inspector, community services coordinator/emergency services coordinator, administrative clerk, school crossing guard and civilian dispatchers. The fire inspector, who is a PSO II, is responsible for overseeing fire inspections conducted by the patrol officers and also has duties relating to apparatus maintenance.

Six civilian dispatcher positions were in existence at the time of the hearing; however, two of the dispatcher positions were vacant and one dispatcher was on temporary medical leave. The civilian dispatcher position is represented for purposes of collective bargaining by the Oak Park Dispatchers Association, which is affiliated with the Police Officers Association of Michigan. The civilian dispatchers are responsible for answering all non-emergency and 911 telephone calls which are received by the department and dispatching officers to perform fire, police and emergency medical services. They also maintain radio communications with officers in the field, handle walk-in traffic at the station and manage the flow of paperwork through the department.

The civilian dispatcher position has been in existence since approximately 1998. Prior to that time, dispatching duties were assigned to the PSO classification. Today, PSO's continue to perform dispatching work, filling in for the civilian dispatchers as needed. According to the Union's testimony, PSO's are called upon to perform dispatcher work approximately four to five hours almost every evening. Members of the command officers unit also provide occasional assistance when one or more of the civilian dispatchers is busy or on a break.

3. Investigations Bureau

The investigations bureau is commanded by Lieutenant M. McNeilance, who supervises one sergeant, six detectives, each of whom are classified as PSO II's, a youth officer, a property clerk and an administrative clerk. Personnel assigned to the investigations bureau conduct criminal investigations for the department of public safety, including follow-up investigations. They also screen incident reports and determine which matters may be remanded to the patrol division for further investigation. In addition, the investigations bureau is responsible for administering criminal prosecutions for the City of Oak Park, including preparing cases for trial and managing witnesses. Personnel assigned to the investigations bureau primarily work Monday through Friday, from 8:00 a.m. or 8:30 a.m. to 5:30 p.m.

C. SHIFT LEVELS

It is undisputed that the department of public safety has repeatedly reduced the minimum staffing requirements per shift for on-duty PSO's during the course of the past thirty years. In 1981, the department operated with nine sworn officers on-duty per shift. That number was reduced to eight officers on-duty per shift in April of 1990, with one PSO working as a dispatcher, two officers assigned to standby and five officers on patrol. After the department created the civilian dispatcher position in 1998, the minimum number of sworn public safety officers on-duty per shift was reduced to seven.

On May 7, 2002, the department released a memo stating "Effective immediately supervisors are permitted to allow shift strength to be six officers." Following issuance of the memo, the department has been operating at a minimum staffing level of at least six PSO's on

duty per shift. Typically, four PSO I's are assigned to road patrol, while two officers remain at the station in a standby capacity. However, if there are no prisoners being housed at the station and no housekeeping or maintenance work to be performed, one of the standby officers may also be assigned to road patrol. When less than six PSO I's are available for a particular shift, the department will either hold a PSO I over from another shift or call in an off-duty officer to meet the minimum staffing requirements. There have been isolated instances, however, when the number of officers on duty per shift has briefly fallen below the minimum staffing level of six PSO's. It is also not uncommon for there to be more than six PSO I's working on a given shift.

There is always at least one command officer on duty during each shift. When both a lieutenant and a sergeant are on-duty at the same time, the lieutenant typically remains at the station unless his or her presence is needed at a fire scene or to provide assistance with a law enforcement matter. Under such circumstances, the day-to-day responsibility for supervising the PSO I's in the field lies with the sergeants, who function as assistant platoon leaders and are typically on the road throughout their shifts, unless the lieutenant is off-duty. Sergeants also respond to calls, make traffic stops and, on occasion, serve as backup for the PSO's. In addition, the sergeants are responsible for reviewing reports, performing job evaluations, and issuing discipline.

There are situations in which additional personnel may be needed as the result of a major structure fire, the occurrence of simultaneous incidents or other emergencies. The department has three plans in place should such situations arise, and the determination of whether to call for backup and which plan or plans to implement is made by the incident commander, who is typically the highest ranking command officer at the fire scene. On occasion, a high ranking officer at the station house may also initiate a call for backup. These backup plans consist of the following measures: (1) the use of on-duty officers from other bureaus, as well as other on-duty personnel and command officers; (2) calling up off-duty departmental personnel; and (3) mutual aid agreements with other communities. Each of these plans are discussed individually below.

1. Non-Operational On-Duty Personnel

The first plan calls for the use of other on-duty staff, including command officers and PSO II's from other bureaus within the department, such as the fire inspector or detectives, to provide backup and assistance to the on-duty patrol platoons. As noted, PSO II's and command officers who are not assigned to patrol operations typically work from 8:00 or 8:30 a.m. to 5:00 p.m., Monday through Friday. In the event that a call comes in during those hours, non-operational personnel may be summoned to respond to a fire or police incident or to function in a standby capacity at the station. Although PSO II's and command officers have duties which may require them to be away from the station during business hours, such as conducting investigations or appearing in court, they are equipped with telephones, portable radios and, in some cases, pagers, and are in regular contact with the department throughout the day.

As explained above, PSO II's and command officers have at least the same level of fire fighter training and certification as PSO I's, and the sergeant and lieutenant job descriptions have included fire fighting responsibilities for at least nineteen years. Moreover, PSO II's and command officers have in fact performed fire fighting duties in the past. For example, Deputy Director Bruce Smith testified that when he was a lieutenant in charge of the investigations bureau, he worked with a sergeant from that bureau and a group of detectives, each of whom were

classified as PSO II's, in fighting a fire in a three-story medical building, and that he personally led a wave of fire fighters into the building in an attempt to extinguish the fire.

There is some delay inherent with the use of non-operational staff as backup. Although there may be times when PSO II's or command officers are on the road when the call for backup comes in and may arrive at the fire scene very quickly, they generally will not be in a position to respond to an incident as rapidly as the on-duty patrol officers. Unlike PSO I's, non-operational personnel do not carry their fire fighting equipment with them in their vehicles. Therefore, PSO II's and command officers who are out in the field when a request for assistance is made typically must return to the station first to pick up their fire fighting equipment before proceeding to the incident. Moreover, if additional personnel are needed at night or on weekends, the option to use PSO II's and command officers as backup will typically not be available.

2. Departmental Call-Back

The second backup plan which the department has instituted involves calling in off-duty officers to perform fire fighting and law enforcement duties. The department maintains a list setting forth the names and phone numbers of all sworn personnel, including PSO I and II's and command officers. Although any officer on the list may be subject to call-back at any time, individuals who live closest to the station and who have indicated their willingness to be available as backup are identified on the list with an asterisk and are the first to be contacted by the department in an emergency situation. When a command officer or PSO II is called back, he or she is typically assigned supervisory tasks at the fire scene. However, non-operational personnel may be called upon to assist in an interior attack or to perform other fire fighting duties.

As with the first backup plan, there is a measure of delay inherent in the use of departmental call-back as a means of providing backup in the event of a fire or other emergency. Employees of the public safety department are not required to live in Oak Park and, according to the testimony of Director Siefert and Officer Loftis, many officers actually live some distance from the City. In fact, none of the individuals identified with an asterisk on the departmental staff list actually reside within the City limits. It may take as much as a half-hour for the department to reach an off-duty officer in an emergency situation, and another half-hour for that individual to actually make it back to the station. Upon arriving at the station, the officer will typically need additional time to assemble his or her equipment and, if necessary, proceed to the fire scene.

3. Mutual Aid

The final backup plan involves the use of mutual aid pacts. A mutual aid pact is a contractual agreement between two or more communities to provide assistance and share resources and equipment in the event of a fire or other emergency. With respect to fire situations, Oak Park is a member of the Oakland County Emergency Assistance Plan, which was adopted in 1992 and, at the time of hearing, included approximately 25 communities throughout the county. Oak Park also participates in a four-party fire mutual aid pact involving the neighboring communities of Berkley and Huntington Woods, as well as Beverly Hills, which is located approximately five miles from Oak Park. With respect to police mutual aid, Oak Park is a participant in the Oakland County Law Enforcement Mutual Aid Agreement, which consists of approximately 33 communities countywide.

In addition to these formal mutual aid agreements, the Oak Park city council has passed a resolution giving Director Siefert the authority to extend aid to, or seek assistance from, any police or fire agency at his discretion. Moreover, police mutual aid is often provided to Oak Park on an informal basis by officers from neighboring communities who may be passing through the City or patrolling areas near its boundaries, and vice versa. According to Director Siefert, officers from different departments routinely drive by each other's traffic stops and look out for the safety of their fellow officers. The Oakland County Sheriff's Department also has police jurisdiction within Oak Park and can enter the City to perform law enforcement functions with or without Charging Party's invitation.[2]

None of the mutual pacts to which Oak Park is a member mandate that the participating communities actually provide assistance, and no agency may be held liable under such agreements for denying a request for backup or leaving the scene of an emergency. Officer Loftis testified that he was involved in fighting a fire on Christmas Eve in 1998 in which mutual aid was requested but did not respond, and his testimony was corroborated by the incident report which shows that a request for assistance from Huntington Woods was made by the department. However, the record establishes that the City of Royal Oak voluntarily provided assistance to Oak Park for a period of time that evening at the fire scene, and neither Siefert nor Petrides could recall any situation in which Oak Park was unable to secure the assistance of another agency during an emergency.

As with the previously discussed backup plans, mutual aid typically involves some delay before backup is available. The decision to call for mutual aid is generally made by the commanding officer at the fire scene, who must first communicate that request to dispatch. The dispatch officer must then contact supervisory personnel within the agency from whom mutual aid is being sought. If that agency is not available or is unwilling to provide assistance, additional time may elapse while another community is contacted. However, in an effort to minimize the potential for delay, Oak Park may, as a precautionary measure, ask another agency to go on standby in the event of an emergency, and neighboring communities often monitor each other's radio communications and anticipate that a request for aid may be forthcoming. In fact, the record indicates that Oak Park and Beverly Hills share the same radio frequency.

D. FIRE RESPONSE PRACTICES

The specific fire response practices utilized by the public safety department are set forth in a series of general orders. A one-bell response pertains to a nonstructural fire, typically involving a vehicle, dumpster or grass fires. In such situations, General Order No. 6, entitled "Emergency Medical Service and Fire Response Order" calls for the department to send one truck, two PSO I's and a patrol vehicle with one officer. A command officer may also respond if he or she determines that additional assistance is necessary. The record establishes that command officers attend a majority of one-bell fires. A two-bell response signifies a structure fire the size of a single dwelling or smaller. Pursuant to General Order No. 6, a two-bell response calls for the department to send one pumper truck with two officers, one patrol unit and a supervisor. In addition, all available units not already on assignment are required to respond to the scene. For a

[2] Charging Party's witnesses testified that there is also State Police post located within Oak Park. However, the record was insufficient to establish that the City could reasonably expect to receive assistance from the troopers assigned to that facility.

three-bell response, which pertains to all structures larger than a single family dwelling, General Order 6 requires that the department send two pumper trucks, all available patrol units and a supervisor.

In practice, the department does not actually differentiate between a two and three-bell response. Rather, the department follows the three-bell response procedures outlined in General Order No. 6 for every structural fire occurring within the City. When a structure fire call is received, the department sends two trucks, usually driven by the standby officers who were working at the station at the time of the call. All but one of the PSO I's who are on road patrol also respond to the fire scene, including the district car in whose geographical area the fire is occurring. The remaining PSO I reports back to the station on standby status to watch over prisoners or handle police calls. If there are no prisoners at the station, the PSO I will typically attend the fire and call-back would be used to fill the standby position at the station. A lieutenant or sergeant is also sent to the scene to serve as incident commander. Thus, the department's initial response to every structure fire is typically at least five PSO I's and a supervisor. However, there may be situations in which one or more of the PSO I's on-duty is responding to other incidents at the time and cannot immediately report to the fire scene. Under such circumstances, the officer is instructed to notify the incident commander and clear the scene as soon as possible.

The first officer to arrive at the fire scene surveys or "sizes up" the situation and conveys that information to the incident commander, who relies on the officer's report until he or she can physically make it to the fire. One of the PSO I's is assigned the task of engineer, also known as pump operator. The engineer wraps the hydrant with supply line and hooks the line into the outlets which supply water to the tank. The engineer then places the engine in pump mode and is responsible for monitoring the pumping operation and associated instruments to ensure a continual supply of water. If the water stream were to stop while an interior attack is in progress, the officers are expected to discontinue their suppression operations and use the hose as a lifeline to guide them out of the building. Although the engineer needs to stay in close proximity to the truck and does not participate in an interior attack, he or she is able to perform other tasks around the engine, such as changing SCBA bottles.

As required by the Michigan Occupational Safety and Health Act (MIOSHA), an incident commander is present at every structure fire to which members of the department respond. The incident commander is typically the most senior command officer on duty at the time of the fire call. If the fire grows larger, the incident commander may expand the command structure by assigning specific supervisory duties to other officers, including sector commander and safety officer responsibilities. As set forth in the department's General Order No. 95, the incident commander is responsible for the overall coordination and direction of all activities on the incident scene, including the health and safety of all personnel. According to the general order, the duties of the incident commander include, but are not limited to, an assessment of incident priorities in the following priority: life safety; incident stabilization; and property conservation.

Upon arrival at the fire scene, the incident commander conducts his or her own "size up" and begins developing strategic goals and tactical objectives, including a decision regarding whether to engage in an interior attack of the structure or adopt a defensive mode and remain outside. In making that determination, the incident commander will consider factors such as the size of the fire and how long it has been in progress. The incident commander must also develop a plan for the deployment of resources to meet the established goals and objectives. Because fires

are dynamic in nature, this is an ongoing process. Other factors to be considered by the incident commander as the fire develops may include: the stability of the structure; the height and size of the structure; whether auxiliary lighting is needed; the weather; ventilation; whether additional personnel are needed to fight the fire; the estimated number of people within and around the fire; whether there are handicapped individuals or people with other special needs inside the structure; available routes of ingress and egress; the development of a rescue plan; the progress of ongoing rescue operations; the availability of water and pump capacity; and the existence of enclosures or fire separations within the building.

In the event that the incident commander orders an interior attack, the department follows the "two-in/two-out" rule as required by MIOSHA. This rule states that when officers enter a burning structure, they do so in teams of at least two and remain in constant visual or voice contact with one another. In addition, a team of at least two officers must remain outside the structure ready to initiate an immediate rescue should one be necessary. General Order No. 104 states that one of the two individuals located outside the structure may be assigned an additional role during that time, such as incident commander, "so long as this individual is able to perform assistance or rescue activities without jeopardizing the safety or health of any fire fighter working at the incident." Whether it is actually possible for an incident commander to perform such duties depends on factors such as the size of the fire and the resources required. Director Siefert testified that if the fire involves a standard 800 square foot, three-bedroom home, the incident commander could stand outside the door and serve as one of the "two-out" while still effectively performing his or her duties as command officer. According to Siefert, such multi-tasking is less likely to occur if a larger structure is involved. Officer Loftis testified that he has never personally observed an incident commander take part in interior fire fighting activities.

With respect to the question of interior entry into a burning structure, the City of Oak Park Public Safety Department has adopted an "aggressive interior attack" philosophy for fighting fires. This means that the officers responding to the fire scene attempt to enter the structure, identify the source of the fire and extinguish it as quickly as possible to prevent the fire from spreading. In commenting upon this philosophy at the hearing, Officer Loftis testified that time is "of the essence in fighting fires" and noted that during the initial stages, a fire doubles in intensity every two minutes. According to Loftis, "There has to be a quick initial response if you are going to save the structure, the contents, and anybody inside the structure." Director Siefert agreed with Loftis that the first few minutes of a fire are critical with respect to determining how big it ultimately becomes. Siefert testified that "time is the enemy with fire, and the sooner we can attack and extinguish a fire in its incipient stages, the less risk to everyone, including the public and the officers." However, Siefert explained that response time is only one factor affecting the department's ability to safely extinguish the fire. For example, if the fire was burning for some time before it was discovered and the department was notified, the officers may arrive at the scene quickly only to find the entire structure ablaze.

Siefert also testified that despite the department's policy of "aggressive interior attack," the safety of the officers takes first priority over all other considerations, including the prevention of property loss. As noted, the incident commander is charged with protecting the well being of the officers at the scene, and an interior attack will not be initiated if he or she determines upon arrival that there is insufficient manpower or equipment. Under such circumstances, the incident commander will attempt to procure additional personnel pursuant to one of the plans described above. If those attempts fail, the incident commander will adopt a defensive mode until help

arrives and, if necessary, allow the structure to burn down to protect the safety of the officers. According to Siefert, the department's "consideration for safety in tactical situations would be the rule of the day, that we would not expose anyone to a danger that, in a case where we didn't have adequate resources." Siefert testified that the incident commander is also expected to order his officers to abandon a burning structure if an interior attack is underway and the situation deteriorates so that additional assistance is required. Corroborating Siefert's testimony, Fire Marshal Petrides explained, "[E]verything I've ever been taught or heard from others or commanders prior to me becoming a commander were that there isn't a building in our town that's worth one of our people's lives."

E. LAW ENFORCEMENT RESPONSE PRACTICES

At hearing, Director Siefert acknowledged that backup is "an important consideration in assigning law enforcement," and several of the general orders issued by the department specifically address the issue of additional personnel for police runs. For example, General Order No. 62 indicates that both a primary and a backup unit should be used during police chases, and that certain situations may call for the involvement of more than two vehicles to "enhance officer safety (i.e. multiple armed felons, etc,)." General Order No. 92 states that two officers should be dispatched to a domestic violence response "whenever possible" and that "one officer responses should be avoided." General Order No. 89, which pertains to "high risk incidents" also contemplates the use of more than one officer when responding to special situations, including barricaded persons, hostage takers/domestic hostages, armed suicidals, high-risk search/arrest warrant service and narcotics raids.

Situations may arise in which, due to an ongoing fire or simultaneous emergency incidents, there may be only one PSO I available to handle law enforcement runs. For example, while a fire incident is ongoing, one PSO I usually returns to the fire station in a stand-by capacity. During the time that the officer is on stand-by status, he or she may also get dispatched to perform law enforcement duties without there being backup immediately available. Officer Loftis testified that PSO I's are frequently sent on runs alone. However, the record establishes that when circumstances warrant the deployment of more than one officer, the dispatcher will immediately request backup from the neighboring department. The PSO is instructed as to which department has been called and is expected to wait for backup to arrive before responding to the scene. Siefert testified that the responding officer will typically drive close to the scene while waiting for mutual aid to respond. As noted above, police mutual aid is also provided to Oak Park on an informal basis as officers from neighboring communities pass through the City or patrol near its boundaries.

F. FIRES STATISTICS AND INJURIES

Both parties introduced statistical evidence concerning the number of times the department responded to calls during the period 2000 to 2002. According to the Union's testimony and exhibits, which were based upon data from the Courts Law Enforcement Management System (CLEMIS), a county-wide public safety database, the department responded to 365 fire incidents in Oak Park in 2000, including 75 structure fires, and 21,598 police calls. In 2001, the department responded to 446 fire incidents, of which 107 were structure fires, and 21,004 police calls. According to the CLEMIS reports, there were 292 fire incidents in Oak Park in 2002, including 59 structure fires, and 18,676 police calls. The Employer's statistics were based upon on a survey of the actual reports prepared by the dispatchers, PSO's and command officers around the time of

each incident. According to the Employer's testimony and exhibits, there were 302 fire incidents within Oak Park in 2000, including 48 structure fires. The City's survey for 2001 indicates that there were 397 fire incidents to which the department responded, of which 93 were structure fires. The City's data for 2002 shows 247 fire incidents, including 59 structure fires. Toward the conclusion of the hearing, the Union stipulated that the discrepancy between its statistics and those of the Employer were not materially significant.

Evidence was also introduced by the parties concerning injuries suffered by PSO I's while fighting fires in Oak Park. All but two of the incidents happened more than seventeen years prior to the start of the hearing in this matter, and all of the injuries occurred during situations in which call-back was utilized. For example, the Union presented evidence concerning a house fire which occurred on November 22, 1981. Officers Luxton and Grindem were on a hose team inside the house when the floor collapsed. Grindem started to fall through the floor and was pulled out by Luxton. Grindem suffered a knee injury and was off work for eight weeks. At the time that Grindem sustained his injury, call-back had been requested by the department but additional personnel had not yet arrived on the scene. In commenting on this incident at hearing, Fire Marshal Petrides testified that the number of officers gathered at the fire scene was likely not a contributing factor in Grindem's injury. According to Petrides, "[Grindem] went through the floor probably because it was full of smoke and he couldn't see. That's pretty typical. . . . Having a third person behind you isn't going to make any difference in that regard. And he was pulled out by Officer Luxton, so his backup person did the job that he was supposed to do."

II. Positions of the Parties:

The City contends that Respondent's minimum staffing proposal which it submitted to the Act 312 arbitration panel on August 19, 2003, is not inextricably intertwined with safety and, therefore, is not a mandatory subject of bargaining. According to Charging Party, the public safety department has appropriate regulations in place to maintain the safety of the fire fighter at the fire scene. In support of this contention, Charging Party cites the fact that the department has in place an incident command system, and that it adheres to the "two-in/two-out" rule as defined by MIOSHA. In addition, backup forces are available whenever needed through the use of non-operational, on-duty personnel, departmental call-back and mutual aid.

The City further contends that a delay in assembling an appropriately sized crew does not raise a safety issue for the fire fighters on the ground, since the incident commander will adopt a defensive mode until additional personnel have arrived. According to Charging Party, the Union's testimony concerning injuries suffered by PSO I's over the years fails to demonstrate that its proposal is inextricably intertwined with a genuine or significant impact on fire fighter safety. Charging Party contends that the injuries would have occurred no matter how many PSO I's were in the initial response or how many officers eventually arrived at the fire scene through call-back or mutual aid.

Charging Party argues that the Union's demand with respect to the minimum number of personnel deployed at the scene of a structure fire, as well as its proposal that at least two PSO I's be deployed as primary and backup to perform law enforcement responsibilities when a fire incident arises, are part of a thinly veiled effort to "back into" the Union's proposed daily staffing level of seven on-duty PSO I's. According to Charging Party, such proposals are not mandatory

subjects of bargaining and, therefore, the Union violated Section 10(1)(3) of PERA in submitting such issues to the Act 312 panel.

Charging Party contends that the Union's submission to Act 312 arbitration of the layoff and recall provisions from Article XXXIII of the parties' expired contract also constituted a violation of the duty to bargain. The civilian dispatchers are in a different bargaining unit and covered by a different collective bargaining agreement. According to Charging Party, it is well-settled that a bargaining unit may not condition the layoff of unit members on the layoff of other non-unit personnel. Charging Party further contends that dispatching is not the exclusive work of the PSO unit.

Finally, Charging Party asserts that the Union breached its duty to bargain under PERA by demanding retention of a provision in the prior contract mandating that there be at least one two-person car on duty during the night shift, and a provision requiring the department to maintain no less than 45 sworn bargaining unit members assigned to the operations division. According to Charging Party, both provisions are permissive subjects of bargaining. Charging Party contends that the Union's subsequent withdrawal of the proposals did not render these allegations moot because the issues involve important questions of public interest and are likely to reoccur.

Respondent argues that the minimum staffing provision for PSO I's which it submitted to the Act 312 panel on August 19, 2003, is a mandatory subject of bargaining. According to the Union, the "inextricably intertwined with safety" test cited by Charging Party is merely descriptive, not prescriptive, and other formulations of the test, including "related to safety" and "affecting safety" are equally valid. Based upon its analysis of judicial and administrative decisions addressing the minimum staffing issue, Respondent submits the following language as the standard which the Commission should utilize for determining whether a minimum staffing proposal constitutes a mandatory subject: whether there is a significant impact on safety to the extent that safety concerns are arguably intertwined with and inseparable from, the minimum staffing issue.

Respondent further contends that regardless of which standard is applied, the evidence demonstrates that its staffing proposal was a proper subject for compulsory arbitration. Respondent asserts that the minimum manning issue in this case is unique because it involves a public safety department whose officers are certified to perform both firefighting and police work. Respondent argues that by the very nature of this dual capacity, added levels of stress and fatigue are self-evident, as its members may be called upon be called upon to fight a fire after having already spent many hours performing law enforcement duties. According to Respondent, the unpredictable nature of fires in Oak Park and the established history of PSO I injuries, as well as the department's policy favoring aggressive interior attacks, further demonstrate that its staffing proposal, which links the staffing number to police and fire operations, including the operation of fire equipment and apparatus in the performance of fire related tasks, has a significant impact on safety.

With respect to law enforcement response practices, the Union contends that its staffing proposal addresses the department's current practice, which leaves only one PSO I available to perform police duties when a structural fire occurs. Respondent argues that this practice may leave the officer without backup and, therefore, is inherently unsafe. Respondent further contends that the department's backup plans are ineffective and fail to alleviate the safety concerns which

gave rise to its proposal. According to Respondent, all three backup plans fail to take into account the safety issues which arise when on-duty officers must wait for additional personnel to arrive on the scene.

Finally, the Union argues that the merits of its proposal are corroborated by information from the National Fire Protection Association (NFPA). Although materials published by the NFPA were not admitted into the record at hearing, Respondent contends that they still may be relied upon as a secondary source of information.

III. Discussion and Conclusions of Law:

Under Section 15 of PERA, a public employer and union representative have a duty to bargain in good faith over "wages, hours, and other terms and conditions of employment . . . ." MCL 423.215(1). Such issues are referred to as 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 Comm College Faculty Ass'n v Grand Rapids Comm College*, 239 Mich App 650, 656-657 (2000); *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177-178 (1989). The test generally applied to determine whether a subject is mandatory or permissive is whether the matter has a significant impact upon wages, hours, or other conditions of employment, or settles an aspect of the employer-employee relationship. *City of Manistee v Manistee Fire Fighters Ass'n, Local 645*, 174 Mich App 118, 122 (1989), aff'g *Manistee Fire Fighters Ass'n*, 1987 MERC Lab Op 590; *City of Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215.

What constitutes a mandatory subject is determined on a case-by-case basis, and the Commission has primary jurisdiction to decide whether a particular topic is a mandatory or permissive subject of bargaining. *Jackson Fire Fighters Assoc*, 1996 MERC Lab Op 125, aff'd *Jackson Fire Assoc, Local 1306 v City of Jackson (On Remand)*, 227 Mich App 520 (1998); *Manistee*, 174 Mich App at 122. An Act 312 arbitration panel has no authority to issue an award on a permissive subject of bargaining. *Local 1277, Metropolitan Council No. 23, AFSCME, AFL-CIO v City of Center Line*, 414 Mich 642, 653. Therefore, it is an unfair labor practice for either party to insist to impasse on a nonmandatory subject or to submit such an issue to arbitration under Act 312. *Id.* at 653; *Manistee, supra*. See also *Detroit Fire Fighter Ass'n, Local 344, IAFF v Detroit*, 96 Mich App 543, 545-546 (1980). In the instant case, Respondent has before the Act 312 panel a minimum staffing proposal, as well as a proposal to maintain the layoff and recall provisions set forth in the expired contract. Two other proposals which Respondent submitted to the Act 312 panel and then subsequently withdrew are also at issue in this case, one requiring the Employer to deploy at least one two-person car during the night shift, and the other mandating the size of the bargaining unit.

A. MINIMUM MANNING

Generally, manning issues, including decisions regarding the number of individuals to be employed and their allocation to particular functions, do not constitute mandatory subjects of bargaining, but rather are reserved to the public employer as a matter of management prerogative. *Center Line, supra*; *Benzie County*, 1986 MERC Lab Op 55, 59. However, issues of employee

workload and safety constitute conditions of employment and, therefore, are mandatory subjects of bargaining. *City of Sault Ste Marie v Fraternal Order of Police Labor Council*, 163 Mich App 350, 355 (1987). See also *Alpena v Alpena Fire Fighters Ass'n*, 56 Mich App 568, 575 (1974), overruled in part on other grounds, *Detroit v Detroit Police Officers Ass'n*, 483 Mich 410, 483 n 65 (1980), and cases cited therein. In prior cases, both the Commission and the Court of Appeals have held that the test for determining whether a minimum staffing provision constitutes a mandatory or permissive subject of bargaining is whether the staffing requirement is "inextricably intertwined" with the safety of the officers or fire fighters. *City of Trenton v Trenton Fire Fighters Union, Local 2701, IAFF*, 166 Mich App 285, 295 (1988); *City of Wyandotte*, 1989 MERC Lab Op 1020; *City of Detroit*, 1992 MERC Lab Op 82.

In an attempt to establish that the minimum staffing clause at issue in the instant case implicates the safety of its members and, as such, constitutes a mandatory subject of bargaining, Respondent dedicates much of its brief to questioning whether prior Commission decisions have placed undue reliance on the phrase "inextricably intertwined with safety." The Union argues that over the years, many different forms of the test have been applied in minimum staffing situations, including whether the staffing provision "affects safety" or "concerns safety." While conceding that "inextricably intertwined with safety" is one statement of the test, the Union argues that such language should not be interpreted as a different standard entirely, but rather as a parallel descriptive phrase which is no more strict than the "affects safety" or "concerns safety" formulations. Based upon its review of prior Commission case law, as well as decisions of the Court of Appeals, Respondent contends that the proper test for determining whether a minimum staffing proposal constitutes a mandatory subject is whether the proposal "has a significant impact on terms and conditions of employment, such as safety, to the extent that safety concerns may arguably be deemed intertwined with and inseparable from the minimum staffing issue in dispute."

The Commission has already considered and flatly rejected an almost identical attempt to narrow application of the "inextricably intertwined with safety' language. In *Jackson Fire Fighters Ass'n, Local 1306*, 1996 MERC Lab Op 125, the employer filed a charge alleging that the union had violated its bargaining duty under PERA by submitting to Act 312 arbitration a proposal requiring that a minimum of 15 fire fighters be assigned to each shift. Relying upon evidence establishing the extensive safety policies of the fire department and the availability of backup forces, the ALJ found in favor of the employer, concluding that the union's proposed minimum staffing requirements were not "inextricably intertwined" with fire fighter safety. In so holding, the ALJ characterized the "inextricably intertwined" test as a "stricter standard" than whether the staffing proposal "affected" or was "related to" safety. On exception, the union argued that the ALJ erred in concluding that the appropriate standard to be applied was the "inextricably intertwined with safety" test. The union asserted that "inextricably intertwined with safety" was one of two alternate tests for establishing that a staffing issue is a mandatory subject of bargaining, and that if either test is met, the issue is a mandatory subject. The union argued that the second, more liberal test, required only that the Union show that the staffing issue is "related to safety."

The Commission disagreed with the union and adopted the legal analysis of its ALJ. Finding no merit to the union's "alternate test" theory, the Commission concluded, "There is but one test to be applied in such cases; minimum staffing issues become bargainable only when they are inextricably intertwined with employee safety." *Id*. at 133. In so holding, the Commission

referred to its decision in *City of Detroit Fire Department*, 1992 MERC Lab Op 82, affirmed in an unpublished opinion (Docket No. 149506, issued September 26, 1994), in which it stated, "[T]he evidence must show that the safety of employees and the number of employees scheduled per shift is "inextricably intertwined." That is, there must be at the minimum, evidence demonstrating a genuine or significant impact on safety." 1992 MERC Lab Op 82 at 85. The Court of Appeals subsequently affirmed MERC's decision in *Jackson* but explicitly declined to address whether there exists any distinction between issues "related to" safety and those "inextricably intertwined" with it, finding that sufficient evidence existed to affirm the Commission "under either statement of the criterion." *Jackson Fire Fighters Ass'n*, 227 Mich App at 527 n 1.

Respondent criticizes *Jackson* and contends that it was wrongly decided. Respondent asserts that the ALJ in *Jackson* reached an "unsupported and incorrect conclusion" when she characterized the "inextricably intertwined with safety" standard as a "stricter" test than "related to safety," and that the Commission engaged in an "unduly narrow and restrictive application of the 'inextricably intertwined with safety test'" which placed an "improper burden" upon the union. This argument must be rejected. *Jackson* stands as the Commission's most recent enunciation of the standard which should be applied in a minimum staffing case such as this, and I am bound to follow it pursuant to the doctrine of stare decisis. Thus, it is not sufficient in this case for the Union to show that its minimum staffing proposal is "related to" "affects" or "concerns" safety. To establish that the minimum staffing proposal constitutes a mandatory subject of bargaining, the evidence must demonstrate that the proposal is inextricably intertwined with the safety of its members; i.e. that the staffing proposal has a genuine or significant impact on safety. *Jackson*, 1996 MERC Lab Op at 132-133; *Trenton*, 166 Mich App at 295.

Respondent contends that even if the "inextricably intertwined with safety" standard, as enunciated by the Commission in *Jackson*, is applied in the instant case, its minimum staffing proposal constitutes a mandatory subject of bargaining. As described above, the Union's August 20, 2003, proposal would set a minimum staffing requirement of seven PSO I's on duty per shift at all times, establish the minimum manpower required per task or apparatus at the scene of a structure fire, and mandate that the City deploy a minimum of two PSO I's to perform police work when a fire incident arises. Respondent argues that this proposal is distinguishable from the minimum staffing language at issue in cases such as *Jackson* and *Trenton* in that it does not call for a fixed number of officers to be employed by the department or on-duty per shift, but rather seeks to ensure that there are a sufficient number of PSO's to safely operate the equipment and apparatus and perform the tasks demanded by the City. Regardless of whether the Union's proposal is framed in terms of officers per shift or per task, I find that the record in this case fails to establish that the Union's minimum staffing proposal has a significant impact on the safety of its members.

The Union's minimum manning proposal would require that the City maintain a staffing level of seven PSO I's on-duty per shift. However, the record indicates that the City's current minimum staffing level of at least six PSO I's on-duty per shift is sufficient to safely fulfill the duties and responsibilities required by the department and mandated by law. When a structure fire call is received, the department's current policy is to send at least five PSO I's and one command officer to the fire scene. The remaining PSO I typically reports back to the station and remains on stand-by. At the fire scene, one PSO is assigned the task of engineer, while the other four officers make up the "two-in/two-out" contingent required for interior entry under MIOSHA and the department's General Order No. 104. Pursuant to MIOSHA and General Order No. 95, an

incident command system is set up, with the most senior lieutenant or sergeant designated to coordinate and direct all activities at the fire scene, including matters relating to officer safety. If, upon arriving at the fire scene, the incident commander determines that there is insufficient manpower or equipment to engage in an interior attack, the incident commander is not expected to order officers into the structure until additional personnel can be assembled.

With respect to the use of backup forces for fire suppression, the record establishes that the City has in place detailed plans to ensure the deployment of adequate personnel when necessary. Depending on the size of the structure involved and the nature of the fire, the incident commander can serve as one of the "two-out" for an interior attack. If there are simultaneous emergencies or circumstances at the fire scene which require the assistance of additional officers, the incident commander can order the deployment of supplementary personnel from other staff who are on-duty at the time, including lieutenants, sergeants and PSO II's. Non-operational personnel are in contact with the department and available for deployment during business hours, Monday through Friday and, to a limited extent, in the evenings and on weekends. If on-duty non-operational personnel are unavailable, the department has additional manpower it can draw from by calling up off-duty PSO's, or by requesting the assistance of officers from other departments through one of the mutual aid pacts in which the City is a member. Based upon this evidence, I conclude that the department's reduction in minimum daily staffing to six PSO I's on duty per shift does not significantly impact the safety of Respondent's members.

The second aspect of the Union's proposal would establish the minimum number of PSO's required per task at the scene of a structure fire. Specifically, the proposal would require that at least five PSO's be deployed at every fire scene, including one PSO to operate the apparatus and no less than four PSO's to suppress the fire and make up the "two-in/two-out" contingent. While this is identical to the City's current practice with respect to the minimum number of personnel initially assembled at the fire scene, I find that the Union's proposal is not inextricably intertwined with safety. By specifying that the initial response must always include a designated number of PSO's, the clause unduly restricts Charging Party's ability to determine the composition of its workforce and essentially prevents the City from using command officers and other non-operational staff as it sees fit, whether as part of the initial response or as backup in the case of simultaneous emergencies. It would also place a severe limitation on the City's ability to freely use the incident commander and other personnel as part of the "two-in/two-out" equation. As noted, all command officers and PSO II's employed by Charging Party have at least the same level of certification and training as PSO I's, and fire fighting duties have long been part of their job descriptions. If Respondent's proposal was truly aimed at improving safety, then the use of qualified non-operational personnel at the fire scene, in whatever capacity, would have no bearing on the issue. The clear purpose of this aspect of the Union's proposal was to protect bargaining unit jobs by requiring the City to keep more of its members on the street on a daily basis.

The Union contends that only PSO's should be relied upon for the initial response to a structure fire since they are the only employees of the Public Safety Department who can respond to a fire in a prompt and efficient manner. According to Respondent, the City's backup procedures are inadequate because each backup plan involves a significant delay in officer response time and, therefore, will result in increased risk to the fire fighters who are assembled at the scene. However, the evidence indicates that response time is only one factor affecting the department's ability to fight the fire. More importantly, the testimony of Director Siefert and Fire Marshal Petrides reveals that despite the City's policy favoring aggressive interior attacks, fire

fighter safety is the department's first consideration and that an interior attack will not be undertaken unless and until adequate manpower and equipment have been assembled at the fire scene. The policy of the department, as described by Siefert and Petrides, is to adopt a defensive mode in such situations and, if necessary, to allow the structure to burn down if an interior attack cannot be safely conducted. Thus, while the delay associated with the department's backup plans may increase the risk to the citizens of Oak Park and their property, fire fighter safety will not be affected. It is well-established that the level of fire protection services provided to citizens is not subject to the duty to bargain under Section 10 of PERA. See e.g. *Wyandotte*, 1989 MERC Lab Op at 1023; *Detroit*, 1992 MERC Lab Op at 86.

With respect to the department's law enforcement practices, the evidence establishes that there may be times when PSO I's are sent on police runs by themselves. However, there is nothing in the record to suggest that safety considerations require there to be two officers on every police run, or that a two-person car is inherently safer than a one person response. See generally *Sault Ste Marie*, 163 Mich App at 356-357 (minimum manning clause not a mandatory subject of bargaining where there was no evidence showing that two-person patrols were safer than one-person patrols). Moreover, the record establishes that when the nature of the call indicates that more than one officer should be deployed, such as in cases involving domestic violence or high risk incidents, back up is requested immediately by the dispatcher and the responding officer is not expected to go to the scene until mutual aid arrives. As noted above, while the delay associated with calling for backup may impact the safety of the citizens of Oak Park, it is not a matter over which Charging Party is required to bargain. Finally, the record indicates that police mutual aid is also provided to Oak Park on an informal basis and that personnel from other departments routinely monitor the safety of Charging Party's officers, and vice versa.

In an attempt to prove that its minimum staffing proposal is inextricably intertwined with the safety of its members, Respondent relies upon statistics setting forth the number of fires which have occurred in Oak Park in the years preceding the hearing, as well as evidence pertaining to injuries suffered by PSO I's since 1979. The testimony and exhibits describing PSO I injuries plainly show the dangers which are inherent to the profession. However, the Union failed to establish any correlation whatsoever between this evidence and staffing levels, and it would require the undersigned to engage in speculation and conjecture in order to find such a nexus. It is just as likely that any or all of these injuries would have occurred regardless of how many officers were deployed at the scene at the time the incidents occurred. Similarly, I fail to see how evidence showing a fluctuating number of fires per year establishes that the Union's minimum staffing proposal has a genuine or significant impact on PSO safety.

Finally, Respondent argues that the safety concerns implicit in its proposal are corroborated by materials published by the National Fire Protection Association (NFPA). In particular, the Union relies upon sections of the Fire Protection Handbook and the NFPA 1500 Standard on Fire Department Occupational Safety and Health Program. The record indicates that the NFPA's safety guidelines are not binding on governmental agencies and municipalities, and that neither the City of Oak Park nor the State of Michigan have explicitly adopted any of the organization's recommendations. At hearing, I ruled that the materials were hearsay under MRE 801(c) and that neither publication was admissible under MRE 707, the learned treatise exception to the hearsay rule. Under that exception, statements contained in treatises are admissible only on cross-examination and for the limited purpose of impeachment. Moreover, if admitted, such materials may be read into evidence, but not received as an exhibit. MRE 707. See also

Stachowiak v Subczynski, 411 Mich 459 (1981) (treatises shall not be used as substantive evidence); *Fletcher v Ford Motor Co*, 128 Mich App 823 (1983) (safety publications drafted by voluntary publications constitute learned treatises). Respondent now contends that identification of the NFPA publications as "treatises" allows for their consideration by the Commission as "secondary source materials." I disagree and reaffirm my earlier ruling with respect to the inadmissibility of the NFPA documents.

Based upon the above discussion, I conclude that the evidence presented does not establish that the minimum staffing provision submitted by the Union to the Act 312 panel is inextricably intertwined with PSO safety. I find the minimum staffing clause to be a permissive subject of bargaining. Accordingly, I find that Respondent violated Section 10(3)(c) of PERA by bargaining to impasse on the staffing proposal.

B. LAYOFF AND RECALL

Charging Party contends that the Union violated its duty to bargain under Section 10(3)(c) by insisting to impasse and presenting to the Act 312 arbitration panel a proposal to maintain the layoff and recall language set forth in Sections 33.4 and 33.5 of the collective bargaining agreement. That language prohibits the department from laying off any bargaining unit member until all non-members, including civilians, who "perform police and fire duties are laid off first. Said duties are to be defined as work presently or previously performed by Public Safety Officers." The contract further requires that PSO's who have been laid off shall be rehired before non-PSO's or civilians who perform such duties. The City argues that this layoff and recall provision is a permissive subject of bargaining because the language restricts its ability to layoff PSO I's before civilian dispatchers. According to the Union, the provision does not restrict the City's ability to determine the size or composition of its workforce, but rather merely seeks to require the City to bargain over the impact of any layoff decision on its members. Respondent contends that its members have performed dispatch work for years, and that the clause merely seeks to protect the integrity, workload and safety of the unit.

In *Center Line*, *supra*, the Michigan Supreme Court found that an Act 312 arbitration panel did not have the authority to compel inclusion of a no-layoff provision in a collective bargaining agreement. The layoff clause at issue in *Center Line* provided, "The word 'layoff' means a reduction in the working force due to a decrease of work or general lack of funds. If for lack of funds, police officers may be laid off only in conjunction with layoffs and cutbacks in other departments." Distinguishing an earlier Court of Appeals decision, *Alpena*, *supra*, 56 Mich App 568, the Court in *Center Line* concluded that the manpower clause was not a mandatory subject of bargaining:

> We interpret this clause as one that is within the scope of management prerogative. The clause unduly restricts the city in its ability to make decisions regarding the size and scope of municipal services. [T] he city no longer would be able to base its decision on factors such as need, available revenues, or public interest. The decision regarding layoffs could only be based on the level of services in other departments if the layoff clause was to be upheld. This severely restricts the city in its ability to function effectively and poses serious questions with regard to political accountability for such decisions.

> [T]he clause is a mild restriction, but it speaks to the very essence of the [city's decision-making process.]

Center Line, 414 Mich at 660.

I find *Center Line* to be controlling with respect to this issue. Because PSO's have performed and continue to perform dispatch work for the department, the layoff and recall provision at issue in this case would clearly prohibit the City from laying off a single PSO until each and every civilian dispatcher is laid-off first. I conclude that the layoff and recall language which Respondent submitted to the Act 312 panel in the instant case, like the clause at issue in *Center Line*, deprives Charging Party of its ability to make policy decisions regarding the number of PSO's needed to operate the department and the level of fire and law enforcement services to offer its citizens. While Respondent has the right to demand bargaining over the impact of a decision to layoff bargaining unit members, including the safety and workload of the remaining PSO's, seniority, and "bumping" rights, the Union may not demand to bargain over and take to impasse a proposal conditioning the layoff of its members on the layoff of non-unit employees.

C. TWO-PERSON PATROLS AND THE SIZE OF BARGAINING UNIT

Charging Party argues the Union breached its duty to bargain under PERA by submitting to the Act 312 arbitration panel proposals to maintain two provisions in the expired contract, one pertaining to two-person patrol cars on duty during the night shift, the other mandating that the City maintain no less than 45 sworn bargaining unit members assigned to the operations division. Although Respondent ultimately withdrew these proposals just prior to the hearing in this matter, Charging Party contends that the charges are not rendered moot because the issues raised therein involve important questions of public interest and are capable of repetition. Because these allegations relate to the statutory duty to bargain, I agree with the City that a decision is required in this instance even though the provisions are no longer before the Act 312 panel. See e.g. *Rochester Comm Sch,* 1994 MERC Lab Op 640, 644 (no exceptions); *Ingham County and Ingham County Sheriff*, 1988 MERC Lab Op 170, 172; *Kent County*, 1991 MERC Lab Op 549, 551 n 1; *Wayne State Univ*, 1991 MERC Lab Op 496; 499-500.

The Union did not present a defense with respect to either of the allegations at issue here, and it is clear that both provisions constitute permissive subjects of bargaining. With respect to Section 30, as it relates to the use of two-person patrol during night shifts, there is no evidence establishing a link between PSO safety and two-person patrol cars. As noted above, the record indicates that backup is readily available either informally or through mutual aid and, depending on the nature of the incident, PSO's are be expected to wait for backup to arrive before proceeding to the scene. Therefore, I find that the Union's submission of the two-person patrol language violated Section 10(3)(c) of PERA. The Union's submission to Act 312 arbitration of a provision pertaining to minimum staffing in the operations division was similarly unlawful. Decisions regarding the size and scope of municipal services are within a public employer's inherent managerial authority, and provisions relating to staffing levels or the size of the total work force are not mandatory subjects of bargaining. *Center Line, supra*. See also *Leoni Twp*, 1986 MERC Lab Op 689, 694 (no exceptions); *Manistee Fire Fighters Ass'n*, 1987 MERC Lab Op at 606.

IV. Conclusion:

In summary, I find that Respondent's attempt to take the issues of minimum staffing, layoff and recall, two-person cars during the night shift, and size of the bargaining unit to binding arbitration over the objection of the City constitutes a violation of its bargaining obligation under PERA. The contract provisions pertaining to minimum staffing and layoffs must be withdrawn from presentation to the Act 312 arbitration panel, and Charging Party must be permitted to eliminate the layoff and recall provision from the collective bargaining agreement.

All other arguments raised by the parties have been carefully considered and do not warrant a change in the result. Accordingly, I hereby recommend that the Commission issue the order set forth below. Because of the technical nature of the violation, it is not recommended that a notice be posted.

RECOMMENDED ORDER

The Oak Park Public Safety Officers Association is hereby ordered to cease and desist from insisting to the point of impasse on, or submitting to arbitration under Act 312, proposals which constitute permissive subjects of bargaining, including daily shift minimum staffing, layoff and recall, two-person patrol cars, and minimum staffing in the operations division.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____