STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

Case No. C02 J-217

- and -

WAYNE COUNTY SHERIFFS, LOCAL 502,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Cheryl Yapo, Esq., for the Public Employer

Sachs Waldman, P.C., by John R. Runyan, Esq., for the Labor Organization

DECISION AND ORDER

On October 27, 2006, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in this matter finding that Respondent, Wayne County (Employer), discriminated against Thomas Browne, a member of the bargaining unit represented by Charging Party, Wayne County Sheriffs, Local 502 (Union), by transferring Browne to less preferred work in retaliation for Browne's union activity. The ALJ found that Respondent violated Section 10(1)(c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(c), and recommended that we order Respondent to cease and desist such unlawful activity and to take certain affirmative remedial action. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On November 20, 2006, Respondent filed exceptions to the ALJ's Decision and Recommended Order and requested oral argument. Attached to Respondent's exceptions are two unpublished Court of Appeals orders, issued May 13, 2005 and November 9, 2005, dismissing Respondent's appeals from an order of the Wayne County Circuit Court in *SEIU Local 502 v Wayne Co*, Case No. 04-423930-CL.

On December 27, 2006, Charging Party filed a brief in support of the ALJ's Decision and Recommended Order. At the same time, Charging Party also filed a motion to strike the

attachments to Respondent's exceptions and brief, the two Court of Appeals orders, which Charging Party asserts Respondent has proffered as evidence in support of Respondent's factual argument. Respondent did not file a reply to Charging Party's motion to strike.

In its exceptions, Respondent contends that it was denied due process when, after the retirement of the ALJ who conducted the hearing, an ALJ who was not present at the hearing and did not observe the witnesses was assigned to draft the decision. Respondent asserts that the ALJ erred in finding that Charging Party demonstrated a prima facie case of discrimination against Browne and in making credibility findings. Respondent argues that the ALJ erred when he failed to consider its treatment of similarly situated employees as evidence of a legitimate business reason for its transfer of Browne to less desirable work. Upon review of Respondent's exceptions, we find them to be without merit.

Procedural Issues:

In Respondent's brief in support of its exceptions, Respondent argues that the two Court of Appeals orders disprove the ALJ's statement in footnote 9 of the Decision and Recommended Order that "there is no evidence that the county appealed the several injunctions issued in this matter." Since these documents were not offered as exhibits before the close of the record and Respondent did not seek leave from the ALJ to reopen the record for inclusion of these documents, the record contains no evidence that the County appealed the circuit court injunctions. Apparently, by attaching these two documents to its brief, Respondent seeks to have them included in the record. Since Respondent has not filed a timely motion for reopening of the record with this Commission, the record will not be reopened to include the two Court of Appeals orders as evidence in this matter. Moreover, even if Respondent had moved for reopening, the requirements for reopening have not been met. Rule 166 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.166 provides:

> A motion for reopening of the record will be granted only upon a showing of all of the following:
>
> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
>
> (b) The additional evidence itself, and not merely its materiality, is newly discovered.
>
> (c) The additional evidence, if adduced and credited, would require a different result.

Respondent has failed to explain why the May 13, 2005 order was not offered into evidence before the record closed at the September 6, 2005 hearing. Indeed, on November 20, 2006 when these orders were filed as attachments to Respondent's exceptions, neither order could be considered newly discovered. Moreover, the addition of these two documents to the record would not require a different result in this matter as the Respondent's appeal of the circuit court orders is not material to our decision. Accordingly, Charging Party's motion to strike is granted.

After reviewing the exceptions and briefs filed by the parties, we find that oral argument

would not materially assist us in deciding this case. Therefore, Respondent's request for oral argument is denied.

Findings of Fact:

Background Facts

Charging Party represents a bargaining unit of deputy sheriffs within Respondent's Sheriff's Department and Respondent's separate Department of Community Justice. A single collective bargaining agreement between Charging Party and Respondent addresses assignment procedures for all deputies within the two departments.

Thomas Browne has been employed as a deputy sheriff since 1985 and is a member of the bargaining unit represented by Charging Party. In 1997, he requested and was granted assignment to the Warrant Enforcement Bureau (WEB), which was headed by Commander Lawrence Meyer within the Department of Community Justice. Sheriff's Department employees generally considered this a preferred assignment. The Employer has discretion under the collective bargaining agreement to select whom it chooses for this assignment, and generally has the discretion to remove an employee from such a position at any time. Possible assignments within the WEB included instant referrals, juvenile apprehension, or adult apprehension. Assignment to instant referrals was considered the least desirable of the three possible assignments as it merely involved transporting a prisoner who was already in custody. Instant referral assignments were usually reserved for less senior officers or those new to the WEB. However, officers that are more senior were sometimes assigned to instant referrals as discipline. As was typically the case for junior officers, Browne was initially assigned to the juvenile apprehension unit at the WEB. Over time, he worked his way up to an assignment on the adult apprehension team.

Browne was counseled for attendance matters on February 2, 1999, while his wife was suffering from terminal cancer, and in December 2000, shortly after her death. Such counseling sessions are not discipline and are not considered in progressive discipline. Browne also received a one-day disciplinary suspension in October 2001 for failing to secure Employer equipment in accordance with the Employer's rule.

By letters dated March 15, 2002, Local 502 President Vincent Gregory notified Sheriff Robert Ficano and Community Justice Department Director Jerial Herd that Browne had been appointed alternate steward. Neither Ficano nor Herd objected to Browne's appointment to this position. Browne was the first WEB officer to serve as a union steward.

Browne's supervisor, Executive Sergeant Scott Gatti, considered him a good officer and an effective employee. Based on his experience, and despite his prior discipline, Browne was made team leader of a WEB adult apprehension team in April of 2002. Browne also received a citation for exemplary police work on April 30, 2002.

Browne Presents Grievance to Meyer

In July 2002, Browne presented a grievance to the WEB commander, Meyer, concerning overtime hours that Browne believed he should have had the opportunity to work. According to Browne's testimony, Meyer responded by saying, "you're fucked" and that it would be "a cold day in hell" before Browne would be able to resolve the issue through the grievance procedure. Meyer testified that this incident was his first indication that Browne was acting as a union steward and that he was shocked to receive the grievance because he had never received a grievance before. Meyer testified that he could not specifically recall what he said to Browne when Browne handed him the grievance, but he denied using the first of the two quoted expletives. After Meyer refused to accept the grievance, Browne gave it to Gregory.

In an August 2002 discussion between Meyer and Gregory, Meyer made it known that he did not want grievances filed in the WEB because he feared that it would jeopardize the grant money that funded the unit. After his conversation with Meyer, Gregory told Browne to take the grievance back to Meyer, and have it signed; Gregory's instructions were carried out.

Meyer testified that he did not remember "receiving anything indicating that Tommy [Browne] was a blessed union steward by the administration." Gatti also testified that he did not recall ever being informed that Browne was a union steward. Gatti's superior, Executive Lieutenant Christopher Clark, also denied ever receiving notice from his superiors that Browne was a union steward. Clark testified that it would be a hardship on the WEB to have a union steward assigned to the WEB. Clarke testified that such an assignment would interfere with the performance of the duties of the entire team to which the steward is assigned.

Instant Referral from Lincoln Park

On October 9, 2002, Browne was accused of disobeying an order from his superior, Sergeant Althea Kinney. That morning, Kinney, received a request from the Department of Corrections to have an instant referral picked up from Lincoln Park. The employees usually assigned to instant referrals had other tasks to perform and Kinney sought to assign the instant referral to an adult apprehension team. According to Kinney's written report, she instructed Browne and his team member Vince Alvarado[1] to take care of the instant referral. Later that day, Kinney learned that the instant referral had not been picked up. She telephoned Alvarado and questioned him about the instant referral at Lincoln Park. Alvarado told Kinney that he had not heard her say that his team was to pick up the instant referral that morning and that they were presently interviewing someone in Inkster regarding another matter. According to Kinney's statement, she instructed them to pick up the instant referral as soon as they finished the interview.

After the team returned to the office, Gatti reviewed their daily log and prepared a memo on the incident for his executive lieutenant, Christopher Clark. Gatti directed Kinney to prepare a report and passed that and his memo on to Clark. Clark subsequently directed Browne and Alvarado to prepare written statements about the incident. Alvarado's October 17, 2002 written

[1] Alvarado had recently returned to the adult apprehension team after a seven-month assignment to instant referrals as discipline for being involved in a "verbal disagreement" with another officer.

statement denies knowing of Kinney's request to take care of the instant referral that morning. Alvarado testified that Kinney told him about the instant referral assignment that afternoon, but he had no knowledge of Kinney informing Browne of the assignment. In his written statement about the matter and in testimony, Browne denied that Kinney had given him the order to pick up the instant referral. He further testified that when he discussed the matter later with Kinney, she admitted that she gave the order in question to two other officers, Godre and Alvarado, but not to him. (Kinney did not testify at the hearing in this matter.)

Browne's Removal from Adult Apprehension Team and Assignment to Instant Referrals

On the day of the incident involving the Lincoln Park instant referral, Gatti removed Browne from the adult apprehension team and assigned him to the instant referral team. Alvarado was not disciplined and continued to work on the adult apprehension team. Godre had been on the instant referral team on October 9, 2002, and was transferred to adult apprehension to replace Browne.

On October 17, 2002, the Union president, Gregory, sent a letter to Meyer requesting a special conference to discuss the "harassment of steward." While delivering the letter, the Union's chief steward, Anthony Simmons, encountered Lieutenant Gatti. Simmons and asked Gatti why the Employer was giving Browne such a hard time about the overtime grievance and why Browne had been moved out of the apprehension team. Gatti told Simmons that Browne knew why he had been moved. When Simmons continued to question Gatti about Browne's removal from the apprehension team, Gatti angrily responded, "the Union does not regulate anything out here and we do not have to do what the Union tells us to do."

Browne's Transfer to the Jail Division

Gatti's superior, Clark, testified that after reviewing Browne's and Alvarado's statements, he discussed the matter with Kinney and reviewed Browne's performance record. Clark then prepared a memo to his superior, Meyer, in which he recommended that Browne be disciplined. Meyer acknowledged that after Browne and Alvarado provided written statements about the incident, he did not discuss the matter with Kinney, and proceeded to request Browne's transfer from the WEB.

Browne remained assigned to the instant referral unit of the WEB until October 25, 2002. On that day, Browne and Clark met. Browne told Clark of Kinney's admission that she was wrong when she said she had given Browne an instant referral assignment on the morning of October 9. Clark told Browne that the facts had been reviewed and he was being transferred to the jail division. Clark did not talk to Kinney after Browne told him that Kinney admitted to making an error in her statement.

Work in the jail division is generally considered by Sheriff's Department employees to be a less desirable assignment than working for the WEB. The jail division is the lowest seniority position in the department; under the collective bargaining agreement, employees must bid on or apply for all other positions. Article 7, paragraph 7.04C of the collective bargaining agreement prohibits any union steward selected to represent a particular division from being transferred to

another division without the agreement of both the Union and the Employer. However, Respondent did not seek the Union's agreement to Browne's transfer from the WEB to the jail division.

Meyer testified that Browne's removal from adult apprehension and transfer to the jail division was based on Browne's disciplinary history and prior work performance. Meyer testified that if an employee was not working out in the WEB, he would request the undersheriff to arrange for the person to be transferred. Meyer further testified that it was not his decision to have Browne transferred to the jail division, and that the undersheriff was responsible for determining where Browne would be assigned. Clark testified that other WEB team members had been removed from the WEB and transferred to the jail division in lieu of discipline.

Contrary to Meyer's testimony, Donald Watts, who is retired from the Sheriff's Department and was the undersheriff over the WEB at the time of Browne's transfer, testified that he did not have any input in Browne's transfer from the WEB to the jail division. Watts testified that when an officer failed to meet performance standards, after coaching and counseling efforts with the employee had been exhausted, and after written and oral reprimands, the appropriate procedure was to document the employee's performance and send it over to the discipline commander for an administrative hearing. Watts testified that to transfer an employee instead of referring the employee for discipline was not consistent with department policy.

Special Conference between Union and Employer

The special conference requested by the Union was held on October 28, 2002. Present were Gregory, Browne, Simmons, Meyer, Clarke, and Jim Olasinsi from the Employer's labor relations department. The purpose of the meeting was to discuss Browne's appointment as alternate steward and the Union's assertions that Browne had been harassed because of that appointment. Gregory was unaware of Browne's transfer to the jail division at the time he requested the special conference and learned of it during the conference. Gregory asked Meyer the reason for Browne's transfer. Meyer told Gregory that Browne was transferred pursuant to the Employer's discretionary authority under the contract, but would not provide further details. Simmons testified that Meyer stated that he was not going to answer Gregory's question, that he did not have to answer, and that the Employer was within its rights under the contract. According to Gregory, Meyer refused to answer the question, got up, and left the meeting.

The Union filed suit in Wayne County Circuit Court and on December 30, 2002, Wayne County Circuit Court Judge John A. Murphy temporarily enjoined Respondent from transferring Browne from the WEB. Respondent then assigned Browne to the WEB juvenile section instead of reinstating him to the adult apprehension section. In addressing that assignment, Meyer testified that there were no separate divisions in the WEB and that there was no difference between the adult and juvenile apprehension division, despite their geographic separation in early 2003. However, Clark testified that the WEB unit had separate divisions, the juvenile apprehension section, and the adult apprehension section.

Browne's Assignment with the Prosecutors Office

In early 2003, Browne left the juvenile section of the WEB and accepted a position in the prosecutor's office. While there, Browne was under the supervision of Executive Lieutenant Kevin Losen. Losen testified that he knew the Union had attempted to name Browne as a union steward, but he never recognized Browne as a steward and had never seen any documentation from the Employer indicating that Browne was a union steward.

After Browne called in sick one Monday in July 2003, Losen noted the amount of time that Browne had missed in the seven months in which Browne had worked for him. Losen then investigated the process used for the payroll system in the prosecutor's office and learned that the four employees in the unit reported their time on weekly time sheets, which were submitted to the payroll office without prior review by the employees' supervisor. Losen then obtained copies of the past time sheets for that year to compare them with his records of the employees' time off. Losen testified on direct examination that upon review of the records, he discovered nine discrepancies between his records and Browne's time sheets. On cross-examination, Losen acknowledged that of the nine discrepancies, two or three of the signatures purported to be Browne's did not look like Browne's signature. Losen did not take any steps to determine whether Browne had signed the time sheets or whether someone else had signed his name to the sheets. He did not question Browne about the matter. Losen submitted a memorandum to his commander, Gatti, alleging a discrepancy between Browne's time sheets and the time Browne was actually at work. Gatti instructed Losen to prepare a memo about the allegation, which was to be forwarded to internal affairs over Gatti's signature. While the internal affairs investigation was pending, the Employer's Chief of Staff, Donald Cox, transferred Browne from the prosecutor's office back to the jail division. Respondent did not seek the Union's agreement to the July 2003 transfer.

The Sheriff's office referred the matter for prosecution, but the prosecutor's office refused to prosecute. The matter was finally resolved via a settlement agreement in October 2003, in which Browne agreed to accept a four-day suspension and to repay wages for fifty-two hours that he did not work.

Brown's Assignment to the Fugitive Apprehension Service Team

On August 12, 2003, Judge Murphy issued an order to show cause as to why Respondent's repeated transfers of Browne should not be viewed as contempt in violation of the court-ordered injunction. Respondent refused to move Browne back to the prosecutor's office. On September 22, 2003, two days before the contempt hearing, Respondent transferred Browne to the Fugitive Apprehension Service Team (FAST), a unit that was functionally similar to the WEB.

By letter dated October 2, 2003, the Union requested that they be allowed to appoint a chief steward and three alternates for the special operations unit. The Sheriff's Department chief of staff, Cox, agreed to the additional stewards with the proviso that the Union reimburse the Employer for the cost of releasing the additional stewards to perform union duties during working hours. However, despite that agreement, the Employer refused to recognize the

individuals appointed as stewards for the special operations unit. Browne was appointed chief steward of the special operations unit in October 2003 and was elected to the position in March 2004.

Brown's Transfer to the Juvenile Section of the WEB, then to the Jail Division, then Back to Instant Referrals

On July 30, 2004, Browne was again transferred to the juvenile section of the WEB. This transfer was purportedly for "cross-training," even though Browne was the only officer with his level of experience to be reassigned for this purpose. By letter dated August 13, 2004, the Union provided Clark, then the executive lieutenant over the WEB, with an updated list of stewards, including Browne as chief steward for special services and two alternates for that division. In September 2004, Browne was involuntarily transferred from a day position in the WEB juvenile section to an afternoon shift at the jail.

On September 30, 2004, the Union obtained a restraining order requiring Respondent to rescind Browne's transfer to the juvenile division of the WEB and prohibiting his transfer to the jail division. At that point, the Employer returned Browne to the WEB, but put Browne on instant referrals as a permanent assignment.

By letter dated October 8, 2004, the Employer's chief of staff, Cox, notified the Union of the Employer's objection to the Union's claim that Browne was a chief steward and two other employees were alternates for the special services units. Cox wrote that the additional stewards could only be added upon mutual agreement and that had not yet occurred. In the absence of such agreement, Cox wrote that the Employer would not recognize Browne or the two alternates as stewards.

As a chief steward, Browne was expected to attend monthly executive board meetings and weekly chief stewards meetings. Clark testified that while he did receive a letter from the Union naming Browne as a union steward, he did not have the authority to acknowledge Browne as a steward; he did not receive anything from the Employer's administration acknowledging Browne as a steward. As a result, Clarke did not allow Browne to attend union executive board or grievance committee meetings.

Discussion and Conclusions of Law:

Change in ALJ

After the retirement of the ALJ who presided at the hearing, the drafting of the Decision and Recommended Order was reassigned to ALJ O'Connor pursuant to Rule 174 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.174. The parties were notified of the reassignment on September 20, 2006, more than a month before the ALJ's Decision and Recommended Order was issued. Neither party objected to the assignment of the matter to ALJ O'Connor until Respondent did so in its exceptions.

Respondent complains in its exceptions, "ALJ O'Connor did not seek further hearing or input from the parties as allowed by R.423.174." Inasmuch as both parties indicated they had no further evidence to offer at the close of the hearing on September 6, 2005, it would have been somewhat irregular for ALJ O'Connor to *sua sponte* set the matter for further hearing. When the parties were notified on September 20, 2006 of the matter's reassignment to ALJ O'Connor, they had the opportunity to raise any issues resulting from that reassignment. Respondent contends that due process requires that the decision be made by the ALJ who conducted the hearing in this matter. However, Respondent has not cited any authority to support this assertion. Moreover, Respondent has waived this argument by failing to object timely to the reassignment of the case. See *City of Detroit*, 20 MPER 68 (2007). The failure to raise a timely objection constitutes a waiver of that objection. *Detroit Bd of Ed*, 16 MPER 29 (2003); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 540.

Credibility Assessment

In its exceptions, Respondent contends that without the opportunity to observe the demeanor of the witnesses, ALJ O'Connor was limited to a review of the cold record and "had no basis by which to declare the credibility of any of the witnesses." The ALJ who conducts the hearing may reach conclusions as to credibility by relying on his or her own evaluation of witness demeanor and nonverbal responses to questions. Thus, deference is given to findings of fact made by the ALJ who heard the case and observed the witnesses' demeanor. See *Rosales-Lopez v United States*, 451 US 182, 188; 101 S Ct 1629, 1634 (1981); *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 126; 223 NW2d 283, 289 (1974); *Bellaire Pub Sch*, 19 MPER 17 (2006). However, when the ALJ who conducted the hearing is unavailable, there are other indicia of credibility in the record that may be relied upon by the decision maker, such as "the consistency and inherent probability of testimony." *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich At 127, 223 NW2d at 289 (Mich 1974). When we conduct our de novo review of a record upon receipt of exceptions to an ALJ's decision and recommended order, we are also limited to a review of the "cold" record. Nevertheless, where credibility is an issue we must look for indications of witness credibility in that "cold" record.

To a degree, the decision in this case involves witness credibility. With respect to several factual questions, there are significant differences in the stories given by the witnesses. The ALJ found certain witnesses presented by Charging Party to be more credible than at least one witness presented by Respondent. Based on that credibility finding, the ALJ concluded that Charging Party had presented sufficient evidence to establish a prima facie case of discrimination. As we examine whether the elements necessary for establishing discrimination have been met, we will look at the facts and credibility issues with respect to each element. However, we point out here that we generally agree with the ALJ's conclusion that the testimony by Respondent's witness Meyer often lacked credibility. Meyer's testimony was frequently inconsistent with testimony from other Respondent witnesses. Moreover, it was evident from Meyer's testimony that he personally harbored anti-union animus, which caused him to characterize events differently from other witnesses. Thus, where Meyer's testimony conflicts with other apparently credible witnesses, we generally accept the other witnesses' testimony.

In order to establish a *prima facie* case of discrimination under Section 10(1)(c) of PERA, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Trans Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). Ultimately, however, the charging party bears the burden of proof. See *Waterford Sch Dist*, 19 MPER 60 (2006); *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

Browne's Union Activity and Employer Knowledge of that Activity

First, it is evident that Browne was active in the union. In 2002, he became an alternate steward. He was subsequently appointed and then elected to be a chief steward. The record contains numerous instances in which Browne or the Union provided Respondent with notice of Browne's union activity. Meyer testified that he first learned Browne was a union steward when he received the grievance in July 2002. Other Respondent witnesses, Losen and Clark, denied knowing that Browne was a union steward. They contended that they had not received official notification from Respondent's administration that they were authorized to treat Browne as a steward. However, they did not deny that both Browne and the Union had informed them of Browne's status as a steward, thereby providing them with notice that Browne was active in the union.

Anti-Union Animus or Hostility to Browne's Protected Rights

Respondent's witnesses uniformly denied having any animus toward the Union. However, other testimony indicates that anti-union animus was indeed present. First, we must consider Meyer's response to Browne's presentation of a grievance. According to Browne's testimony, Meyer responded by saying "you're fucked" and that it would be "a cold day in hell" before Browne would be able to resolve the issue through the grievance procedure. While Meyer testified that he could not specifically recall what he said when Browne handed him the grievance, he denied using the first of the two expletives that Browne attributed to him. Meyer did not deny telling Browne that it would be "a cold day in hell" before Browne would be able to resolve the issue through the grievance procedure. Nor did Meyer deny that he refused to accept the grievance. Also indicative of Meyer's attitude is his testimony that he did not remember "receiving anything indicating that Tommy [Browne] was a blessed union steward by the administration." Meyer's reference to the union steward position as "blessed" appears to be a sarcastic characterization indicating Meyer's hostility toward that role. We also consider Meyer's refusal to discuss the reason for Browne's removal from the adult apprehension team when Gregory asked about it during the special conference. Similarly, we consider Gatti's agitation when questioned by Simmons about Browne's removal from the apprehension team. If the

Employer had legitimate disciplinary reasons for removing Browne from the adult apprehension team and placing him in the jail division, we must question why neither Meyer nor Gatti was willing to disclose those reasons to Browne's union representatives. In the light of the attitude displayed by Meyer's actions and testimony, we also count as credible union president Gregory's testimony that Meyer made it known to him that he did not want grievances filed in the WEB. Moreover, we consider Clark's testimony that it would be a hardship to have a union steward assigned to the WEB. Accordingly, we find there is sufficient evidence of Respondent's anti-union animus.

Suspicious Timing or Other Evidence That Browne's Protected Activity Was a Motivating Cause of the Allegedly Discriminatory Action

The timing of Browne's reassignments was indeed suspicious and likely motivated by his union activities. It does not seem to be purely coincidental that the numerous transfers to less desirable assignments began shortly after Browne attempted to file his first grievance, the initial indication to Meyer of Browne's status as a union official. Within three months of Browne's presentation of the grievance to Meyer, and while that matter was still pending, Browne was removed from his preferred work assignment as a team leader of an adult apprehension team and assigned to instant referrals. That reassignment was based on the allegation that Browne violated Kinney's order on October 9, 2002. The only "evidence" offered by the Employer in support of its contention that Browne disobeyed an order is Kinney's written statement, a hearsay document. Both Browne and Alvarado, witnesses with firsthand knowledge, deny that Kinney ordered them to pick up the instant referral that morning. Browne testified on the second hearing date, January 11, 2005, that Kinney subsequently acknowledged that he was not present when she gave the order to pick up the instant referral. The hearing proceeded on March 16, 2005, April 28, 2005, and September 6, 2005, but Kinney was not called as a witness either to verify Respondent's version of the event or to contradict Browne's testimony that she had recanted her written statement. An adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if she may reasonably be assumed to be favorably disposed to the party. See *Ionia Co & 64A District Court*, 1999 MERC Lab Op 523, 526; *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 540. The fact that Respondent neglected to call Kinney as a witness to rebut Browne's testimony indicates that no such rebuttal would have been forthcoming had Kinney testified. Inasmuch as there is no evidence that an order was given to Browne, there is no evidence that an order was disobeyed by Browne. Thus, we can find no evidence that the Employer had a legitimate basis for removing Browne from the adult apprehension team.

Moreover, both Gatti's and Meyer's refusal to discuss the reason for Browne's removal from the adult apprehension team with Browne's union representative indicates their inability to articulate a legitimate reason for Browne's transfer. After Browne was moved to instant referrals, the Union requested the special conference. Then, on the very day of the special conference to discuss Respondent's alleged harassment of Browne, the Employer transferred Browne to the jail division, the least desirable position. A further indication that Respondent lacked a legitimate reason for Browne's transfer from the WEB to the jail division is the fact that such a transfer is inconsistent with the Employer's disciplinary policies. We find Meyer's

testimony that the decision to transfer Browne to the jail division was made by the undersheriff lacked credibility. Instead, we find credible the testimony of retired undersheriff Donald Watts that he did not authorize Browne's transfer and that a transfer for disciplinary reasons is not in accordance with the Employer's policies. We also accept Watts' testimony that the Employer's policies required a disciplinary review and hearing in accordance with the collective-bargaining agreement to determine the extent of any discipline. Watts is retired from his employment with Respondent and has no apparent reason to side with one party or the other. Moreover, Watt's testimony is consistent with the very detailed provisions of the collective bargaining agreement, which provides for an administrative review and determination hearing prior to discipline.

Respondent argues that the ALJ erred when he failed to consider its treatment of similarly situated employees as evidence of a legitimate business reason for its transfer of Browne to less desirable work. The fact that similar transfers have been made from the WEB previously does not justify this further contravention of the Employer's policy. Indeed, the fact that similar transfers have been made in the past simply indicates that in administering the WEB, Meyer ignored both the collective bargaining agreement and the Employer's disciplinary policies.

Given the absence of a legitimate reason for Browne's initial involuntary transfers and Meyer and Gatti's refusal to discuss the reason for those transfers with Browne's union representatives, we must agree with the ALJ's statement that "Browne was transferred to punish him for his earlier protected activity and to make clear the Employer's disdain for the Union's intervention on Browne's behalf." It is well settled that when a party's alleged motives for its actions are found to be without merit or credibility, inferences of animus and discriminatory motive may be drawn from the totality of the circumstances provided, often in the absence of direct evidence. See *Shattuck Denn Mining Corp, (Iron King Branch) v NLRB*, 362 F2d 466, 470 (CA 9, 1966). Furthermore, discriminatory conduct may be evidenced by a materially adverse change in the terms and conditions of employment, indicated by reassignment or a demotion consisting of a decrease in wages, hours, or, as in this case, less desirable work with significantly diminished responsibilities. See *Burlington Northern and Santa Fe Ry Co v White*, 548 US 53, 71, 126 SCt 2405, 2416 (2006); *Hit N Run Food Stores*, 231 NLRB 660, (1977). See also *Crown Cork De Puerto Rico, Inc*, 273 NLRB 243, 246 (1984). That being said, we find that Respondent's conduct was both discriminatory and motivated by union animus toward Browne's protected union activities. Accordingly, we find that Charging Party has presented sufficient evidence to establish a prima facie case of discrimination.

Evidence That Browne Would Have Been Transferred Absent His Union Activity

It is undisputed that the order to pick up the instant referral was given directly to Alvarado. During her telephone conversation with Alvarado, Kinney left it up to Alvarado to pass on her instructions to Browne, his team leader. Yet despite the Employer's dissatisfaction with the amount of time that elapsed between the time the order was given to Alvarado and the time the job was carried out, Alvarado, who is not a union steward and had previously been assigned to instant referrals as discipline for another incident, was not disciplined and remained on the adult apprehension team.

Meyer testified that Browne's removal from adult apprehension and initial transfer to the jail division was based on Browne's disciplinary history and prior work performance. However, Browne's only prior discipline was for the failure to comply with the Employer's rules regarding handling of equipment. That occurred before Browne was made a WEB team leader. When that is considered along with the fact that there is no evidence that Browne disobeyed any order that he received, and the fact that Alvarado was neither transferred nor disciplined, it is clear that the Employer's rationale for transferring Browne from adult apprehension to the jail division, in October of 2002 was a pretext.

After Browne's initial transfer to the jail division and the December 30, 2002 circuit court order returning him to the WEB, he was involuntarily transferred three more times, once to the juvenile section of the WEB and twice more to the jail division, before his final transfer back to the instant referral division of the WEB following the circuit court's September 30, 2004 order. The Employer gave little or no explanation for the three additional involuntary transfers occurring within less than two years. Nor has Respondent explained its reason for Browne's permanent assignment to instant referrals after he was finally returned to the WEB. In the light of the repeated assignment to these disfavored positions, it appears that Respondent transferred Browne because of Browne's position with the Union and his union activity.

It is evident that the parties are involved in a contractual dispute over whether union stewards should be assigned to the special operations unit. It is clear from the testimony of Meyer and Clark that Respondent was opposed to having a steward assigned to the WEB or FAST, as it appears that Meyer administered those units without regard for the collective-bargaining agreement or the Employer's own disciplinary policies. As the union steward assigned to the WEB, it is evident that Browne was used by Meyer to show Meyer's contempt for the Union, for its efforts to place a steward in the WEB, and for Meyer's responsibilities under the collective-bargaining agreement.

We conclude that the record shows the Employer's motive was to retaliate against Browne for undertaking activities protected under Section 9 of PERA, and further to discourage him from continuing as a union official. We have carefully examined all other issues raised by the parties and find they would not change the result. Therefore, we agree with the ALJ that the Employer's conduct violated Sections 10(1)(a) and (c) of PERA and issue the following order.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:
WAYNE COUNTY,
Respondent-Public Employer,

Case No. C02 J-217

-and-

WAYNE COUNTY SHERIFF, LOCAL 502,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Cheryl Yapo, for the Public Employer

Sachs Waldman, P.C., by John R. Runyan, for the Labor Organization

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 multiple dates concluding on September 6, 2005, before Roy L. Roulhac and briefed before Doyle O'Connor, Administrative Law Judges (ALJ) for the Michigan Employment Relations Commission[2]. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before December 27, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Position of the Parties:

The charge in this matter was filed by Charging Party Wayne County Sheriff, Local 502 on October 3, 2002, and was amended multiple times. The Respondent Wayne County's motion to sever the charges was granted on December 21, 2004. The matter proceeded to hearing on the following allegation:

> Since on or about October 9, 2002 the Respondent has discriminated against alternate steward Thomas Browne, including, but not limited to, in his work assignment and by

[2] Pursuant to Commission Rule 423.174, this matter was reassigned to Administrative Law Judge O'Connor following the retirement of Administrative Law Judge Roulhac.

threatening to prosecute and/or discipline him because of his activities as alternate steward on behalf of the Charging Party.

The Union asserts that its member, Thomas Browne, had an uneventful and indeed exemplary work history of approximately 17 years, all of which changed when he accepted a position of alternate steward and later served as chief steward for the Union. The Charging Party asserts that the employer discriminated against Browne and retaliated against him because of his union activity. Much of the complaint involves involuntary transfers from preferred work assignments to less preferred work.

The Employer denies unlawful animus towards Browne, while asserting a contractual entitlement to remove Browne from discretionary assignments. Additionally, the Employer criticizes Browne's overall work performance and asserts that a general deficiency in performance lead to certain of the adverse employment actions taken regarding Browne. The employer additionally asserts that it was inappropriate for the Union to select as an officer an employee who had been selected by the employer for discretionary work assignments within the bargaining unit.

Findings of Fact:

Background

Charging Party represents a bargaining unit of deputy sheriffs who are assigned to several divisions, units, or teams within the Sheriff's Department and within the separate Department of Community Justice. All of the relevant assignments of deputies, regardless of division, unit, or team, are covered by a single collective bargaining agreement between the Union and Wayne County. The Sheriff's Department has a typical hierarchical para-military police command structure.

Thomas Browne began employment in 1985 as a police officer and after 15 years of service was promoted to the rank of Corporal. In 1997, Browne applied for, and was granted, a discretionary position in the Warrant Enforcement Bureau (WEB) of the Department of Community Justice. The founder and head of the WEB unit at the time was Commander Lawrence Meyer, who personally approved Browne's transfer. The second in command of WEB was Executive Lieutenant Christopher Clarke, and the remaining relevant member of the command structure was Lieutenant Scott Gatti[3]. The WEB unit was considered by all to be a desirable assignment within the Sheriff's Department, with assignment to the jail division generally considered to be the least desirable assignment for a deputy sheriff.

[3] Individuals will be referred to in this decision by their rank at the relevant time period, rather than by ranks that they may have later acquired. By the time of his testimony, Meyer had been promoted up the ranks to Undersheriff and then Chief of Field Operations, and retired from that position, but was re-employed with the same title while collecting retirement benefits.

The WEB Bureau had several discrete units.[4] The juvenile apprehension unit was considered a less desirable entry-level position. The adult apprehension unit was considered more desirable and was the unit to which Browne was consistently assigned until 2002. Within the adult unit was a team that carried out an assignment called instant referrals, which involved merely picking up and transporting prisoners. The instant referral team was staffed with less experienced officers and was at least sometimes used as a punishment detail within the WEB. Apprehension work involved the “cat and mouse" search for fugitives and was clearly considered more challenging and desirable police work than the mere transporting of prisoners.

Browne was initially assigned to the Juvenile Apprehension unit at WEB, which was typical for junior officers. Later, he was assigned to the Adult Apprehension team. After a period of time, he was elevated to the position of team leader for an adult apprehension team, upon the recommendation of his immediate supervisor Lieutenant Scott Gatti, based on his superior performance and the confidence that his command officers had in him. Browne was given this position as a Corporal even though it was a position usually reserved for Sergeants. Gatti remained very pleased with Browne's performance as a team leader.

Protected Activity by Browne

On March 15, 2002, Union President Vincent Gregory wrote to Sheriff Robert Ficano and Community Justice Department Director Jerial Herd to formally notify them that Browne had been appointed alternate steward. Ficano and Herd were respectively the head of the Sheriff's Department and the head of the department where Browne was immediately assigned. They were the individuals who were routinely notified of all changes in the Union's internal assignment of officers. No objection was raised by the Sheriff or by the Director of the Community Justice Department to the appointment of Browne as alternate steward.

On July 16, 2002, Browne attempted to file his first grievance as alternate steward, which related to the assignment of overtime work, by presenting it to WEB Commander Meyer. After determining that Browne had in fact personally signed the grievance, Commander Meyer told him, “you’re fucked", and threw the grievance back across the desk at him, telling him that it would be a “cold day in hell" before he would secure relief through the grievance procedure. Commander Meyer told Browne to have the Local President Vincent Gregory call Meyer, asserting that Meyer believed they had an agreement that no grievances would be filed in the WEB unit. Meyer refused to accept, or sign for, the grievance, which would have been the ordinary procedure.

Local President Gregory did contact Commander Meyer and conferred with him in late July or early August 2002. In that telephone conversation, Meyer insisted to Gregory that he wanted no grievances filed in his WEB unit and that the Union would be creating a lot of problems if it pursued the matter. Gregory advised Meyer that regardless of Meyer’s personal views, he was going to have to accept the fact that the Union could, and would, file grievances.

[4] All of the witnesses, with the exception of Commander Meyer, agreed that the Bureau had separate units which, based upon the regular assignments of work, were considered more or less desirable, and that the assignments were distributed in part based on seniority within the Bureau.

Meyer denied telling Browne that he "was fucked" for having filed the grievance, but did not deny telling Browne that it would be a "cold day in hell" before Browne secured relief via the grievance procedure. Meyer claimed that he could not recall the remainder of the conversation with Browne. Meyer admitted that he had a conversation with Gregory, but again claimed that he could not recall its content. Meyer's testimony throughout conflicted with the testimony of all of the other witnesses, and was not credible.

Following the conversation between Gregory and Meyer, Browne re-filed the grievance with Meyer. This time, Meyer signed for the grievance. The parties never resolved the underlying grievance.

On October 17, 2002, Local President Gregory wrote to Meyer to request a special conference regarding alleged harassment of Browne in his capacity as alternate steward, as discussed below. That special conference was held on October 28, 2002, at which Gregory discussed with Commander Meyer and Executive Lieutenant Clarke both Browne's appointment as alternate steward and the Union's allegation of harassment of Browne as a result of that appointment.

Browne was later appointed and subsequently elected to the position of Chief Steward. In October 2003, the Sheriff was notified of, and expressly accepted and acknowledged, Browne's appointment as chief steward. Similar formal notice was sent to the Sheriff in March 2004 regarding Browne's election by the membership as chief steward.[5]

Allegedly Discriminatory Actions

The Union alleges that Browne was subjected to a series of adverse transfers among assignments within the Sheriff's Department, and to several instances of explicit discipline, and that the employer's action was motivated by animus towards Browne arising from his protected activity. According to the Union these actions were designed to force Browne to choose between engaging in protected activity or giving up his desirable assignment in the WEB bureau.

1. The October, 2002 removal as team leader, removal from adult apprehension team, and involuntary reassignment to instant referrals

On October 9, 2002 Thomas Browne was assigned as team leader, on the day shift, of the adult apprehension team, working with Corporal Alvarado and Investigator Michael Milka, of the Taylor Police Department. At the beginning of the shift that day, Sergeant Althea Kinney approached officers Alvarado and Godre to advise them that the regular instant referral team had been assigned to a special matter and, therefore, the adult apprehension team should do a prisoner pickup from Lincoln Park. The prisoner pickup was delayed as the adult apprehension team addressed other assignments. In the early afternoon the team was contacted directly by Sergeant Kinney and instructed to immediately pick up the Lincoln Park prisoner.

The delay in picking up the Lincoln Park prisoner violated the Sheriff Department's agreement with the Department of Corrections that it would pick up instant referrals within 45

[5] Meyer, and his subordinate command officers Ex. Lt. Clarke and Lt. Gatti, testified insistently and implausibly that they had never, even up to the hearing, been properly or officially notified that Browne was a union official.

minutes. An investigation by Lieutenant Gatti, Executive Lieutenant Clarke, and Commander Meyer ensued. A written report by Sergeant Kinney suggested that she had that morning directly informed Alvarado and Browne of the needed pick up of the prisoner in Lincoln Park. Sergeant Kinney quickly recanted the claim, acknowledging that she had instead spoken only with officers Alvarado and Godre.[6]

Commander Meyer concluded that Browne had disobeyed a direct order, despite the fact that Kinney had already recanted her earlier mistaken claim. Even though disobeying a direct order would have been a serious, and in fact dischargeable, offense, no formal discipline was imposed on Browne, which avoided the triggering of protections granted him under the collective bargaining agreement. Instead, Browne was removed as team leader, he was taken off the preferred assignment to adult apprehension, and he was permanently reassigned to the disfavored instant referrals prisoner pickup detail. Officers Alvarado, Godre, and Milka were not disciplined and the Employer continued to assign them to the apprehension teams.

Meyer testified that such a reassignment could not be considered adverse, as there were purportedly no separate divisions within the WEB unit and all of the officers were assigned interchangeably to the various tasks. He testified that he was 'shocked' at the suggestion that there were defined teams within WEB, with some considered more desirable assignments than others. Meyer lacked credibility on this issue, as his testimony on this point was directly contradicted by both of his subordinate command officers, Lt. Gatti and Ex. Lt. Clarke. Additionally, Clarke acknowledged that assigning an officer to the instant referrals team had been used as a disciplinary tool in the past.

Meyer further testified that the reassignment of Browne was warranted as the command structure had lost faith in him and he had become a lackluster officer. Meyer was directly contradicted in this by Browne's immediate supervisor Gatti, who considered Browne an exemplary officer and had no prior concerns with his performance. In fact, Gatti described the alleged involvement by Browne in the October 9, 2002 error as being out of character for Browne.

2. <u>The October 28, 2002 involuntary transfer from WEB to Jail Division I</u>

As discussed above, on October 17, 2002, Local President Gregory wrote to Commander Meyer to request a special conference to discuss the alleged harassment of Browne. That letter was hand-delivered by Chief Steward Anthony Simmons. While delivering the letter, Simmons stopped by to see Lieutenant Gatti and asked him why management was giving Browne such a hard time about the overtime grievance and why Browne had been moved out of the apprehension team. Gatti responded that Browne "knew why" he had been moved. When Simmons persisted in questioning the move, Gatti became agitated and asserted that "the Union does not regulate anything up here . . . we do not have to listen to the Union."

On October 25, 2002, Browne was informed that he was being transferred entirely from the WEB unit and sent to Jail Division 1, a clearly disfavored assignment usually reserved for junior officers. The transfer was to be effective October 28, the same day as the scheduled special

[6] The employer, without explanation, failed to call Kinney as a witness.

conference with the Union to discuss the allegation that Browne was being harassed. At that special conference, Gregory attempted unsuccessfully to question Commander Meyer regarding both the removal of Browne from the apprehension team and his sudden transfer to the jail. Meyer responded by asserting that he did not have to, and would not, give the Union a reason for the transfers.

Meyer testified that he did not order Browne's transfer to the jail, asserting that the undersheriff would have ordered such a transfer. Meyer's testimony was contradicted by that of then-undersheriff Don Watts, who insisted that he had not authorized the October 2002 transfer to the jail, and Watts testified that such a transfer would not have been a proper way of handling a disciplinary issue.[7] Meyer's immediate subordinate, Executive Lieutenant Clarke, likewise testified that it was Meyer who ordered Browne transferred to the jail, further contradicting Meyer's testimony.

On November 11, 2002, Charging Party amended a pending unfair labor practice charge to allege that the Employer was unlawfully discriminating against Browne because of his union activities. On December 20, 2002, Wayne County Circuit Court Judge John A. Murphy granted a temporary injunction pursuant to Section 16(h) of PERA prohibiting the employer from transferring or continuing the transfer of union steward Thomas Browne from the WEB unit.

3. The multiple July-September, 2003 involuntary transfers.

Following Judge Murphy's order, the County told Browne to report back to his former work location at WEB, commencing January 3, 2003. When Browne reported as ordered, he found only empty desks and discovered that the entire adult section workforce been moved out of the location where he had been directed to report for work. Browne was not restored to his former position, and was instead assigned to the WEB unit's juvenile section.

While still assigned to the jail in late 2002, and prior to Judge Murphy's order, Browne had applied for a voluntary transfer to a position in the prosecutor's office. In early 2003, Browne was offered the position in the prosecutor's office and accepted it because he had been placed in the juvenile section notwithstanding Judge Murphy's injunction.

On July 17, 2003, Browne was again involuntarily transferred, this time from the prosecutor's office to a position at the jail.[8] Browne was again involuntarily transferred, on August 26, 2003, from the jail to a position in the Circuit Court. On September 3, 2003 Browne

[7] The credibility of Meyer's testimony regarding the October 2002 transfer to the jail is further undercut by his later testimony about the involuntary July 2003 transfer of Browne to the jail, which occurred while Meyer was undersheriff. Meyer insisted that he had not ordered this transfer, asserting that the undersheriff would not ordinarily make such a decision.

[8] The employer asserts that this transfer was a proper transfer as Browne was under investigation for alleged time keeping irregularities. According to the Charge, the timekeeping dispute also lead to a threat by the Sheriff's Department to prosecute Browne, with that threat specifically asserted to be an unlawful retaliatory act. The County Prosecutor declined to pursue prosecution. The Union did not further pursue relief specific to the threatened prosecution aspect of the Charge, after a separate resolution by the parties.

was again transferred, this time from the Circuit Court back to the prosecutor's office position from which he had been transferred in July.

Meanwhile on August 12, 2003, Judge Murphy entered an order to show cause why the County should not be held in contempt for violating the earlier injunction by again transferring Browne. The contempt hearing was set for September 24, 2003. Two days prior to the contempt hearing, the employer agreed to transfer Browne to the Fugitive Apprehension Service Team (FAST), which is an interagency unit that had taken over some of the functions previously performed by the WEB unit.

4. The July, 2004 involuntary transfer to juvenile section and September, 2004 involuntary transfer to the jail

Browne worked uneventfully in adult apprehension at FAST from September 22, 2003 until July 30, 2004. During that time, he was allowed to attend grievance meetings and monthly Union executive board meetings without interference.

On July 30, 2004, Browne was involuntarily transferred to the juvenile section at WEB, supposedly for "cross-training." None of the other officers with experience similar to Browne were assigned to the juvenile section for cross-training. While at the juvenile section, he was prohibited by Lieutenant Clarke from attending Union meetings, based on Clarke's assertion that he did not officially know that Browne was a union officer. Clarke's testimony on this issue is contradicted by his own admission that he had actually received the October 2003 correspondence between the Sheriff and the Union regarding Browne's status.

On September 20, 2004, Browne was transferred again, this time from a day shift position to the afternoon shift, back at the jail. On September 30, 2004 Judge Murphy entered yet another order requiring the County to return Browne to the FAST unit and prohibiting the County from transferring him again to the juvenile unit at WEB or to the jail. Browne was returned to the adult FAST unit as required by the court order; however, instead of being returned to his former duties, he was permanently assigned to the instant referrals unit. That work had otherwise been assigned to junior officers, or as a punishment detail, with no other officer ever having been permanently assigned to the instant referrals unit.

Discussion and Conclusions of Law:

Charging Party asserts that the Employer discriminated against Browne in retaliation for his protected activity under PERA. The elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employees' protected activities; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Warren Con Schs*, 18 MPER 63 (2005); *City of St Clair Shores*, 17 MPER (2004); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686.

Charging Party has established that Brown engaged in protected activity in accepting a position as alternate steward and then seeking and accepting the position of chief steward. The

employer's entire chain of command was aware of Browne's status as a union official and of the Union's assertion that the employer was retaliating against Browne because of his protected activity. The persistent denial of that knowledge, in the face of overwhelming direct evidence to the contrary, underscores the Employer's, and specifically Meyer's, animosity regarding Browne's status as a union official.

Inferences of animus and discriminatory motive may be drawn from circumstantial evidence, including the pretextual nature of the reasons offered for the alleged discriminatory actions. *Volair Contractors, Inc*, 341 NLRB 673 (2004); *Tubular Corp of America*, 337 NLRB 99 (2001); *Washington Nursing Home, Inc*, 321 NLRB 366, 375 (1966). Unlawful discriminatory actions may consist of formal discipline or, as in this case, of informal but objectively and materially adverse changes in assignments or working conditions, such as assignments to less challenging or more onerous work, as here, or to an undesired shift. *Burlington N & Santa Fe Ry Co v White,* 2006 US LEXIS 4895 (2006).

With respect to the third element, the record is replete with evidence of hostility toward Browne as a result of his protected activities. Meyer's immediate reaction to Browne's first attempt to file a grievance was to threaten Browne with adverse consequences. Meyer then repeatedly and insistently reassigned or transferred Browne out of both the desirable WEB unit and into undesirable work at different locations and on different shifts.[8]

Meyer's animosity toward Browne's protected activity is further exemplified by his repeated circumventing of injunctions issued in aid of MERC's jurisdiction. I find that Meyer testified falsely regarding the reasons for the adverse employment actions affecting Browne, and testified falsely regarding his own decision-making role. I also find that the repeated violations of the Court's orders both indicate the strength of the animus held by Meyer and establish that the Employer knew of and ratified Meyer's unlawful actions. The County was repeatedly placed on notice, and drawn into the controversy, by the need to defend Meyer's conduct in court. The para-military command structure of the employer cannot be presumed to have inadvertently tolerated independent unlawful acts by Meyer, and the County must be found to have ratified Meyer's conduct and his animus.

I find that that the reasons given for the disciplinary removal of Browne from the WEB unit were pretextual. Following the October 9, 2002 incident, Browne was removed for supposedly violating a direct order by Sgt. Kinney, despite the fact that Kinney had recanted her mistaken claim before the discipline was imposed. The officers who did receive, and failed to promptly comply with, Kinney's order were not disciplined. Meyer was not credible in claiming that the October removal from adult apprehension was based, in part, on the fact that Browne had previously received unrelated and minor discipline. Those earlier events predated, and had not deterred, the clearly discretionary elevation of Browne to the team leader position, which

[8] Notably, the employer's post-hearing brief asserts an alternative theory—that Meyer's animosity was as likely based on Browne filing the disputed overtime grievance for his own benefit, rather than based on Browne filing it as a putative union steward. The alternative theory is factually supported by Meyer's testimony that it would have been acceptable to Meyer if Browne had approached him informally regarding the overtime dispute, rather than by filing a formal grievance. Either motivation would violate the Act.

occurred prior to his becoming a union steward. Browne would not have been subjected to the disciplinary reassignment if not for the animosity toward his protected activity.

The October 2002 disciplinary reassignment of Browne was the first of many steps by the employer to implement its refusal to deal with Browne as the Union's chosen steward. I also find that Browne's October 2002 transfer to the jail was clearly retaliatory, and that the explanations given by the Employer to support the action were pretextual. The timing of Browne's adverse transfer to the jail, which occurred on the very day of the special conference regarding harassment of him, was no coincidence. I conclude that Meyer's testimony about who made the decision to order that transfer was not credible and that the lack of credible explanation underscores the implausibility of such a coincidence. I conclude that Browne was transferred to punish him for his earlier protected activity and to make clear the Employer's disdain for the Union's intervention on Browne's behalf.

I find that the pretextual nature of the Employer's explanation for the transfer is further underscored by the post-hearing assertions by the Employer that it had been, and remained, unwilling to have a Union officer assigned to the WEB unit. While the Employer asserts that under the parties collective bargaining agreement, assignments to this plum job are 'discretionary', such discretionary authority cannot be used to discriminate against an employee because he has accepted Union office or otherwise engaged in protected activity. *MERC* v *Reeths-Puffer School District*, 391 Mich 253, 259 (1974); *City of Grand Rapids*, 1984 MERC Lab OP 118. The Employer offered no explanation for why holding union office would substantially interfere with an employee's performance of his or her duties in the WEB unit.

In December 2002, an injunction in aid of MERC's jurisdiction was issued, prohibiting the transfer of Browne.[9] Rather than resolving the dispute, the injunction engendered greater animosity toward Browne. Instead of sending Browne back to his former position at the WEB unit, he was sent in January 2003 to an unstaffed office full of empty desks, and ultimately to the less advantageous juvenile section. Browne was then subjected to several additional adverse transfers during the spring and summer of 2003, until the Court threatened the County with contempt. The County offered no credible explanation for those transfers, and the only reasonable conclusion is that they were part of the continuing pattern of unlawful retaliation and discrimination.

The Employer asserted a contractual right to reassign employees within a division, that is, within the WEB unit. However, the contract prohibits the involuntary transfer of a Union steward from one division to another, i.e., from WEB to the jail. The Employer offers no credible explanation for the inter-divisional transfers, which were admittedly prohibited by the collective bargaining agreement, at least to the extent that they occurred after the Sheriff's October 2003 written acknowledgement of Browne's status as a union officer. The lack of any legitimate basis

[9] The County complains that Browne and the union 'manipulated' the Court system to supersede the County's contractual rights. There is no evidence that the County appealed the several injunctions issued in this matter. The argument itself supports the finding that the County acted out of unlawful and unrestrained animosity based on Browne's protected activity, including based on his effort to seek and secure the protection of the Court, as expressly provided for in PERA. The county's post hearing brief likewise contends that the Union acted improperly in violating a supposed past practice which precluded employees in certain desirable bargaining unit positions from also holding office in the Union. Such a practice would be unlawful, as is the County's ongoing effort to enforce it.

for the post-October 2003 inter-divisional transfers warrants a conclusion that they were motivated by unlawful animus.

In July 2004, Browne was again subjected to an adverse transfer, this time from the FAST unit adult section back to the less-favored juvenile section. The Employer's assertion that this transfer was for cross-training is not credible. No other similarly situated officer was sent for such cross-training. As a result of that transfer, Browne was placed under the supervision of Clarke, who ordered him to stop attending Union officer meetings.

In September 2004, Browne was transferred back to the jail and moved to second shift. The Circuit Court again enjoined the move and expressly ordered his return to FAST unit, and prohibited any future transfer to WEB juvenile section or to the jail. Browne was then permanently assigned to the disfavored instant referrals unit. No legitimate business purpose for these punitive moves was established.

When a charging party alleges that the employer has taken adverse action which was motivated by anti-union animus, it must be demonstrated that protected concerted activity was a motivating or substantial factor in the respondent's decision to take the complained of action. *Charter Twp of Plymouth*, 18 MPER 46 (2005); *Schoolcraft College Ass'n of Office Personnel, MESPA* v *Schoolcraft Cmty College*, 156 Mich App 754, 763(1986). Here, the evidence establishes that Browne was a good officer, and was favorably perceived by his supervisors, who not only placed him in the favored WEB unit, but also promoted him to team leader as a corporal, even though that leadership position was normally reserved for sergeants. The animosity arising from his protected activity resulted in him becoming the least favored employee and in being endlessly shuffled among disfavored assignments. Even after the demotions and reassignments, his immediate supervisors still considered him an efficient and capable employee.

The Employer presented no credible lawful explanation for repeatedly reassigning and transferring Browne to disfavored positions. I conclude that the record clearly establishes that the Employer's motive was to retaliate against Browne for his protected activities and to discourage him from continuing as a union officer, and that the Employer's conduct violated Sections 10(1)(a) and (c) of PERA. In accord with this conclusion and the findings of fact and discussion above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Wayne County, its officers, agents, and representatives shall:

1. Cease and desist from

    a. Interfering with, restraining, or coercing employees, including but not limited to Thomas Browne, in the exercise of rights guaranteed in section 9 of the Act, including the right to pursue grievances, hold union office, seek injunctive relief from the Courts, or seek remedies from the MERC.

b. Discriminating against employees, including but not limited to Thomas Browne, regarding terms or other conditions of employment in order to encourage or discourage membership in a labor organization.
c. Subjecting Thomas Browne to discriminatory adverse employment actions, including involuntary transfers or reassignments of duties, locations, or shifts.

2. Take the following affirmative action necessary to effectuate the purposes of the Act

   a. Make Thomas Browne whole for any loss of pay, including overtime pay if any, that he may have suffered.
   b. Maintain Thomas Browne in his appropriate position and assignment of duties, including in assignments considered discretionary, notwithstanding any current or future appointed or elected Union office he might hold.
   c. Restore Thomas Browne, upon his request, to adult apprehension work with the FAST unit, or a successor unit if any, or in the absence of the existence of such work, to comparable work duties and conditions as those prevailing prior to October of 2002.

3. Posted the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, WAYNE COUNTY, a public employer under the PUBLIC EMPLOYMENT RELATONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Interfere with, restrain, or coerce employees, including but not limited to Thomas Browne, in the exercise of rights guaranteed in section 9 of the Act, including the right to pursue grievances, hold union office, seek injunctive relief from the Courts, or seek remedies from the MERC.
b. Discriminate against employees, including but not limited to Thomas Browne, regarding terms or other conditions of employment in order to encourage or discourage membership in a labor organization.
c. Subject Thomas Browne to discriminatory adverse employment actions, including involuntary transfers or reassignments of duties, locations, or shifts.

WE WILL

a. Make Thomas Browne whole for any loss of pay, including overtime pay if any, that he may have suffered.
b. Maintain Thomas Browne in his appropriate position and assignment of duties, including in assignments considered discretionary, notwithstanding any current or future appointed or elected Union office he might hold.
c. Restore Thomas Browne, upon his request, to adult apprehension work with the FAST unit, or a successor unit if any, or in the absence of the existence of such work, to comparable work duties and conditions as those prevailing prior to October of 2002.

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

WAYNE COUNTY

By:_____

Title:_____

Date:_____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.