STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

Leoni Township
Public Employer - Respondent,

- and - Case No. C08 D-060

Leoni Township Fire Fighters, Local 1766,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Mika, Meyers, Beckett & Jones, P.L.C., by Scott E. Dwyer, Esq., for Respondent

Helveston and Helveston, P.C., by Ronald R. Helveston, Esq., and Michael D. McFerren, Esq., for Charging Party

DECISION AND ORDER

On March 23, 2009, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

LEONI CHARTER TOWNSHIP,
Public Employer-Respondent,

Case No. C08 D-060

-and-

LEONI TOWNSHIP FIRE FIGHTERS, LOCAL 1766,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Mika, Meyers, Beckett & Jones, P.L.C, by Scott E. Dwyer, Esq., for Respondent

Helveston and Helveston, P.C., by Ronald Helveston, Esq., and Michael D. McFerren, Esq., for Charging Party

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, this case was heard at Detroit, Michigan, on August 15, 2008, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on October 20, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Leoni Township Fire Fighters, Local 1766, filed this charge against Leoni Charter Township on April 2, 2008 alleging violations of Sections 10(1)(a) and (e) of PERA. Charging Party represents a bargaining unit of full-time fire fighters employed by Respondent in its fire department. The charge arises from Respondent's plan, announced but not yet fully implemented at the time of the hearing, to merge its police and fire departments into a public safety department with public safety officers trained in both police work and fire fighting. Charging Party asserts that Respondent had a duty to bargain with it over its decision to transfer its bargaining unit work to police/public safety officers outside the unit. It alleges that Respondent violated this duty when, on November 14, 2007, it announced that it would cross-train police officers as fire fighters and use them to perform unit work without giving Charging Party an opportunity to bargain, and when it subsequently refused to bargain over this issue. It also alleges that Respondent unlawfully bypassed

the union and engaged in direct bargaining when, on or about March 11, 2008, it sent letters to members of Charging Party's bargaining unit asking them if they would accept cross-training as police officers. Finally, Charging Party alleges that in March 2008, Respondent unlawfully threatened to lay off unit members and terminate Charging Party's contract if Charging Party's members did not offer public support for a proposed millage to fund the new public safety department.

Findings of Fact:

Background

The events that lead to this charge began in about March 2007. At that time, Respondent's fire department had twelve full-time fire fighters. Full-time fire fighters worked twenty-four hour shifts. Two full-time fire fighters were assigned to each of Respondent's two fire stations on a twenty-four hour per day, seven day per week basis. Respondent assigned overtime to the full-time fire fighters as needed to keep the stations manned.

Respondent also employed about seven part-time fire fighters who worked on call. The part-time fire fighters were not represented by a union. Article XI, Section 1 of the collective bargaining agreement between Respondent and Charging Party addressed the use of part-time fire fighters:

> [Part-time] firefighters not covered by terms of this Agreement may temporarily perform work covered by this Agreement for purposes of instruction training [sic], fill in, or in case of emergency.

In early 2007, all the part-time fire fighters had other full-time jobs. They were paged to respond to emergency scenes only when needed to assist the full-time fire fighters, and responded when they were available to do so. In 2007, part-time fire fighters responded to between one-fifth and one-fourth of the emergency runs handled by the fire department. Part-time fire fighters were also assigned to help man the fire stations, although it was not clear from the record how often this occurred. In early 2007, part-time fire fighters worked parts of shifts to fill in for full-time fire fighters. Part-time fire fighters also worked entire twenty-four shifts at the fire stations, but this was rare.

In early 2007, Respondent also had mutual and automatic aid pacts with the City of Jackson, Summit Township and Blackman Township fire departments. Under the automatic and mutual aid pacts, these communities sent fire fighters and equipment to assist Respondent's full-time fire fighters when there was a structural fire in Leoni Township, and Respondent's fire fighters responded to structural fires in these communities.

In March 2007, Respondent had a separate police department consisting of two full-time and four or five part-time police officers. At that time, Respondent's police department responded to calls only between 6 am and 10 pm, Monday through Friday. Either the state police or the county sheriff's department responded to calls for police services in the Township at other times.

For fiscal year 2007-2008, the Township's total budget was about $2.4 million. Of this, about $1.2 million went to the fire department and about $500,000 to the police department. In early 2007,

one of two millages dedicated to the fire department expired without Respondent realizing it in time to seek a renewal. As a result, Respondent had to transfer $600,000 from its general fund to the fire department to cover a shortage in the fire department's budget, and Respondent's rainy day fund was reduced.

In addition to this budget problem, Respondent was receiving complaints from citizens about lack of police coverage. In early 2007, Respondent representatives began talking about consolidating their police and fire departments into a public safety department with officers trained to do both police work and fire fighting. In February 2007, Respondent also discussed sharing police and fire services with Blackman Township, which already had a public safety department. In early March 2007, Charging Party's president, Chris Huttenlocker, heard about these discussions and made a written demand to bargain over the creation of a Township public safety department and/or a joint public safety department with Blackman Township. Respondent and Charging Party met, and Respondent presented Charging Party with a proposal for a one-year trial service sharing arrangement with Blackman Township. Under this arrangement, Blackman Township's public safety officers would conduct police patrols in the northern area of Leoni Township, and Blackman Township would receive assistance from Leoni Township fire fighters in staffing its fire stations. Charging Party's members met with representatives of Blackman Township's public safety department to discuss the proposed arrangement. After this meeting, on May 9, 2007, Charging Party's members voted to reject any arrangement with Blackman Township and "continue operating the way we currently do." After it was notified of this vote, Respondent stopped discussions with Blackman Township.

During the parties' discussion of the Blackman Township arrangement, Respondent told Charging Party that it wanted to reduce its fire fighter overtime costs and felt that a public safety department with cross-trained officers would help accomplish this. Huttenlocker said that Charging Party was opposed to having a public safety department with cross-trained officers. In July 2007, Charging Party presented Respondent with a three-part proposal designed to reduce overtime costs in the fire department. Part one of the proposal allowed Respondent to hire a public safety director and assign him to fire fighting duties part-time. Part two stated that part-time fire fighters could "work holiday and/or weekend shifts as necessary to cover overtime," although full-time fire fighters would be assigned the overtime if part-time fire fighters were not available. Part three of Charging Party's proposal stated, "Every attempt will be made to ensure 24 hour shifts are covered with 12 hours being covered by bargaining unit members and 12 hours being covered by the paid-on-call fire fighters." Respondent's township board accepted this proposal, and the parties signed a letter of understanding (LOA) incorporating the proposals on August 3, 2007. The LOA included the following paragraph:

> This agreement is non-precedent setting, temporary, and will expire on June 30, 2008, or at any time prior with reasonable notice from the Union. In addition, the Union is not waiving any rights under the collective bargaining agreement.

Respondent Announces its Public Safety Department Plan

In late August, 2007, Respondent hired a new township supervisor, Clifton Ballast, and a new public safety director, Bill Lenaghan. At a regular meeting of Respondent's township board on November 14, 2007, the board approved the hiring of six new full-time police/public safety officers effective December 1, 2007. Ballast announced at the meeting that the hiring of these new officers would allow Respondent to provide twenty-four hour, seven day per week police patrols. He also announced that four of the new public safety officers, who were already certified police officers, would be sent to fire training so that they would be able to do fire fighter work.1 Ballast said that Respondent's plan was to have a combined public safety department with separate police and fire fighting units, but that the police officers would be cross-trained so that they could "step in where a fire fighter may need to be." He said that the cost to the Township of increasing police coverage would be partially offset by potential savings in overtime pay to the fire fighters.2

Charging Party president Huttenlocker attended the November 14 meeting. He testified that this was the first Charging Party had heard of a specific plan to cross-train police officers as fire fighters. On November 15, Huttenlocker sent a letter to Lenaghan demanding to bargain over the cross-training of police officers to perform bargaining unit work. Lenaghan responded in a letter dated November 21:

> I am unaware of any change in your required duties and I am not sure what duties that you feel are being usurped by the creation of the public safety officer position. The paramount factor is the public safety of the citizens of Leoni Township and how we can best provide that factor. Any suggestions you or the members of your union have regarding this will be considered and evaluated.
>
> The newly created position is to supplement the fire division not to replace it. Public safety officers will be cross trained to assist the fire division as do the on call fire fighters and will be held to the same standard as the on call personnel.

In December 2007, the parties met in Ballast's office. Ballast and Lenaghan represented Respondent, and Huttenlocker was accompanied by a representative of the International Association of Fire Fighters. The meeting began with Respondent telling the Union that it had not done anything to help reduce overtime costs, and Charging Party pointing out that public safety director Lenaghan was not working as a fire fighter as the August 2 LOA had contemplated. Ballast told Huttenlocker that this was not what Lenaghan had been hired to do. Ballast testified, without contradiction, that the parties then discussed Respondent's plans for a public safety department. Ballast testified that he explained that Respondent intended to use the public safety officers in the fire department in the same way that it currently used part-time fire fighters. According to Ballast, Charging Party representatives, "said that they wanted to talk about bargaining, but did not want to bargain at that time." According to Ballast, he asked Charging Party representatives what they wanted to bargain

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1 One of the new officers and one of Respondent's existing police officers were already trained in fire fighting.

2 These comments were reported in a newspaper article appearing after the meeting. However, Huttenlocker testified that every comment attributed to Ballast in the article was made by him at the November 14 meeting.

about, and Charging Party's representatives said that it was the amount of overtime. Ballast testified that he told them that he did not believe that this was an appropriate issue for bargaining, and made a reference to the contract's management rights clause.

The parties also discussed a $400,000 millage dedicated to the fire department that was set to expire in June 2008. As noted above, another fire department millage had expired in early 2007 and was not renewed. Charging Party asked Ballast what he was going to do about the millage expiring in June. Ballast said that Respondent's plan was to move toward a public safety department, and that it did not intend to seek renewal of the fire department millage. He said that Respondent intended instead to seek a $1 million millage to fund the combined police-fire public safety department. Huttenlocker told Ballast that Charging Party could not support that millage. However, he told Ballast that he could get members from other union locals to go door to door to help pass a fire department millage. Ballast retorted that Respondent did not need Charging Party's help.

It was not clear from the record whether the parties had any further meetings regarding Respondent's plan for a public safety department plan. However, Ballast testified that in informal discussions with fire fighters, including Huttenlocker, he indicated that Respondent did not plan to force the existing fire fighters to become certified police officers, and that they could remain fire fighters for the rest of their career. Ballast also testified that Respondent's plan was to replace the fire fighters with cross-trained public safety officers by attrition.

Respondent's millage proposal was placed on the ballot for a May 2008 election. Insofar as the record discloses, Charging Party did not actively oppose the millage. However, it did not do anything to assist its passage. The millage did not pass. In February 2008, a full-time fire fighter left Respondent's employment. A second left in May 2008. Respondent did not hire full-time fire fighters to replace them.

Alleged Direct Dealing

At the regular meeting of the township board in March 2008, Huttenlocker told the board that Charging Party was opposed to its public safety department plan. During the meeting, Ballast and Huttenlocker got into an argument about whether there were any individual fire fighters who supported the idea of a public safety department. Board trustee Shirley Johnson made a motion to send out letters to individual fire fighters asking them if they were interested in being cross-trained, and the board adopted her suggestion. Huttenlocker did not raise an objection to the letters at the meeting. However, a day or two later, Huttenlocker stopped Ballast and told him not to send the letters because dealing directly with individual fire fighters would be an unfair labor practice.

On March 11, 2008, Respondent sent each member of Charging Party's unit and each part-time fire fighter a letter which stated that Respondent was accepting applications for public safety officers and also offering the position to current employees of the fire division. The letter stated:

> You will be given the opportunity to attend police officer training at the Township's expense. This is not a requirement of the position but an opportunity to receive further training.

If you are interested in the training please fill in the yes box. Yes _____

If you are not interested in the training please fill in the no box. No _____

Return the completed form to the Director's office by the deadline date 3/31/2008.

None of the members of Charging Party's unit returned their letters.

Alleged Threats

In March 2008, Charging Party sent Respondent a letter requesting that the parties begin negotiations for a successor to their collective bargaining agreement expiring on June 30, 2008. On March 18, 2008, Ballast replied as follows:

> This letter is to serve as notice of the Leoni Township Board of Trustees' desire to begin negotiations for the successor collective bargaining agreement to renegotiate the fire contract.
>
> We are providing you notice pursuant to Article XXV of the collective bargaining agreement which provides: "either party shall give the other party written notice of desire to terminate, modify or amend this agreement." We wish to amend this agreement, however, the Union has stated that it does not support the millage effort put forth by the Township therefore we reserve the right to terminate this contract as of June 30, 2008.

Ballast testified that when he referred to terminating the contract he meant "the need to totally redo the contract," although there was no indication that he explained this to Charging Party.

On March 24, 2008, Huttenlocker invited Ballast and Respondent township clerk Michele Manke to attend a Charging Party membership meeting to talk about the future of the fire department. At that meeting, several members asked Ballast what would happen if the public safety millage was defeated. According to Huttenlocker, Ballast said in response that "if anybody opposed his millage or if the millage would get defeated, he would lay off members of the department." Fire Fighter Ross Emerson testified that Ballast said that "if we don't support the public safety millage, he would lay guys off." Retired fire fighter Mark Demosiuk testified that, "the gist of it was that if the millage didn't pass and if the fire fighters didn't support it, we would be gone, we would be laid off." Demosiuk then asked Ballast if this was "blackmail." According to the three fire fighters, Ballast did not deny this. Huttenlocker and Emerson testified that Ballast said either, "Call it what you want," or "You can take it as what it is." After Ballast made this statement the meeting ended abruptly when the fire fighters had to respond to a call.

Ballast testified that he told Charging Party's members that if the millage failed, the fire department would be closed because Respondent could not afford it. Ballast denied saying that he would lay off the entire fire department if the fire fighters opposed the millage. According to Ballast, he did say that he thought it was short-sighted for the fire fighters to oppose the millage since it paid for their paycheck. On cross-examination, Ballast replied as follows when asked by Charging

Party's counsel if he had told the employees in the police department that Respondent would eliminate the police department if the millage failed.

A. (Ballast): No, I did not.
Q. (Counsel): But you did say that to the Fire Department. Correct?
A. The police department were in favor of the millage [sic], and the fire department was not.

Events after May 2008

Between May and August, three more full-time fire fighters left the department after receiving buyout offers from Respondent. As of the date of the hearing in August 2008, the four new police/public safety officers had completed their fire fighter training and had been assigned fire fighting equipment to carry in their vehicles. However, because the full-time fire fighters would not work with them, Respondent had not assigned them to perform any fire fighting duties. As there were fewer full-time fire fighters and the public safety officers were not doing any fire fighting, the remaining full-time fire fighters had not experienced any reduction in overtime.

Discussion and Conclusions of Law:

Duty to Bargain over the Transfer of Fire Fighting Work

Charging Party maintains that Respondent violated its duty to bargain over the transfer of Charging Party's unit work to nonunit police/public safety officers on November 14, 2007 when it announced its plan to cross-train these officers as a *fait accompli.* Respondent argues that it had no duty to bargain over either the decision to cross-train police officers as fire fighters or the decision to offer Charging Party's members the opportunity to cross-train as police officers because these decisions were made as part of a legitimate reorganization.

In support of its argument that it had an inherent managerial right to assign public safety officers to perform fire fighting duties, Respondent cites *United Teachers of Flint v Flint School District*, 158 Mich App 138 (1986). *Flint* relied on an earlier Court decision, *Local 128, AFSCME v Ishpeming*, 155 Mich 501 (1986). In *Ishpeming*, the Court of Appeals reversed the Commission's holding that an employer had a duty to bargain with a union representing supervisory employees over its decision to eliminate a supervisory position and redistribute its work among existing positions outside the supervisory unit. The Court held that the employer had both a contractual and statutory right to reorganize without bargaining. It held that this right encompassed both the decision to eliminate the position and the decision as to which positions would receive its duties. In *Flint*, three positions, community school director I, II and III, were excluded from the teachers' bargaining unit as supervisors. One position, community school director I, had performed some teaching duties. The union representing teachers filed a charge alleging that the employer had a duty to bargain over its decision to convert the community schools director II and III positions into community school director I's with teaching responsibilities. The Commission dismissed the charge on the basis that the teaching work transferred to the new community school director I positions had not been exclusively performed by unit members. The Court upheld the Commission's dismissal of the charge, but relied on *Ishpeming* for the proposition that a transfer of work made pursuant to a legitimate reorganization was part of the employer's inherent managerial prerogative.

In a subsequent case, *Southfield POA v Southfield,* 433 Mich 168 (1989), the Supreme Court upheld the Commission's decision that a charge alleging an unlawful unilateral transfer of work from a police unit to lower-paid positions in another unit should be dismissed because the work involved had not previously been performed exclusively by members of the police unit. The Supreme Court in *Southfield* cited *Lansing Fire Fighters Union v Lansing*, 133 Mich App 56 (1984) for the proposition that a public employer has a duty to bargain over a decision to remove bargaining unit work from unit employees and hire employees outside the unit to do the work, but distinguished *Lansing* on the basis that the work in *Southfield* had been performed interchangeably by members of Charging Party's unit and members of the other unit. The *Southfield* Court cited both *Ishpeming* and *Flint* but did not discuss them. Although the transfers in *Southfield* had clearly been made for reasons of efficiency, the Court did not consider whether the employer in that case had the right to transfer the work as part of a legitimate reorganization.

In *City of Detroit (Water & Sewerage Dept),* 1990 MERC Lab Op 34, the Commission attempted to reconcile the *Lansing, Southfield*, *Ishpeming,* and *Flint* cases. After discussing these cases in detail, the Commission, at 40, stated that it did not believe that the legislature intended that a public employer have no obligation to bargain over a decision to remove work from a bargaining unit for reasons of efficiency or cost. However, it held that several elements were essential before a duty to bargain over a transfer of work could be imposed on a public employer. It held, as the Court had in *Southfield,* that it must be established that the transferred work had been exclusively performed by members of charging party's unit. The Commission held, however, that the record must also show that transfer would have a significant adverse impact on unit employees. The Commission said that the evidence must show that unit employees would be laid off or terminated, not recalled, demoted, or would suffer a significant drop in overtime as a result of the transfer. It held that the mere loss of positions in the unit, or speculation regarding the loss of promotional opportunities, would not give rise to a duty to bargain. Finally, the Commission held that the transfer dispute must be amenable to resolution through the collective bargaining process. The Commission said that this meant that the decision must be based, at least in part, on either labor costs or general enterprise costs which could be affected by the bargaining process.

In *City of Iron Mountain,* 18 MPER 51 (2005) (no exceptions), a Commission administrative law judge used the test set out in *City of Detroit (Water & Sewerage)* to find that an employer had a duty to bargain with its fire fighters' bargaining representative over a decision to cross train its police officers to serve as fire fighters. The administrative law judge concluded that the fact that the employer had mutual aid agreements with the fire departments in neighboring cities did not mean that the work the fire fighters performed was not exclusive bargaining unit work. He noted that the fire fighters from the other municipalities who responded to fires in Iron Mountain under the mutual aid agreements were not the employer's employees and had no claim to the work as their own. In *Iron Mountain,* the transfer of fire fighting duties to police officers had a clear impact on the unit because four fire fighters were laid off as a result. The administrative law judge also concluded that the decision was amenable to collective bargaining because the decision was based on overall labor costs and the employer's belief that it could operate effectively with fewer employees.

In the instant case, Respondent not only has mutual and automatic aid pacts, it employs both full-time fire fighters represented by Charging Party and part-time on call fire fighters who are not

part of its unit. Respondent argues that even if a *City of Detroit (Water & Sewerage)* analysis is applied to these facts, it had no duty to bargain over the assignment of fire fighting duties to nonunit public safety officers because these duties were not exclusive to Charging Party's unit. In its brief, Charging Party attempts to distinguish the work performed by the part-time fire fighters from that of the full-time employees. It is true that the parties negotiated a contract provision, Article XI, which appears to restrict the use of part-time fire fighters. In August 2007, the parties entered into a LOA that was apparently intended to ease these restrictions. I agree with Charging Party that a union that has strictly policed the performance of its work by nonunit employees should not be found to have given up all claims to that work by agreeing to permit nonunit employees to do the work under restricted circumstances. However, in this case Article XI grants Respondent a broad right to use part-time fire fighters to fill in for full-time fire fighters. Moreover, according to the testimony of Charging Party president Huttenlocker, part-time fire fighters both responded to fire calls and manned Respondent's fire stations even before the parties entered into their August 2007 LOA. Although the part-time fire fighters spent less time in the fire stations and responded to fewer calls, there does not appear to have been a bright line drawn between their work and that of the full-time fire fighters. I find that the record does not establish that any of the duties Respondent proposed to transfer to its police/public safety officers had been exclusively performed by Charging Party's unit members. Therefore, under City *of Detroit (Water & Sewerage)* Respondent had no duty to bargain over the transfer of this work. 3

Direct Bargaining and Undermining the Bargaining Agent

An employer violates its duty to bargain in good faith with the exclusive representative of its employees when it engages in unlawful direct dealing with these employees on mandatory topics of bargaining. Charging Party asserts that in its March 11, 2008 letter to its fire fighters, Respondent unlawfully surveyed Charging Party's members on a mandatory bargaining topic, cross training for fire fighters, with the intent of undercutting Charging Party's stated position on this topic. It relies in part on *Grand Rapids Public Schools*, 1986 MERC Lab Op 560. In that case, a majority of two Commission members held that an employer engaged in unlawful direct bargaining when it disseminated a survey to teachers which included questions on mandatory subjects of bargaining without first giving the teachers' bargaining representative the opportunity to see the questions. 4 In

3 It could also be argued that a move from separate fire and police departments to a public safety department with employees cross trained in both functions represents such a fundamental change in a public employer's operations that its duty to bargain should be confined to bargaining over the effects of this decision on employees. However, Respondent did not make this argument.

4 The Commission cited *Obie Pacific*, 196 NLRB 458, 459 (1972). In that case, the NLRB found that an employer experiencing financial problems engaged in unlawful direct dealing when it polled its employees regarding their sentiments on an existing contract clause before approaching the union and asking to eliminate it. The union had rejected the efforts of the employer's predecessor to remove the clause from the contract. The NLRB held that while an employer may communicate to employees the reasons for its actions and even for its bargaining objectives, it may not seek to determine for itself the degree of support, or lack thereof, which exists for the stated position of the employees' bargaining agent on a mandatory subject of bargaining.

separate opinions, the two commissioners gave different reasons for their decision. The Court of Appeals, in an unpublished opinion, adopted Member Tanzman's reasoning in his concurring opinion. He concluded that each case involving a survey should be examined on its facts to determine whether either the purpose or the effect of the survey was to engage in direct bargaining or undermine the union's authority as bargaining representative. He found that the fact that the survey was distributed immediately before negotiations, and the fact that Charging Party knew that Respondent possessed information that might be used to undercut its position(s) at the bargaining table, undermined its authority as representative even though the employer did not actually use the results of the survey at the bargaining table. In *Holland Pub Schs,* 1989 MERC Lab Op 346, the Commission applied member Tanzman's "purpose or effect" test to an employer's distribution of a survey asking its teachers their views on smoking policies. It held, at 357-358, that the survey did not have the effect of undermining the union's authority when the parties were not in the middle of or approaching contract negotiations and the union had never demanded to bargain over smoking policy.

Charging Party argues that Respondent's March 11, 2008 letter meets the "purpose or effect" test of *Grand Rapids.* According to Charging Party, like the survey in *Grand Rapids,* the March 11 letter was sent directly to Charging Party's members. Like that survey, it was sent without Charging Party's permission, and asked Charging Party's members for their views on a mandatory subject of bargaining. It argues that the evidence shows in this case that Respondent's intent was to undercut Charging Party's position opposing cross training for its members by producing evidence that at least some of its members wanted the training.

In its brief, Charging Party refers repeatedly to the cross training of its members in police work as a mandatory subject of bargaining. Any matter that has a significant impact on wages, hours, or terms and conditions of employment or settles an aspect of the employment relationship is a mandatory subject of bargaining. *Local 1467, IAFF v City of Portage,* 134 Mich App 466, 473 (1984). It is well established that an employer has a duty to bargain over substantial changes in the job duties of employees. *City of Hamtramck,* 1985 MERC Lab Op 1123; *Twp of Meridian,* 1986 MERC Lab Op 915; *Oakland Univ,* 1994 MERC Lab Op 540. However, as Respondent points out, the cross training Respondent offered the fire fighters in its March 11, 2008 letter was purely voluntary. Insofar as this record discloses, Respondent never proposed to require its current fire fighters to be cross trained as police officers or to require its fire fighters to do police work as a condition of their continued employment. A program offered to employees on a voluntarily basis is not a mandatory subject of bargaining if it does not alter terms or conditions of employment. For example, in *City of Grand Rapids,* 1994 MERC Lab Op 1159, the Commission held that the employer did not have an obligation to bargain over a voluntary physical fitness test for its fire

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In *Permanente Medical Group, Inc,* 332 NLRB 1143, 1144 (2000), the NLRB summarized the criteria that it finds must be met before an employer is found to have engaged in unlawful direct dealing over a mandatory subject of bargaining as follows: (1) the employer was communicating directly with union-represented employees; (2) the communication was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; (3) such communication was made without notice to, or to the exclusion of, the union. See *Southern California Gas Co,* 316 NLRB 979, 982 (1995), and *City of Detroit (Detroit Housing Commission),* 2002 MERC Lab Op 368, 376 (no exceptions).

fighters, and did not engage in direct bargaining by offer this test to unit members, even though the union had objected to either voluntary or mandatory testing. In *Grand Haven Pub Schs,* 19 MPER 82 (2006), the union demanded to bargain over the creation of a voluntary program pursuant to which teachers created web pages on the school district's website, expressing concern that teachers might feel pressured to participate even though the program was voluntary. The Commission held, however, that the school district was not required to bargain over the voluntary program because the implementation of the program did not alter wages, hours, or terms and conditions of employment.

I conclude that Respondent's March 11, 2008 letter did not constitute unlawful direct dealing. The March 11 letter merely offered Charging Party's members the opportunity to be trained as police officers and work as public safety officers. It was clear that this training was voluntary. Since the cross training was voluntary and did not alter the fire fighters' terms or conditions of employment, Respondent had no obligation to bargain with Charging Party over this cross training and, therefore, no duty to deal exclusively with it on this subject.

Alleged Threats

Charging Party alleges that Ballast's March 18, 2008 response to its request to commence negotiations on a new contract constituted an unlawful threat to "terminate" the contract because "Charging Party has stated it does not support the millage effort." Ballast testified that by "terminate" he meant, "redo" the contract, while Respondent in its brief argues that Ballast was simply reserving the right to terminate the agreement if the millage failed and fire department closed. In my view, Ballast's meaning cannot be discerned from the words he used in his March 18, 2008. I find that this letter did not constitute an unlawful threat in violation of Section 10(1) (a) of PERA because the letter is simply incomprehensible and Ballast never provided Charging Party with an explanation of its meaning.

Charging Party also asserts that at the March 24, 2008 union meeting, Ballast threatened to lay off its entire bargaining if the fire fighters did not support the public safety millage. According to Charging Party, the fire fighters engaged in activity protected by Section 9 of PERA when they concertedly refused to support that millage, and Ballast threatened to retaliate against them for their lack of support by closing down the fire department. Therefore, it argues, Ballast's threat plainly interfered with, restrained or coerced the fire fighters in the exercise of their rights under Section 9 in violation of Section 10(1) (a) of the Act.

Three fire fighters testified as to what Ballast said at that meeting. All three had slightly different versions of his statement, but all three testified that Ballast mentioned the fire fighters' refusal to support the millage and Respondent's plan to close the fire department in the same sentence. Ballast testified that he merely told the fire fighters that if the millage failed Respondent would have to close down the fire department. I credit the fire fighters' testimony. There is ample evidence in this record that Ballast was angry at the fire fighters for failing to come out publicly in favor of the millage. The fire department's budget constituted almost half of Respondent's total budget. It may or may nothave been true that Respondent's only alternative if the millage failed was to close the fire department. However, I find that when speaking at the March 24, 2008 union meeting, Ballast specifically linked the threat to close the fire department to the fire fighters'

concerted refusal to publicly support the millage. I conclude, therefore, that Ballast's statement at that meeting violated Section 10(1) (a) of PERA.

In sum, I find that Ballast unlawfully threatened Charging Party's members at the union meeting held on March 24, 2008, but that the statements made by Ballast in his March 18, 2008 letter to Charging Party did not violate Section 10(1) (a). I also find that that Respondent did not have a duty to bargain with Charging Party under Section 15 of PERA over the assignment/transfer of fire fighter duties to its public safety officers in this case because the duties in question had not been performed exclusively by members of Charging Party's unit, and that Respondent did not violate its duty to bargain by offering Charging Party's members voluntary training as police officers on March 11, 2008. In accord with these findings of fact and conclusions of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Leoni Charter Township, its officers and agents, are hereby ordered to:

1. Cease and desist from threatening to close its fire department because of its employees' exercise of their right under Section 9 of PERA to concertedly refuse to support a millage or engaging in any other conduct that interferes with, restrains or coerces employees in the exercise of their rights under that Section.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____