STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (POLICE DEPARTMENT),
Public Employer-Respondent,

Case Nos. C02 G-173 & C04 E-120

-and-

DETROIT POLICE COMMAND OFFICERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Valerie A. Colbert-Osamuede, Esq., Chief Assistant Corporation Counsel, for the Respondent

Sachs Waldman, P.C., by Mary Ellen Gurewitz, Esq., & Marshall J. Widick, Esq., for the Charging Party

DECISION AND ORDER

On July 8, 2009, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent, City of Detroit (Police Department), violated sections 10(1)(a), (c), and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a), (c), and (e) by effectively attempting to eliminate in their entirety two bargaining units comprised, respectively, of police commanders and police inspectors. Both units were represented by the Charging Party, Detroit Police Command Officers Association (Union). In Case No. C04 E-120, the ALJ determined that by attempting to eliminate the two bargaining units and refusing to bargain with Charging Party regarding both units, the City violated Section 10(1)(e) of PERA. The ALJ determined that, by its conduct, the City also violated Section 10(1)(a) of PERA by interfering with the exercise by commanders and inspectors of their Section 9 rights. Lastly, the ALJ concluded that the City's effort to eliminate all members of both bargaining units was intended to and did discriminate against Union members and, particularly, against Union officers, in violation of Section 10(1)(c) of PERA. The ALJ found, however, that Case No. C02 G-173, which involved the imposition on bargaining unit members of the obligation to take and pass a newly imposed examination, was moot, where the City never acted upon the test's results.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. After requesting and receiving an extension of time[1], Respondent filed exceptions to the Decision and Recommended Order of the Administrative Law Judge on August 31, 2009, with a statement of service asserting that the exceptions were served on Charging Party on that same day.[2] Accordingly, Charging Party's response to the exceptions was due on September 14, 2009. Charging Party submitted its response on September 28, 2009. Since the response to the exceptions is untimely, it will not be considered by the Commission.

Respondent excepts to various findings of the ALJ, including his determination that the City took unilateral action when it reorganized the workforce, that it did so in an effort to circumvent the Union and discriminate against Union members and officers, and that its restructuring was not legitimate. Respondent further takes exception to the ALJ's conclusion that the inspector and commander ranks were targeted because of anti-union animus and that little information was provided to the Union regarding the restructuring. Finally, the City takes exception to the ALJ's finding that its action was designed to avoid its duty to bargain.

We have reviewed Respondent's exceptions and conclude that they are without merit.

Factual Summary:

We adopt the ALJ's findings of fact and repeat them only as necessary here.

Charging Party is the exclusive bargaining agent for two units - one of police commanders and one of police inspectors. Each unit had a separate collective bargaining agreement with Respondent effective July 1, 1996 through June 30, 2004. On July 29, 2002, the initial charge was filed by Charging Party in Case No. C02 G-173,[3] protesting Respondent's adoption of new selection procedures, including mandatory testing for the ranks of inspector and commander. Charging Party demanded bargaining over the new procedures. While Respondent rejected the demand, the results of the testing were not used for any purpose.

Prior to the expiration of the 1996-2004 agreements, Charging Party made several requests to begin bargaining successor agreements. By letter of March 12, 2004, Respondent rejected Charging Party's request to bargain regarding the commanders' unit, claiming that the commanders' unit was "not covered by PERA." Respondent initially indicated a willingness to bargain regarding the inspectors' unit; however, the latter negotiations were delayed for several months and terminated without an agreement in August of 2005.

In August 2005, Respondent announced a major reorganization of its police department, including the consolidation of twelve existing police precincts into six new districts. Charging

[1] Charging Party objected to Respondent's request for an extension of time. Since it was Respondent's first request for an extension of time to file its exceptions and the request was filed timely, the extension was granted pursuant to Rule 176(8) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.176(8).

[2] Respondent filed "corrected exceptions" on September 14, 2009. Inasmuch as the "corrected" exceptions were untimely, they will not be considered by the Commission.

[3] This case, along with MERC Case No. C04 E-120, was adjourned numerous times by the parties and was placed on hold for a lengthy period of time pending the outcome of collateral litigation in a related unit clarification case. See, *City of Detroit (Police Dep't)*, 20 MPER 64 (2007).

Party demanded bargaining over both the reorganization and the effects of the reorganization and requested information relevant to those issues. When the parties met on August 31, 2005, little information was provided, as Respondent claimed that it had not decided on many details of the reorganization. Respondent did disclose that there would be a reduction in the number of inspectors and commanders. Respondent did not disclose that it had already reached a decision to eliminate the rank of inspector on the following day.

On the very next day of September 1, 2005, Respondent notified Charging Party that fourteen named inspectors and four named commanders, including Charging Party's president, were being removed from their positions. Seven of Charging Party's ten officers were demoted, and an eighth officer was promoted out of the unit. The combined demotions and promotions entirely eliminated the rank of inspector.

Discussion and Conclusions of Law:

Although the ALJ found that Respondent acted improperly when it announced a new testing requirement and refused to bargain over the issue, he also found that Respondent ultimately abandoned its threatened course of action. In the absence of a timely exception to the ALJ's finding, we dismiss as moot the allegation protesting the testing requirement and adopt the ALJ's recommendation on this issue.

There is no dispute regarding Respondent's refusal to bargain with Charging Party regarding the commanders' unit. Respondent's argument that the commanders were "executives" lacking the protection of PERA was rejected some time ago by this Commission in *City of Detroit Police Dep't*, 1996 MERC Lab Op 84. That argument was rejected again in the more recent unit clarification decision, *City of Detroit (Police Dep't)*, 20 MPER 64 (2007). Respondent's exception, based upon the argument that it had a legitimate belief that a contract covering the commanders' unit was "permissive," is meritless.

Exception is also taken by Respondent to the ALJ's findings that it violated its duty to bargain with Charging Party by attempting to eliminate the entirety of both the inspectors' and the commanders' bargaining units, in violation of §10(1)(e). Respondent excepts further to the finding that its effort to eliminate all of the members of both bargaining units was intended to and did discriminate against Charging Party's members and in particular Charging Party's officers, in violation of §10(1)(c). Combined with Respondent's refusal to bargain regarding the commanders' unit, the elimination of the rank of inspector left Respondent with no obligation to bargain with Charging Party. The unwarranted refusal to bargain with the commanders' unit, combined with the elimination of the inspectors' unit and the removal of Charging Party's president and officers is compelling evidence in support of the ALJ's findings. We hold that by the afore-mentioned actions, Respondent violated §10(1)(c) and (e) of PERA.

Respondent argues that the city charter authorizes the removal of command officers at the discretion of the police chief. It supports its argument with citations to court decisions that predate the enactment of PERA. As noted by the ALJ, "[i]t is axiomatic that authority granted by a Home Rule City Charter is superseded by the duty to bargain imposed by PERA." *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44 (1974). Moreover, even where an employer has

clear and broad discretion regarding particular employment related decision-making, that otherwise unfettered discretion cannot be used for unlawfully discriminatory purposes, as occurred here. See, *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974); *Wayne Co*, 21 MPER 58 (2008); *City of Grand Rapids*, 1984 MERC Lab Op 118.

We have carefully considered the remaining issues raised by Respondent and find that they would not change the results in this case. Accordingly, we affirm the ALJ's Decision and adopt the Recommended 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

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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:

CITY OF DETROIT (POLICE DEPARTMENT),
Public Employer-Respondent,

-and- Case Nos. C02 G-173,
C04 E-120

DETROIT POLICE COMMAND OFFICERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Mary Ellen Gurewitz & Marshall J. Widick, for the Charging Party

Valerie A. Colbert-Osamuede, for the Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard before Roy L. Roulhac at Detroit, Michigan on multiple dates concluding on March 30, 2006. Following the retirement of Administrative Law Judge Roulhac, and pursuant to Commission Rule 423.174, on August 23, 2006, this matter was reassigned for decision to Doyle O'Connor, of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before September 25, 2006[4], I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges and Procedural History:

The Detroit Police Command Officers Association (the Union) has since 1996 represented two separate bargaining units comprised, respectively, of police commanders and police inspectors. On July 29, 2002, the initial Charge was filed by the Union in this

[4] Despite the granting of multiple extensions of time, the City's brief was untimely filed more than three months after the Union's brief; however, it was nonetheless considered, as the City's delay in briefing did not materially affect the handling of this matter, which had been otherwise placed on hold pending the outcome of collateral litigation in the related unit clarification case, *City of Detroit (Police Department)*, 20 MPER 64 (2007).

matter, in Case No. C02 G-173, asserting that the City of Detroit (the Employer) had violated Sections 10 (1)(a) & (e) of PERA in April and July of 2002 by:

1. Unilaterally altering conditions of employment by announcing that all members of the bargaining unit would have to take and pass an exam to retain their current positions;
2. Refusing to negotiate with the Union regarding criteria for promotion from the position of inspector to the position of commander;
3. Unilaterally altering conditions of employment by implementing changes in the criteria for assignments of bargaining unit members within the department;
4. Refusing to furnish requested information regarding the department's reorganization plan and the selection and promotion criteria issues, including related to the unilaterally implemented examination.

On January 31, 2003, Judge Roulhac denied the Employer's motion to dismiss the charge in Case No. C02 G-173. The matter was scheduled for hearing and adjourned six times until it was adjourned without date in March of 2004.[5]

On May 4, 2004, the second charge was filed by the Union, in Case No. C04 E-120, asserting that the Employer had violated Sections 10 (1)(a) & (e) of PERA, beginning in March 2004, by refusing to negotiate a successor collective bargaining agreement regarding the bargaining unit of commanders. That matter was assigned to Administrative Law Judge David Peltz and set for hearing on October 12, 2004.

An amended charge was filed in Case No. C04 E-120 on July 14, 2004, adding allegations that the Employer had violated Sections 10 (1)(a) & (e) of PERA, beginning in March 2004, by refusing to negotiate a successor collective bargaining agreement regarding the bargaining unit of inspectors. It was additionally alleged that, beginning in July 2004, the Employer had violated Sections 10 (1)(a) & (e) of PERA by beginning to remove, demote, or force the retirement of commanders.

The newly amended charge in Case No. C04 E-120 was set for hearing on November 9, 2004; however, on November 8, 2004, the Union filed via fax a motion to consolidate the new charge with the dormant 2002 charge, adjourn the November 9 hearing, and assign the consolidated matters to Judge Roulhac. On August 18, 2005, the Union renewed its request that the matter be held open, but without a scheduled hearing date.

On September 6, 2005, another amendment to the charge in Case No. C04 E-120 was filed, asserting that beginning in September 2005, the Employer had violated Sections 10 (1)(a), (c) & (e) of PERA by removing, demoting, or forcing the retirements of commanders and inspectors, including seven of the ten members of the Union's executive board. The now consolidated matters were then set for hearing on March 29-

[5] The matter was scheduled for hearing, but adjourned by the parties, on December 12, 2002; March 20, 2003; August 20, 2003; October 31, 2003; February 26, 2004; and March 24, 2004.

30, 2006. On March 27, 2006, a final amendment to the charge was filed, raising two new claims. First, that the Employer, beginning in September 2005, had violated Sections 10 (1)(a), (c) & (e) of PERA by seeking to abolish the ranks of commander and inspector and replace them with the non-union rank of captain. The final claim was that beginning at some unspecified point in 2005, the Employer had violated Sections 10 (1)(a), (c) & (e), by refusing to process grievances submitted by the Union.[6]

The matter was tried before Judge Roulhac on March 29-30, 2006. A timely post-hearing brief was filed by the Union in June 2006. The undersigned Administrative Law Judge was assigned to the matter post-hearing, on August 23, 2006, following the retirement of Judge Roulhac. The City sought and was granted multiple extensions of time and filed its untimely brief on September 25, 2006.

On March 30, 2006, following the conclusion of the ULP hearing, a unit clarification petition was filed by the City seeking a determination that the police commanders were 'executive' employees and that, therefore, the City had no duty to bargain over their conditions of employment. The claim, if successful, would have likely mooted most of the Union's claims in the charge cases, at least as to the commander classification. Decision-making on the consolidated charge cases was held in abeyance pending the outcome of the unit clarification matter. That matter was heard by Administrative Law Judge Julia Stern in September and October 2006. The Commission's decision, finding that the commanders were not executives and therefore were subject to the bargaining obligation, was issued on August 7, 2007.

On August 23, 2007, the undersigned wrote to the parties, directing that the opposing counsel confer and advise whether the Commission's decision on the unit clarification case had altered the parties' respective positions in the matter. The Union filed a timely response, which noted that they had not conferred with the Respondent's counsel, and which suggested that aspects of the charge had been rendered moot by the passage of time or by the intervening Commission decision, but still asserting that every aspect of the multiple issues raised in the consolidated charges remained in dispute, notwithstanding the Commission's August 7, 2007 unit clarification decision. More specifically, the Union's response acknowledged that the disputes related to testing may have been mooted by the passage of time. Additionally, the Union acknowledged that the dispute over the City's withdrawal of recognition with regard to the commanders' unit had been resolved by the Commission decision in the unit clarification case. The Union's response also indicated that an appeal of the Commission's decision had been filed by the City. Despite being given an extension of time, the City filed no response to the undersigned's request, nor to the Union's submission.

On August 29, 2007, an appeal of the Commission's decision in the unit clarification case was filed by the City with the Michigan Court of Appeals, Case no.

[6] The allegations in the final amended Charge at paragraph 3(6) regarding the failure to process grievances was not pursued by the Union and will not be further addressed herein.

280390. Decision-making on the consolidated charge cases was held in abeyance pending the outcome of that appeal. That appeal was dismissed as untimely filed.[7]

An injunction maintaining the *status quo ante* was issued by Judge Isidore Torres of the Wayne County Circuit Court on August 17, 2004, and apparently remains in effect. The parties returned to contract negotiations regarding both units and are presently engaged in proceedings before an Act 312 arbitrator, having been unsuccessful at negotiating a successor collective bargaining agreement.

Findings of Fact:

The Union was certified, following a contested hearing and election, as the exclusive bargaining agent for the two separate units of commanders and inspectors in 1996. The parties negotiated separate, but nearly identical, collective bargaining agreements covering each unit, effective July 1, 1996 through June 30, 2004.

The first significant dispute arose in April of 2002, when the newly-appointed, and now former, police chief Jerry Oliver unilaterally announced a new selection process pursuant to which all inspectors and commanders would have to reapply for their current position or any other command position. In May of 2002, Oliver announced, again unilaterally, that an exam would be given which was open to all unit members who wished to seek promotion to deputy chief. The announcement included the assertion that a list of 21 individuals would be derived from the testing process and that those individuals would then be further considered for promotion. When few, if any, command officers indicated an interest in taking the exam, Oliver announced, unilaterally, that the exam was mandatory and that any command officer who failed to take it would lose their current position.

The Union objected to the mandatory exam, demanded bargaining over its imposition, and demanded information regarding the exam and how it would be scored and used. The Employer refused the Union's demands and the initial unfair labor practice charge was filed. At hearing, then-chief Ella Bully-Cummings, who took over from Oliver in November of 2003, testified without contradiction that the test results were never used for any purpose.

Beginning in August 2003, the Union sought bargaining over successor agreements in anticipation of the June 2004 expiration of the two contracts. In September of 2003, Roger Cheek, city director of labor relations, responded that the City did not want to bargain at that time because of multiple other units with which it was bargaining. Additional bargaining requests were made by the Union later in 2003 and in early 2004.

By letter of March 12, 2004, Cheek emphatically and unequivocally rejected the Union's demand to bargain regarding the commanders unit, insisting that the City would not enter into a new collective bargaining agreement with the Union covering the

[7] The undersigned was not timely notified of the dismissal of the Court of Appeals action and determined independently in July of 2008 that the appeal was no longer pending.

commanders. Despite MERC's earlier unappealed certification of the commanders unit, Cheek insisted that the commanders unit was "not covered by PERA". The City did not then file a unit clarification petition to properly test its theory that the commanders were not covered by PERA, and instead resorted to unilateral action. The City did indicate a willingness to bargain with the Union regarding the inspectors unit; however, those negotiations were delayed for many months and terminated without an agreement in August of 2005.

In July of 2004, following the expiration of the contracts, the City advised commander Charles Barbieri that he was being 'removed from rank' and that he had the choice of either being demoted to lieutenant or taking his retirement as a commander. Barbieri retired. The Union amended the unfair labor practice charge and sought and secured injunctive relief. An *ex parte* temporary restraining order prohibited the City from "eliminating, demoting, terminating, or otherwise removing" any commander, or changing the existing *status quo* between the parties, pending further order of the Court. A stipulated order was later entered in the Wayne County Circuit Court which directed that the City, until further order of the Court following resolution of the unfair labor practice charge in case C04 E-120, continue to honor the expired contract; refrain from implementing any unilateral changes in conditions of employment; and refrain from withdrawing recognition of the Union as exclusive bargaining agent for the commanders unit. Unlike the temporary restraining order, the stipulated order of August 17, 2004, did not prohibit the City from removing individual commanders.

In March of 2005, the City presented commander Alfred Gomez-Mesquita with the same choice it had given to Barbieri—accept involuntary retirement or be demoted to lieutenant. Gomez-Mesquita refused to retire and was demoted. The parties arbitrated the dispute over the demotion of Gomez-Mesquita, resulting in a December 16, 2005 award by George Roumell. In relevant part, the arbitrator held that the collective bargaining agreement covering commanders, unlike other City collective bargaining agreements including that of the Detroit Police Officers Association, did not require traditional 'just cause' to remove a commander, where the department was dissatisfied with the commander's perceived performance. Rather, the arbitrator held that the City's removal decision making was subject to an 'arbitrary and capricious' standard. Under that standard of review, Roumell found that the demotion of Gomez-Mesquita did not violate the collective bargaining agreement. Although the Union addresses the Gomez-Mesquita dispute in its post-hearing brief, the Union did not amend its charge to include any allegations regarding the removal or demotion of Gomez-Mesquita, and for that reason the dispute will not be further addressed herein.[8]

In August and September of 2005, the City's resort to unilateral action came fully into force. The City announced that a major reorganization of the police department was

[8] The Union's July 2004 amendment of the charge only addressed the demotion of Barbieri and logically could not have covered the circumstances surrounding the Gomez-Mesquita demotion which occurred eight months later in March 2005. Similarly, the Union's next amendment of the charge, in September 2005, could not have covered the circumstances surrounding the Gomez-Mesquita demotion, where by its terms that amendment only addressed Employer conduct "beginning on September 1, 2005".

underway, driven in significant part by a budget crisis. On August 29, 2005 the chief held a press conference and announced the consolidation of twelve existing precincts into six newly formulated districts. The public announcement did not detail how, if at all, the ranks of inspector and commander would be affected by the reorganization. On August 30, 2005, the Union demanded bargaining both over the restructuring plan itself and over the effects of that restructuring, and requested information relevant to those issues. The parties met on August 31, although little information was provided at that meeting. The City representatives insisted that, despite the public announcement, they were in fact still undecided on many details of the reorganization and on how it would affect the ranks of inspector and commander. The City acknowledged at that meeting that there would be an uncertain reduction in the number of inspectors and commanders. They did not disclose at that meeting that the City, as later admitted in Bully-Cummings' testimony, had already decided to entirely eliminate the rank of inspector the very next day. The only information provided was the same glossy booklet which had been distributed to the media at the prior day's press conference.

On the following day, September 1, 2005, the City notified the Union that fourteen named inspectors and four named commanders were being removed from their positions, including the president of the Union. Seven of the ten officers of the Union were demoted, and an eighth Union officer was promoted out of the unit. Those being removed from their positions were given a mere five minutes to decide whether to take the demotion or accept involuntary retirement. They were not even allowed time to consult the pension board to determine their individual retirement entitlements. The City offered no explanation for the urgency which warranted requiring employees to make such weighty decision in such a limited time, contrary to the City's prior practice of understandably affording ample time to consider such significant career moves.

The combined demotions and promotions entirely eliminated the rank of inspector. The personnel transactions of September 1, 2005, when combined with the earlier express refusal to bargain regarding the commanders unit, if not reversed, would have eliminated any obligation of the City to bargain with any of its command officers.

Two weeks later, on September 13, 2005, the City's human resources director filed the paperwork necessary to completely abolish the ranks of commander and inspector and replace them all with the new and expressly titled "non-union" rank of captain. According to Bully-Cummings, the City Council never gave final approval for the creation of the captain rank or to the intended elimination of the inspector and commander ranks. Bully-Cummings implausibly denied knowing who had proposed that the new captain rank be designated as "non-union", or why that had been proposed, while acknowledging that her goal had been to create the new captain classification to "remove as much of the old and the *status quo*" as she could in the command ranks. Had the department succeeded in creating the captain position and eliminating the inspector and commander classification, the Union would have been left with no members whatsoever and the City would have escaped permanently from the bargaining obligation it had sought to avoid.

On September 8, 2005, the Wayne County Circuit Court ordered the reinstatement of the eighteen commanders and inspectors who had been removed. The City was so insistent on enforcing its unilateral moves that it failed to comply with the Court's order, even after multiple enforcement motions and hearings, such that Bully-Cummings was personally held in contempt of the court on January 11, 2006.

Discussion and Conclusions of Law:

The record in this case establishes that, despite the Commission's order in the earlier representation case, the City embarked on a course of conduct designed to shed the unwanted burden of negotiating with the lawfully selected exclusive bargaining agent of its police command officers in the two units of inspectors and commanders. Rather than properly submit to the Commission its theory that the commanders were "executives", and therefore not subject to the Act, the City chose to engage in self-help remedies. The City's tactics included: openly refusing to bargain over the commanders' conditions of employment with the MERC certified representative; attempting to remove the overwhelming majority of the Union's officers from their rank and from the bargaining unit; attempting to entirely eliminate both the inspector and the commander classifications; delaying bargaining with the inspectors until their classification was eliminated; and attempting to create a new replacement classification for the entirety of both units expressly titled "non-union" captain. The City acted in a willfully unlawful manner.

The Imposition of the Testing Requirement (Case No. C02 G-173)

The City acted unilaterally in imposing on the members of the bargaining unit the obligation to take and pass a newly imposed examination, where it was announced that their continued employment in their existing position was contingent on compliance. Evaluation procedures or other criteria which determine promotion or job retention directly effect conditions of employment and are therefore mandatory subjects of bargaining. See, *CMU Faculty Ass'n v Central Michigan Univ*, 404 Mich 268 (1978); *DPOA v Detroit,* 61 Mich App 487 (1975). Because such issues are mandatory subjects of bargaining, there is a statutory duty for the employer to provide relevant information at the request of the Union. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. Where, as here, the information sought relates to working conditions of bargaining unit employees, the information is presumptively relevant. *City of Detroit, Department of Transportation*, 1998 MERC Lab Op 205.

The City acted improperly in first announcing that it would unilaterally impose this testing requirement and then in refusing to bargain over the issue, including by refusing to provide the information requested by the Union. However, it is factually undisputed that, despite their threats, the City never in fact acted upon the testing results. Those results were not used for promotional purposes. No unit member was demoted or otherwise removed from rank as a result of the testing. Thus, both the bargaining demand and the request for information related to the testing became irrelevant where the City did not pursue its threatened course of action.

A finding that a dispute is moot is warranted where, as here, the threatened unlawful unilateral change in conditions of employment was withdrawn shortly after it was made; where there exists no practical remedy; where even the Union sought to have the matter held in adjourned without date status for an extended period; and where the passage of time has diminished the significance of the posting of a notice. Mootness, under these circumstances, warrants dismissal of the unfair labor practice charge in Case No. C02 G-173. *City of Bay City*, 22 MPER___, (2009) (C06 F-151, June 25, 1979); *cf*, *Wayne State Univ*, 1991 MERC Lab Op 496.

The Refusal to Bargain Regarding the Commanders Unit
(Case No. C04 E-120, ¶ 3(1))

There is no legitimate dispute either of fact or law regarding the City's March 2004 announced refusal to bargain with the Union as the certified exclusive bargaining agent of the commanders unit. It is well-settled, and well known by this Employer, that either party may insist on bargaining over mandatory subjects of bargaining and that neither party may refuse to take part in negotiations or take unilateral action on such an issue prior to reaching a good faith impasse in negotiations. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974).

The sole defense offered regarding this aspect of the charge is the City's ill-considered argument that the commanders were "executives" lacking the protection of PERA. That argument had failed in the original disputed representation case in 1996 and it failed in the more recent unit clarification decision by the Commission. *City of Detroit Police Department*, 1996 MERC Lab Op 84; *City of Detroit Police Department*, 20 MPER 64 (2007). The City violated its duty to bargain with the Detroit Police Command Officers Association regarding the commanders unit and thereby violated §10 (1)(e) of the Act.[9] Even in the absence of the Commission's recent unit clarification decision, a violation would have been found where the Employer willfully resorted to self-help to avoid a bargaining obligation earlier found by the Commission. Labor relations is an arena particularly susceptible to long-term disruption based on the unlawful resort to such self-help, which must, therefore, be subject to sanction. In this instance, where fortunately injunctive relief was timely granted by the Court, the only relief awardable by the Commission, despite the willful nature of the violation of the Act, is a cease and desist order and the posting of a notice.[10]

[9] I do not find a separate violation of §10 (1)(a) as pled by the Union regarding this aspect of the charge.

[10] For the reasons stated above, and were it not for the contrary holding in *Goolsby v Detroit*, 211 Mich App 214 (1995), I would in this instance follow the Commission's earlier decision in *Wayne-Westland Community School District*, 1987 MERC Lab Op 381, aff'd, *Hunter v Wayne-Westland Community School District*, 174 Mich App 330 (1989), and award compensatory damages on this aspect of the charge to the Union expressly for the purpose of deterring future potentially disruptive resorts to self-help by this and other employers. See also, *Police Officers Labor Council*, 1999 MERC Lab Op 196, 202, 209; *Michigan State University*, 16 MPER 52 (2003).

The Refusal to Bargain Regarding the Inspectors Unit
(Case No. C04 E-120, ¶ 3(2))

The City's position regarding the inspectors unit was initially, at least seemingly, more nuanced than the position it took regarding the commanders unit. The City agreed to meet with the Union and negotiate a successor agreement regarding the inspectors unit. A number of meetings took place; however, before any agreement was reached, the City took sudden and unilateral action to eliminate the bargaining obligation by entirely eliminating the inspector classification and by promoting or demoting every single member of the bargaining unit out of the unit. Regardless of any earlier potentially legitimate efforts at negotiations, the City's conduct in September of 2005 was designed to, and had the primary effect of, avoiding its established duty to bargain with the exclusive agent of its police inspectors. The City violated its duty to bargain with the Detroit Police Command Officers Association regarding the inspectors unit and thereby violated §10 (1)(e) of the Act.[11]

The July 2004 Removal of Commander Charles Barbieri
(Case No. C04 E-120, ¶ 3(3))

The Union asserts that the Employer violated §§10 (1)(a) & (e) in July of 2004 by the forced retirement of commander Barbieri. The Union's post-hearing brief characterizes the Barbieri forced retirement as a unilateral change in conditions of employment. While the Employer's actions toward Barbieri certainly changed his personal conditions of employment, the City's singular action regarding Barbieri was not a "unilateral change in conditions of employment" as that phrase is understood under PERA. The demotion of Barbieri was based on claimed dissatisfaction with his individual performance.[12] The Barbieri dispute is temporally isolated from the mass removals which occurred over one year later. There are no facts in the record suggestive of a factual link between the removal of Barbieri and the later mass removals. There is no §10(1)(e) bargaining violation involved where an isolated adverse individualized employment decision is made, even if there is a dispute as to whether that particular decision breached a contractual restriction. There is no claim that the City violated §10(1)(e) by refusing to process a contractual grievance over its treatment of Barbieri. No violation of §10(1)(e) has been established regarding the Barbieri dispute.

The charge additionally asserted a §10(1)(a) violation in the removal of Barbieri. To show such a violation, it must be proved that the Employer's conduct interfered with, restrained, or coerced an employee regarding the exercise of rights under the Act. There are no facts in the record even suggestive of an interference with Barbieri's Section 9 rights. Simply, PERA does not prohibit all types of discrimination or unfair treatment.

[11] I do not find a separate violation of §10 (1)(a) as pled by the Union regarding this aspect of the charge.

[12] It is notable that in the Gomez-Mesquita award, the Arbitrator found that the City could remove a command officer from rank, based on individualized dissatisfaction with his performance, without meeting the traditional just cause standard, which is not required by the contract at issue, so long as the decision-making was not arbitrary or capricious.

Absent proof that the Employer interfered with union or other activity protected by Section 9 of PERA, the Commission is foreclosed from making a judgment on the merits or fairness of the City's actions regarding Barbieri. See e.g. *City of Detroit (Fire Department)*, 1988 MERC Lab Op 561, 563-564; *Detroit Board of Education*, 1987 MERC Lab Op 523, 524. No violation of §10(1)(a) has been established regarding the Barbieri dispute.[13]

The September 2005 Removal of Commanders and Inspectors and the Abolishment of the Ranks of Inspector and Commander (Case No. C04 E-120, ¶ 3(4)& (5))

In September of 2005, the City faced one of its perennial budget crises. In the police department, that budget issue was seized upon as an excuse to carry out extraordinary personnel moves which would have had the outcome, absent the Circuit Court injunction, of releasing the City from its obligation to bargain with its police command officers union. The City removed three-quarters of the Union's executive board from the bargaining unit, primarily by demotions. That these were not ordinary personnel transactions is underscored by the City's giving the individual command officers, among the highest ranked and most responsible officials in the department and in the City, five minutes or less in which to decide to accept demotion or take an involuntary retirement. The City offered no explanation whatsoever for the extraordinary time pressure placed on the individual officers to accept or reject forced retirement. The City made no effort to provide, even at trial, any factual basis for how the individual command officers were selected for inclusion in the mass removals of September 1st. Bully-Cummings testified entirely implausibly that she was unaware of the Union officer status of the targeted group, despite the very small size of the overall unit, and despite the fact that she had regularly met with the Union's bargaining team in the weeks immediately preceding the September purge.

Additionally, underscoring the fact that the personnel transactions were not part of a legitimate or ordinary restructuring is the fact that the entirety of the inspectors bargaining unit was wiped out on September 1st. That act, coupled with the City's earlier open refusal to bargain with the commanders unit, effectively satisfied the City's goal of escaping from the obligation to bargain with any of its command officers. In light of the City's denial, the day earlier in a bargaining session, that its plans regarding the inspectors and commanders had been finalized, that act of eliminating the entire inspectors unit firmly establishes that the City's actions were based on animus toward the bargaining obligation and not premised on a legitimate need to reorganize the department.

Finally, the document submitted on September 13, 2005 by the City's human resources director concurring in the police department's request to permanently eliminate

[13] While the Union's post-hearing brief addressed the Barbieri and Gomez-Mesquita disputes as intertwined, for the reasons set forth above, I have found that the Gomez-Mesquita dispute is not properly before me. Regardless, my substantive analysis of the Gomez-Mesquita dispute would not differ from my findings as to Barbieri.

both ranks of commander and inspector, and replace them with the newly-created expressly "non-union" rank of captain, confirms that the entire scheme was designed to avoid the bargaining obligation. Additionally, the submission of the September 13 document confirms that the scheme was authored at the highest levels of the City's leadership and was not some errant act by some misguided departmental leadership.

The City defends the mass removals on the theory that the City Charter authorizes the removal of command officers at the discretion of the police chief. Regardless of the Charter provision, the City's freedom to act can be constrained by the terms of a collective bargaining agreement negotiated with the exclusive bargaining agent certified by MERC to represent the employees. Further, as the City is all too well aware, it is axiomatic that authority granted by a Home Rule City Charter is superseded by the duty to bargain imposed by PERA. *DPOA v Detroit,* 291 Mich 44 (1974). Moreover, even where an employer has clear and broad discretion regarding particular employment related decision-making, that otherwise unfettered discretion cannot be used for unlawfully discriminatory purposes, as the evidence establishes occurred here. See, *MERC* v *Reeths-Puffer School District*, 391 Mich 253, 259 (1974); *Wayne County Sheriff*, 21 MPER 58 (2008); *City of Grand Rapids*, 1984 MERC Lab OP 118.

The City's conduct in September of 2005 was arrogant in its transparency. That very transparency of motive, makes it apparent that there was no legitimate business purpose served by the September 1st massacre.[14] I find that in attempting to effectively eliminate the entirety of the two bargaining units, the City violated its duty to bargain under §10(1)(e). I additionally find that the attempted elimination of the two units violated §10(1)(a) by interfering in the most effective manner imaginable with the exercise by commanders and inspectors of their Section 9 rights. Lastly, I find that the City's effort to eliminate all of the members of both bargaining units was intended to, and did, discriminate against Union members and in particular against Union officers, in violation of §10(1)(c).[15]

RECOMMENDED ORDER

The City of Detroit, its officers, agents, and representatives shall:

1. Cease and desist from:

[14] The right of the City to engage in a legitimate reorganization based on lawful business considerations is not challenged by the Union and is not at issue in this matter.

[15] For the reasons stated above, and were it not for the contrary holding in *Goolsby v Detroit*, 211 Mich App 214 (1995), I would in this instance follow the Commission's earlier decision in *Wayne-Westland Community School District,* 1987 MERC Lab Op 381, aff'd, *Hunter v Wayne-Westland Community School District,* 174 Mich App 330 (1989), and award compensatory damages on this aspect of the charge to the Union expressly for the purpose of deterring future potentially disruptive resorts to self-help by this and other employers, including the actual costs incurred in litigating both this unfair labor practice matter and the attendant suit for injunctive relief maintaining the *status quo* in aid of MERC's jurisdiction. See also, *Police Officers Labor Council,* 1999 MERC Lab Op 196, 202, 209; *Michigan State University,* 16 MPER 52 (2003).

a. Refusing to bargain with the Detroit Police Command Officers Association as the exclusive bargaining representative of the employees in two units in the Detroit Police Department: Unit I, Inspectors, and Unit II, Commanders, as certified by the Commission on April 22, 1996 in *City of Detroit (Police Department)*, 1996 MERC Lab Op 84 and as revisited by the Commission in *City of Detroit (Police Department)*, 20 MPER 64 (2007).

b. Seeking to avoid the duty to bargain with the Detroit Police Command Officers Association as the exclusive bargaining representative of the employees in two units in the Detroit Police Department: Unit I, Inspectors, and Unit II, Commanders, by eliminating or attempting to eliminate through any mechanism, including any purported reorganization or reclassification scheme, the ranks or classifications of police inspector and police commander.

c. Interfering with individual employees exercising rights under PERA, including by eliminating, or threatening to eliminate positions or classifications, or by demoting or removing any individual from a position or assignment for the purpose of deterring an individual from engaging in conduct protected by Section 9 of PERA.

d. Discriminating against any individual regarding terms or conditions of employment in order to discourage membership in a labor organization or the holding of office in a labor organization, including by eliminating, or threatening to eliminate positions or classifications, or by demoting or removing any individual from a position or assignment.

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

a. Bargain upon demand regarding all mandatory subjects of bargaining with the Detroit Police Command Officers Association, as the exclusive bargaining representative of the employees in two units in the Detroit Police Department: Unit I, Inspectors, and Unit II, Commanders, as certified by the Commission on April 22, 1996 in *City of Detroit (Police Department)*, 1996 MERC Lab Op 84 and as revisited by the Commission in *City of Detroit (Police Department)*, 20 MPER 64 (2007).

b. Retain the ranks or classifications of police inspector and police commander.

c. Make whole all individual police inspectors and commanders for any economic losses, or loss of rank, seniority or any other beneficial condition of employment, resulting from the personnel transactions of September 2005.

3. Post the attached notice to employees in a conspicuous place in each workplace to which bargaining unit employees are assigned for a period of thirty (3) consecutive days; simultaneously distribute the notice via email to all employees of the Detroit Police Department; and in addition prominently post the notice for a period of thirty (30) consecutive days on any City of Detroit website to which Police Department employees regularly have access as a part of their employment.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: July 8, 2009

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the CITY OF DETROIT, a public employer under the PUBLIC EMPLOYMENT RELATIONS 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. Refuse to bargain with the Detroit Police Command Officers Association, as the exclusive bargaining representative of the employees in two units in the Detroit Police Department: Unit I, Inspectors, and Unit II, Commanders.

b. Seek to avoid the duty to bargain with the Detroit Police Command Officers Association by eliminating, or attempting to eliminate through any mechanism, including any purported reorganization or reclassification scheme, the ranks or classifications of police inspector and police commander.

c. Interfere with individual employees exercising rights under PERA, including by eliminating, or threatening to eliminate positions or classifications, or by demoting or removing any individual from a position or assignment for the purpose of deterring that individual from engaging in conduct protected by Section 9 of PERA.

d. Discriminate against any individual regarding terms or conditions of employment in order to discourage membership in a labor organization or the holding of office in a labor organization, including by eliminating, or threatening to eliminate positions or classifications, or by demoting or removing any individual from a position or assignment.

WE WILL

a. Bargain upon demand regarding all mandatory subjects of bargaining with the Detroit Police Command Officers Association, as the exclusive bargaining representative of the employees in two units in the Detroit Police Department: Unit I, Inspectors, and Unit II, Commanders.

b. Retain the ranks or classifications of police inspector and police commander.

c. Make whole for any losses all individual police inspectors or commanders for any economic losses, or loss of rank, seniority or any other beneficial condition of employment, resulting from the personnel transactions of September 2005.

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.

CITY OF DETROIT

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.