STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CHARTER TOWNSHIP OF FLUSHING,
Public Employer-Respondent,

-and-

Case No. C12 B-032
Docket No. 12-000155 MERC

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Charging Party.
_______________________________________/

APPEARANCES:

Fahey Schultz Burzych Rhodes PLC, by Stephen O. Schultz and Helen E.R. Mills, for Respondent

Thomas R. Zulch, Police Officers Labor Council, for Charging Party

DECISION AND ORDER

On September 24, 2013, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Robert S. LaBrant, Commission Member

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Natalie P. Yaw, Commission Member

Dated: ____________

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CHARTER TOWNSHIP OF FLUSHING,
Public Employer-Respondent,

Case No. C12 B-32
Docket No. 12-000155-MERC

-and-

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Charging Party.
____/

APPEARANCES:

Fahey Schultz Burzych Rhodes, P.L.C., by Stephen O. Schultz and Helen Mills, for Respondent

Thomas R. Zulch, 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 and 423.216, this case was heard in Detroit, Michigan on September 12 and November 1, 2012, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on December 19, 2012, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Police Officers Labor Council filed this unfair labor practice charge against the Charter Township of Flushing on February 14, 2012. The charge was amended on March 20, 2012. Charging Party represents a bargaining unit of nonsupervisory police (patrol) officers employed by Respondent. On February 9, 2012, Respondent's Township Board voted to enter into a contract with the Genesee County Sheriff's Department to provide Respondent with police services. The members of Charging Party's unit were then placed on administrative leave until February 24, 2012, when they were indefinitely laid off.

The charge, as amended, alleges that Respondent violated §10(1)(a) and (c) of PERA by contracting out the services provided by Charging Party's members and laying them off because they had engaged in union and other activities protected by §9 of PERA, including filing numerous

grievances and concertedly supporting the recall of members of Respondent's governing body. Additional allegations that Respondent violated its duty to bargain over the decision to subcontract bargaining unit work or the impact of that decision were withdrawn at or before the first date of hearing.

Findings of Fact:

Events Preceding the Contract with Genesee County

Respondent's board consists of seven members, including the Township treasurer, supervisor, clerk, and four trustees. In November 2009, Respondent's patrol officers participated as a group in a recall effort that resulted in the recall of the Township supervisor. Township treasurer Bill Noecker and trustee Mike Gardner survived the recall effort. In March 2010, Terry Peck, a citizen who had served on several board committees, was appointed Township supervisor. Peck was elected to the position in May 2010.

Historically, Respondent has funded its police department almost entirely through separate police millages. Funding for police services constitutes about half of Respondent's annual budget, which in 2012 was approximately $2 million. In 2012, Respondent had about 10,000 residents.

In March 2010, Respondent hired a new police chief, Dale Stevenson. When Stevenson was hired, one of his first actions was to call a meeting in which he told his officers that he felt that, as a police agency, the department should be "politically neutral." Stevenson also told the officers that he had heard stories that during previous election campaigns police officers had attempted to intimidate motorists with bumper stickers opposing the police millages by stopping them for no reason or issuing tickets. Stevenson said that he would not tolerate officers intimidating anyone for any political reason. Over the next two years, Stevenson repeatedly told his officers not to let their "political leanings come out as part of their department" because it reflected negatively on the department.

Between early 2009 and September 2010, Respondent eliminated three nonsupervisory patrol officer positions and a sergeant position for financial reasons. After the elimination of these positions, Respondent's police department consisted of four patrol officers, Chief Stevenson, and a sergeant who was assigned full-time during the school year to school-related duties and whose salary was paid by the local school district. In the fall of 2010, one of the four patrol officers went on worker's compensation leave and did not return to work before retiring in the fall of 2011.

After the reduction in the number of police officers, only one officer was assigned to work at any time. Some shifts were covered by Chief Stevenson. According to Chief Stevenson, he tried several new scheduling options to maximize the number of hours per week during which Respondent had an officer on duty in the Township. This included, for a period, twelve hour shifts instead of the standard eight ten hour shifts within a 14 day period. However, Stevenson testified that Respondent was unable to provide police coverage 24 hours a day, seven days a week, with the number of officers it had after the reduction in personnel. A four hour per day gap in coverage was built into the regular schedule. In addition, if a patrol officer was sick or was on vacation, Respondent did not pay overtime to have his shift covered by another officer. Therefore, there were sometimes periods

up to sixteen hours during which there was no officer from Respondent's police department on duty. Deputies from the Genesee County Sheriff's Department responded to 911 calls when Respondent had no police officer on duty. Minutes of Board meetings from 2010 indicate that some Township residents were dissatisfied with the response time from the Sheriff's Department when they called 911 for certain matters.

In December 2010, Charging Party replaced another labor organization as the bargaining agent for Respondent's patrol officers. The collective bargaining agreement between Respondent and Charging Party's predecessor contained an expiration date of March 31, 2011, but also contained an automatic renewal clause which essentially provided that the contract would remain in effect until the parties signed a successor agreement. Around March 9, 2011, Charging Party and Respondent began negotiations for a contract to replace this agreement. According to the uncontradicted testimony of bargaining committee member and patrol officer Mark Bolin, during the early negotiation sessions the parties discussed Respondent's intention to ask its voters in November to consolidate Respondent's three existing police millages and renew them through 2016. At the time, each of these millages stated specifically that they would be used to fund Respondent's "police department." Charging Party's bargaining representative, Field Representative Lloyd Whetstone, told Respondent that the patrol officers would not be involved in any further recall efforts, and sought a promise from Respondent's representatives to keep the millage language the same so that the police department could not be eliminated. According to Bolin's uncontradicted testimony, Respondent's representatives said that they wanted a "long-term commitment" from Charging Party. No agreement was reached between the parties concerning the millage language.

According to Whetstone's uncontradicted testimony, the parties reached tentative agreements on most economic issues, including a wage freeze, a reduction in the pension benefit multiplier from 3.0 to 2.5 for future years of service, and an increase in the employees' pension contribution from two to eight percent. The current agreement contained caps on both Respondent's responsibility for retiree health care costs and its share of the MERS-required pension payment. The parties disagreed over proposals by Respondent to lower both these caps. However, Whetstone testified without contradiction that it was noneconomic issues that prevented the parties from reaching agreement. One of the issues in negotiations was a proposal by Respondent to agree to maintain three full-time police positions if it was allowed to hire part-time police officers. Charging Party took the position that as there were four full-time positions, four positions should be guaranteed before Respondent hired part-timers. Another issue was scheduling. Respondent wanted contract language that gave it the latitude to establish work schedules that the officers would then bid on. On August 19, 2011, Respondent filed a petition for compulsory interest arbitration pursuant to 1969 PA 312 (Act 312). The parties continued to bargain, but selected Joseph Girolamo as the chairman of the arbitration panel. An Act 312 hearing was scheduled for March 2, 2012.

Between the spring of 2011 and February 2012, about thirteen grievances were filed by the patrol unit. Except for a grievance protesting discipline issued to Charging Party local president and steward Louis Cook in November, the record does not indicate the subject of these grievances. It is unclear from the record if there were also grievances pending when Charging Party took over as bargaining representative or whether any grievances were arbitrated during the 2011 calendar year.

In the summer of 2011, Respondent placed a proposal on the ballot for the November 2011 election to consolidate and renew its three police millages. Unlike previous proposals, this proposal stated that the millages were for "police services." Petitions were also filed that summer to recall board members Noeker and Gardner. The three members of Charging Party's unit agreed to use the proceeds from an annual golf outing sponsored by the local union to fund the recall effort. According to Bolin, after Respondent changed the millage language, the officers felt that the current board was "conspiring to get rid of the department." The recall petitions were delivered in person to the Township clerk's office by Cook and Jared Staley, a Township resident who was the main supporter of the recall effort. Cook paid the filing fees.

On Sunday, October 30, 2011, the Committee to Elect Bill Noeker purchased an ad in the Flushing Journal. The ad attacked Staley's motives for seeking the recalls, listed the persons who had collected signatures for the petition, and suggested that Staley had paid them to collect signatures. The ad asked where the money that Staley and police officer Cook had brought into the Township offices to pay for the recall had come from, and implied that the recall effort was being funded mostly by police officers from Respondent's police department and the City of Flushing.

Around this time, a flyer was sent to Township residents urging them to reject the recall of Noeker and Gardner. The flyer, which consisted of four pages, listed a number of cost saving measures adopted by the Board during Gardner's and Noeker's tenure, including cost savings in the police department. The flyer asserted that Gardner, Noeker and the Board had been responsible for stopping overspending in Respondent's police department. The flyer included these two paragraphs:

> Why another recall attempt? Police officers think that recalling two board members will swing control of the Board in their favor, in effect giving them control of the police department and getting another sweetheart deal.
>
> . . .
>
> Why do laid off officers refuse to work part-time in Flushing Township, yet work part-time at other area police departments?

The ad indicated that it was paid for by the "Committee to Elect Bill Noeker," and the flyer by the "Committee for Responsible Government."

During the election campaign, according to Stevenson, he discovered that one of the patrol officers was routinely permitting Staley to ride with him in his patrol car; Stevenson put a stop to this practice, although he did not discipline the officer involved. Stevenson also had a number of conversations with officers during this time in which the message was, as Stevenson put it, "If you want to recall Mr. Noeker, that's your business, but we cannot have a police face on that, as it was detrimental to the long-term goal … of being a professional police agency." Stevenson testified that he told Bolin, specifically, that the rancor he displayed toward Noeker and other members of the Board was counterproductive to building the image of the police department.

In the November 2011 election, the voters refused to recall Noeker and Gardner and approved the proposal to consolidate and renew the millages for "police services."

On December 8, 2011, Whetstone attended a meeting of the Board during which he and Peck engaged in an open discussion of the status of the contract negotiations. During this discussion, Peck said that Charging Party was not being reasonable, and that negotiations were not going very well. According to Whetstone's uncontradicted testimony, Peck also said during the meeting that "the officers couldn't get along" and were filing grievances and lawsuits. After the meeting, Whetstone approached Peck and asked him what lawsuits the officers had filed. Whetstone testified that Peck said, "None yet, but they will."

In December 2011, Cook came to Peck's office to present a grievance. A statement written by Peck to support Cook's discipline was made part of the record in this case. According to Peck's statement, he asked Cook to have a seat and then asked him if he and the other officers really wanted a contract. Cook said that the officers did not vote to go to Act 312 arbitration. Peck said that he knew, but that he felt Respondent was forced into doing it. When Cook started to leave, Peck asked him to stay and talk about the contract. According to Peck's statement, he said that he was sure that Respondent could come to an agreement with Lloyd Whetstone, but "what good was a new contract to the Township if the behavior of the officers did not change." Cook asked Peck what he meant, and according to Peck, Peck held up the grievance Cook had just given him. Cook became upset and started explaining why the grievance was justified. According to Peck's statement, Cook then walked over to Peck's desk and shouted, while pointing his finger toward Peck's face. "I'll tell you what you are going to do … lay me off, lay Bolin off, and lay Owens off, and I'm going to sue your ass. In three years, you will be standing in front of the arbitrator and I will own you." Cook then left the office, telling Peck, "And you claim to be a Christian." Shortly thereafter, Cook, now composed, returned to Peck's office and asked for a copy of the grievance Peck had signed. Stevenson issued Cook a written reprimand for his behavior during this incident. The discipline was grieved, and in January 2012 amended to a counseling memo. The counseling memo included, at the bottom, these statements by Peck, "Your continued unprofessional behavior is not now nor will it ever be acceptable," and "Your inappropriate behavior, in my opinion, is a disgraceful reflection on the entire Flushing Township Police Department and needs to stop."

Sometime in December 2011, Peck gave an interview to a local television station in which, according to Peck's testimony at the hearing, he said that the stalled contract negotiations between the parties were more about strained relationships between Township officials and police officers than about money. Peck also told the interviewer that the parties could probably get a contract pretty easily, but that it did not change the fact that Respondent's legal bills might not change because Respondent's officers were still filing grievances and lawsuits.

On December 12, 2011, Stevenson posted a message on the Flushing Township Police website stating that Respondent was checking into the possibility of contracting with the Genesee County Sheriff's Department for police services and eliminating the Flushing Township department. Arguing that the department should be retained, Stevenson noted that the police department had reduced its personnel costs almost by half since 2008, that tax revenues had stabilized, that the Township was paying additional funds to erase its retirement fund shortfall, and that the police fund balance was increasing. [1]

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1 Respondent's financial situation during the period before it decided to contract with the County is discussed in a separate section below.

On or about December 15, at Whetstone's request, Whetstone met with Peck, Noeker and Respondent's attorney to discuss the possibility of Respondent's contracting with Genesee County. Noeker told Whetstone that Respondent was getting a bid from the County, and asked Whetstone if Charging Party wanted to bid for the police jobs. According to Whetstone, he asked what Charging Party would be bidding on, including how many officers, but never received a response.

On December 21, 2011, according to a resolution passed at the Board meeting on that date, the Board formed a committee consisting of Peck, Noeker, and the Township clerk to explore alternatives for providing police services. The resolution specified that these alternatives were to include contracting with the Genesee County Sheriff's Department and continuing to maintain a Township police department. The Board also amended its police budget to pay for a study comparing the costs of these alternatives by Respondent's accounting and financial advisory firm.

Sometime between December 2011 and February 2012, the Board committee worked out a tentative agreement with the Genesee County Sheriff's Department based on a similar agreement which the County had with another township. Under the agreement, the Sheriff's Department would assign four deputies who would work full time in the Township and a detective sergeant who would spend forty percent of his time in the Township, covering two shifts per week. With this number of officers, Respondent would have a police officer stationed in the Township to respond to calls 24 hours per day, seven days per week, except when an officer was absent or on vacation. These officers would work from Respondent's police building, Respondent would not charge the County for rent or reasonable utilities, and the County would provide needed office equipment or supplies. The officers would be under the direct supervision of a captain who would be stationed outside the Township, but whose supervisory services would be covered by the cost of the contract. Under the agreement, Respondent could choose whether to pay extra, at overtime rates, to have a deputy assigned to fill in for an absent officer. For example, it might choose to "backfill" in the summer when things were busy and not do so in the winter. The approximate annual amount that Respondent would pay the County per calendar year for police services would be $544,000, not including overtime or "backfill" costs. Respondent's existing patrol officers would be encouraged to apply for jobs with the Sheriff's Department.

On February 1, 2012, Bolin was called into Chief Stevenson's office to discuss his written performance evaluation. During their conversation, Stevenson told Bolin that he considered him insubordinate for not following Stevenson's "coaching" against participating in the recall, and that Bolin's activity had harmed the department. According to Bolin, Stevenson had previously made numerous remarks to the effect that the officers' participation in the recall was detrimental to the department. During discussion of Bolin's evaluation, Stevenson also made a reference to "sweating out the vote" on February 9.

On February 8, 2012, Respondent's accounting and financial advisory firm delivered the study which Respondent had authorized in December. This study, which compared the cost of contracting with the County with the cost of continuing to operate a police department, is discussed in more detail in a section below. On February 9, 2012, the proposed contract with the County was presented to and discussed by Respondent's board. The proposed contract, at this time, was for a two-year period. It was later altered to cover only the remainder of the 2012 calendar year.

According to the minutes of the February 9 Board meeting, the Board's discussion began with a report from Peck during which he went over with the rest of the Board, in some detail, the cost figures set out in the study. Then, according to the minutes, Peck answered a number of questions about the proposed contract with the County and the process the committee had followed. In answer to one of these questions, Peck stated that he had "taken care of the budget," that Township Clerk Julia Morford had met with other municipalities, and that Treasurer Noeker had met with the accounting and financial advisory firm. Peck said that Respondent would have the right to have the deputies assigned to the Township replaced, including the right to ask that lower seniority deputies be assigned to it to reduce the cost of the contract. Peck also stated that the County's health care costs were going to drop with the implementation of a larger premium share, and that the $544,000 contract amount did not include this decrease. He also said that most of the Sheriff's deputies did not have a defined pension, so that the County's pension costs were cheaper. Morford then made her report. Morford presented arguments in favor of delaying action on the contract until the collective bargaining agreement was resolved and/or the City of Flushing was ready to consider a merger, which she believed would provide more financial benefit than the contract with the County. Noeker then made a presentation in support of contracting with the County. According to the minutes, Noeker told the Board that he believed the police department's financial problems began with the Board's decision to establish a MERS defined benefits pension plan, and he emphasized the future danger to Respondent from increasing pension costs. After further discussion, the Board majority passed a resolution to contract with Genesee County for police services.

After the February 9 meeting, the members of Charging Party's unit were immediately placed on administrative leave. They were then indefinitely laid off effective February 24, 2012. Charging Party filed a grievance asserting that the layoffs violated language in the contract defining layoff as "the reduction of the work force due to the limitation of funds." During the period between February 9 and March 7, when the Genesee County Commission approved the contract with Respondent, Chief Stevenson was the only police officer stationed in the Township. Sometime after March 7, Stevenson's job was also eliminated.

After their layoff, the members of Charging Party's unit accrued no additional service credits under Respondent's pension plan. This meant that unless they were recalled, they would not be eligible for early retirement at age forty-eight under Respondent's plan and could not collect benefits from that plan until age sixty. According to the record, unless Charging Party's members were recalled they would also not be eligible to receive retiree health benefits from Respondent at the time they retired.

During a meeting held on February 27, 2012, Respondent and Charging Party reached an agreement that resolved eight outstanding grievances. According to a memo Respondent sent to Charging Party, the only grievances remaining outstanding were a grievance filed in 2011 for which an arbitration hearing had been scheduled (which the arbitrator eventually dismissed as untimely filed), and a grievance Charging Party had filed on February 13, 2012 over the recent layoffs.

Respondent and Charging Party proceeded with the Act 312 arbitration hearing as scheduled on March 2, 2012. Only a few issues were presented to the arbitrator. These included Respondent's proposal to eliminate contract language that defined a layoff as a layoff "due to limitation of funds." They also included Respondent proposals to reduce length of the recall right period after layoff, and

to eliminate Respondent's responsibility to pay any accumulated sick leave to employees who voluntarily quit or were terminated. The amount of the caps on pension and retiree health care benefits also continued to be an issue. The award, issued on June 13, 2012, adopted Respondent's proposed change to the layoff language, going forward, and Charging Party's proposals on the other issues.

On March 7, 2012, the contract between Respondent and the County was brought before the Genesee County Commission for approval. Peck appeared at the Commission meeting as a representative of Respondent. I admitted into the record a DVD recording of this meeting over Respondent's objections. During discussion by the Commission, County Commissioner Archie Bailey asked Peck a number of questions about the proposed contract. Bailey's questions to Peck included the following:

> Bailey: What is this all about, Supervisor Peck?
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> Peck: We started negotiations over a year ago in the police department, and have worked very hard to go this way…. In 2008, the previous board asked for a police millage to fund the department as it was currently funded at that time. It went down, and the Board voted to put it back on the ballot in November. In August 2008, residents were so upset that it was put back on the ballot that five of the seven Board members were recalled. In November that millage got voted down again so in January, February the Board had to lay off somebody. We've had two recalls since that time, both of them failed, and the recalls were surrounding the police protection. We went forward . . . about 65% -75% of the Township feels like what we are doing is correct. In November of last year we went to the voters and asked for a millage renewal – we combined three millages … the previous millage said it had to be used for a Flushing Township police department, this millage, it passed, stated that that it would be used for Flushing Township police protection. It gave us the ability if we had to, to ask for bids, if we couldn't come to an agreement with our police department… We investigated, we found out that if we went to the Sheriff's department state law said they had to grant us protection, so we did that. . .
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> Bailey: So this is about money?
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> Peck: Most of it, yes sir.
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> Bailey: What's the rest of it?
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> Peck: There's problems – we have grievance problems – we've spent $40,000, probably over that now we're not through our fiscal year. And attorney fees. We've gone through arbitration, and so on and so forth. We need to bring all of that to a close. Our citizens want closure and want to get back to where we have patrolmen on duty.
>
> . . .

Bailey (reading from a newspaper): On Tuesday, December 13 you said, "the contract dispute with the officers has nothing to do with money... the main issue is having the police officers learn to work together for the good of the Township with the new police chief. The new contract is meaningless without the behaviors of the officers changing. Around the clock police coverage ended in August, and the contentious relationship between police and Township officials has been exhibited by multiple lawsuits and grievances by officers and was one of the main issues in a failed recall attempt against elected officers." So this isn't all about money?

Peck: You're right. I think I spoke on that subject sir.

Bailey: You budgeted $800,000 for your three patrol officers, a sergeant and chief this year. (Reading again), "In almost all cases, contracting with the County will save a community money because the police chief is eliminated." … I just wanted to make sure that this is what is going to happen; the police chief will be gone once the sheriff takes over.

Peck: . . . that's true.

Bailey: Will there be a school liaison officer?

Peck: Yes, sergeant[ ] will remain in that position through the end of the school year; he will not be wearing a Flushing Township uniform…. he will be there through the end of the school year, at which time the school and the Sheriff will negotiate . . .

Bailey: One other comment. In a written document, Chief Stevenson accused an officer of insubordination because of his off duty involvement in a recall action against the Flushing Township Treasurer. Chief Stevenson further stated that Officer Peck's political activity harmed the police department and made reference to "sweating out a vote on February 9" because of this activity. Chief Stevenson said that this officer's activity was unacceptable and issued a negative evaluation because of his political activity. Stevenson said, "The police department is suffering from this, and there are consequences to your freedom of speech." Do you agree with that document?

Peck: … That's a supervisor's opinion of an employee. .. If [Stevenson] felt that, he was correct in what he wrote down… The chief has a responsibility to run the department, he has a responsibility to do evaluations, and as far as the department, he did an outstanding job, and we appreciate him.

Bailey: You laid off the entire department, with pay and fringe benefits, is that correct?

Peck: We laid off the patrolmen. In accordance with their contract, and then we put them on administrative leave at the time we did it… You and I and the Treasurer had

about a two-and-a-half hour conversation … You reminisced about the time when you were a Flushing City Councilman, and you said something to the effect that when there was a personnel change in the police department, you were fearful for yourself and your family for retaliation against you for a position you took as a councilman, is that correct?

Bailey: It is.

Peck: And I said we have that same fear. Some of the residents of the Township .. that's why we did it… we felt it was a proper decision then, and I feel it is a proper decision now.

Bailey: When I left that three-hour meeting that day, my feeling was that you wanted to eliminate the department, and that, as you stated in the Flint Journal, money was not the issue, it was getting rid of the police department.

Peck: There were other issues, but we have a $1.2 million liability to the retirement fund that there is no way that we can get out from underneath by still maintaining the police department… There's a lot of people in the same position we are in, who are going to have to make the same type of decisions going forward… It would have been nice to sit back like the previous board did and kick the can down the road, but we can't do that.

After discussion, the County Commissioners approved a contract with Respondent for a pro-rated amount of $445,000, from the date of the contract – March 7, 2012 - through the end of December 2012. The contract approved by the County guaranteed that "basic costs," including salaries and employee benefits and retirement contribution insurance premiums, would not exceed the amount of the contract. However, it allowed the County to demand that Respondent pay increases in vehicle fuel costs, and also stated that the County could pass along the cost of any increase in salary, fringe benefits, or other costs implemented as a result of negotiations between the County and its labor union and cost increases as a result of rate increases. The contract, as approved, stated that the County could immediately terminate the contract if Respondent refused to pay the additional costs incurred, and that Respondent could terminate the contract on three days' notice if it was directed to reinstate its police department.

On March 29, 2012, Respondent's Board voted to ratify the contract as approved by the County. Two of the three patrol officers in Charging Party's bargaining unit were hired by the Genesee County Sheriff's Department; the third failed to pass the physical.

Respondent's Financial Situation in Early 2012

Like other local governments in Michigan, Respondent began experiencing significant declines in tax revenues in about 2009 due to declining property values, while its operating expenses continued to increase. In addition, Respondent had operating deficits in its police department for the fiscal years 2004-2005 through 2008-2009, before property values began dropping dramatically. Because of the operating deficits and declining revenues from its police millages, the fund balance in

its law enforcement special fund decreased from approximately $700,000 in 2002 and to a low of $40,000 at the end of the fiscal year ending March 31, 2009. In June 2009, Respondent's accounting and financial advisory firm sent Respondent a letter warning it that state law prohibited deficits in special revenue funds.

Sometime during the period when Respondent was running the operating deficits that drained its law enforcement fund balance, it began borrowing from its water department fund to pay the costs of operating the police department between millage collections. This loan would be paid back, with interest, when Respondent collected the police millage between December and February each year. The amount Respondent borrowed to tide over its police department between millage collections steadily increased as its police department fund balance decreased. Respondent is not legally prohibited from using general funds to fund or supplement the funding of its police department. However, Respondent's accounting and financial advisory firm pointed out that the fund balance in the law enforcement account was supposed to be sufficient to fund the operations of the police department between tax collections, and recommended that Respondent maintain a law enforcement fund balance equivalent to at least eight to nine-twelfths of its annual collection. On February 27, 2011, at Respondent's request that it assess the fund balance, the firm sent Respondent a letter stating that the anticipated fund balance at the end of the 2010-2011 year was "comparatively low," and recommending that the Board keep monitoring the fund balance to avoid any deficit.

When Respondent hired Chief Stevenson in March 2010, it charged him with formulating a plan to manage police department costs. In July 2010, Stevenson presented the Township Board with a plan to reduce the police department's personnel budget by forty percent. In August 2010, Respondent made personnel reductions in the police department and implemented other cost saving measures in the police department on Stevenson's recommendation. In 2009 and 2010, Respondent also made significant cuts in its non-police budget, including cutting the compensation of and eliminating fringe benefits for board members.

These reductions had a positive effect on Respondent's balance sheet. Respondent increased its general fund balance from $356,000 at the end of its 2008-2009 fiscal year to $773, 000 in at the end of the 2011-2012 fiscal year. It also eliminated its police department operating deficit, and the balance in its law enforcement fund rose to $112,000 at the end of the 2009-2010 fiscal year and to $134, 000 at the end of the 2010-2011 fiscal year. At the end of the 2012 calendar year, according to Chief Stevenson's estimates, the balance in the law enforcement fund was about $200,000.

In early 2012, Respondent had a MERS defined benefit pension plan that covered patrol officers, police command officers, and non-police employees, with each forming a separate group within the plan. Starting with the collective bargaining agreement effective April 1, 2008, all new hires in Charging Party's unit were to have a defined contribution, rather than a defined benefit, plan. However, no new patrol officers were hired after that date, and all the patrol officers Respondent employed in 2012 were vested in Respondent's defined benefit plan.

MERS does periodic actuarial valuations of employer plans which it uses to determine how much an employer is required to contribute annually to MERS to fund its plan. At no time did Respondent ever fail to make its MERS-required contribution. However, after 2005 the ratio of unfunded to funded liability in Respondent's MERS plan steadily increased. According to its

financial report for the fiscal year ending March 31, 2011, Respondent's MERS plan was 61.1% funded on December 31, 2008 and 58.9% funded on December 31, 2010. In dollars, the amount of Respondent's unfunded liability was approximately $2.3 million, of which about $1.2 million was attributable to the police department. As explained at the hearing by a representative of Respondent's accounting and financial advisory firm, any number of factors could have been responsible for this decline, including early retirements and investment returns that were lower than what had been assumed, as occurred after 2008 with the decline in the stock market. Although the financial reports admitted into the record did not break down the unfunded liability by group, Bolin testified, without contradiction, that the most recent MERS actuarial valuation conducted before the hearing showed that almost all of the unfunded liability from the police department was in the command officer account. According to Bolin's uncontradicted testimony, the patrol officer account was 87.25% funded, and the dollar amount of Respondent's unfunded pension liability for this group was only about $150,000.

During this period, according to its financial reports, Respondent also had an actuarial accrued liability of about $1 million for retiree health benefits. In its audit, Respondent's accounting and financial advisory firm recommended that Respondent make an annual contribution of approximately $88,000 toward this liability. However, like many public employee retiree health plans, Respondent's retiree health plan, which it administered itself, was "pay as you go." That is, Respondent was required to, and did, pay only the annual premiums necessary to provide insurance for retirees currently receiving benefits.

In the calendar year 2010 and calendar year 2011, Respondent made voluntary additional payments to MERS of $66,000 and $100,000, respectively, for the purpose of decreasing the amount of it unfunded pension liabilities.

<u>Cost Comparison Study</u>

As noted above, in December 2011, Respondent authorized its accounting and financial advisory firm to prepare a study comparing the cost of contracting with the County with the cost continuing to operate its own department at the same level of service. On February 8, 2012, the firm provided Respondent with the study. The study was then presented by Peck to the rest of the Township Board at the Board meeting the following day at the meeting at which the Board voted to approve the County contract. Although a representative of the firm appeared as a witness at the hearing, the employee who actually prepared the analysis did not testify.

As the analysis explained, the study used the final budget figures from the 2011-2012 fiscal year to estimate the cost of continuing to operate the department while maintaining the current level of services and compared it with the cost of the County contract, at the specified level of service, plus certain additional expenses. The page from the study containing the comparison of costs is included as part of this decision as Attachment A. The study estimated the annual cost of continuing to operate the department to be $898,233, while the estimate for the first year of the County contract was $748,011 per year, with ongoing costs after the first year estimated at $660,511 per year. The

study concluded that Respondent should save approximately $150,000, or 16% of its annual police budget, in the first year of the contract, and an estimated $237,000, or 26.5 %, in future years, assuming no cost increases in the County contract. The analysis also noted that the County contract provided an increased level of services. In computing the cost of continuing to operate the department, the study included, as "additional one-time costs incurred by the Township," $4,712 for time spent by elected officials and board members on "contract negotiations, lawsuits, arbitration, etc.," and another $4,500 for "costs related to board members for court time, depositions, lawsuit involvement related to police at a rate of $25 per hour plus related travel costs." It also included both Respondent's MERS required contribution for the 2011-2012 fiscal year and the $100,000 voluntary contribution Respondent made that year to reduce is unfunded liabilities. In computing the costs under the contract with the County, the study included only the MERS required contribution from the previous year. It provided this explanation:

> If the Township chooses to move forward with the Sheriff's contract, the MERS plan will be "closed" and MERS will recalculate the township's required contribution for 2013-2014 and annually thereafter, based on an accelerated amortization schedule for the unfunded liability. Taking the action should contain the amount of the unfunded liability for the Township in the long run, even if the required payments go up due to the accelerated amortization schedule. Additionally, we understand that the Township desires to pay off this unfunded liability as soon as possible to maximize fiscal accountability and transparency.

The study also noted that police department assets might be sold for an estimated one-time additional cash inflow of $50,000 to $100,000, although it recommended that Respondent not do this until it had several years of experience with the contract and was sure that it was satisfied with the County's services. The analysis stated that the one-time costs incurred by Township elected officials related to the "current police department situation" should eventually go away with the County contract, but noted that – for elected officials - this would not represent hard dollar savings but rather additional time available for elected officials to dedicate to other Township business. Finally, the analysis recommended language in the contract limiting the amount that the County could increase costs for the contract period.

Respondent's actual final budget for police services for the 2011-2012 fiscal year, during most of which it operated its own police department, was $863,800. This included the voluntary $100,000 payment to MERS toward its unfunded pension liabilities. Within a week of the beginning of the 2012-2013 fiscal year on March 1, 2012, the County began providing Respondent with police services under their contract. In July 2012, Respondent amended its 2012-2013 police department budget upwards to $863,150. The amended budget included a one-time payment to MERS of $19,000 to close its pension plan, but no voluntary additional payments to MERS. This amended budget remained in effect in September 2012. In other words, at least as of September 2012, Respondent was expecting to save $121,000 less than the study had projected during the first year of the County contract.

Discussion and Conclusions of Law:

Burden of Proof

In order to establish a prima facie case of unlawful discrimination under PERA, a charging party must establish, in addition to an adverse employment action: (1) that the employees engaged in union or other protected concerted activity; (2) that the employer had knowledge of that activity; (3) union animus or hostility towards the employees' protected activity; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory actions. *City of St Clair Shores*, 17 MPER 76 (2004). Although union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, a charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *City of Grand Rapids (Fire Dept),* 1998 MERC Lab Op 703, citing *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). In other words, Charging Party must present sufficient evidence to support an inference that the employees' protected activities were the cause, at least in part, of the adverse action of which it complains.

Although it is Charging Party's burden to show anti-union animus, I disagree with Respondent that Charging Party must show a "longstanding pervasive undercurrent of animus" to meet this burden. I also disagree that Respondent's willingness to process grievances, negotiate a new contract and participate in an Act 312 arbitration establishes that Respondent had no anti-union animus in this case. As I stated in my Decision and Recommended Order in *Parchment Sch Dist,* 2000 MERC Lab Op 110, at 119 (decision adopted by the Commission when no exceptions were filed), in order to make out a prima facie case of unlawful discrimination based on union activity, a charging party does not have to demonstrate that an employer or its agents have a violent, irrational hatred of all unions. As I noted in that decision, the fact that an employer's desire to rid itself of its particular union is based on the cost of dealing with that union, including the administrative costs associated with processing grievances, does not preclude a finding of anti-union animus. See *Calatrello v Automatic Sprinkler Corp,* 55 F3d 208 (6th Cir, 1995), discussed in fn 3 of *Parchment,* in which the Sixth Circuit commented that "anti-union animus is no less anti-union animus simply because it springs from serious economic considerations. Indeed . . . in the major of cases where employers commit unfair labor practices … employers break the law primarily out of concern for their economic welfare."

I note that if a union is unable to show that anti-union animus was a cause of the employer's decision to subcontract work performed by unionized employees, it does not matter whether the employer's financial situation was so bad that it required that the work be outsourced. Contrary to what Charging Party appears to argue, I also conclude that the fact Respondent and Charging Party may have had a collective bargaining agreement which set the pay rate and other terms and conditions of employment for patrol officers when Respondent decided to contract with the County is irrelevant to the question of whether Respondent's decision to enter into the County contract was unlawfully motivated. Rather, whether Respondent had a contractual obligation to maintain that department is another question, and one not raised by the charge here.

However, once a union establishes a prima facie case, the burden shifts to the employer to produce evidence of a lawful reason for its action and that the same action would have taken place even in the absence of the protected conduct. *MESPA v Evart Public Schools,* 125 Mich App 71, 74 (1982); *City of Grand Rapids (Fire Dept*) at 706; *Residential Systems Co*, 1991 MERC Lab Op 394, 405. Although the employer's burden is one of persuasion, not proof, once the charging party has

met its initial burden an employer cannot merely state a legitimate reason for the action taken, but must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996). It is well established that a mere showing that a legitimate reason existed for imposing the adverse action is insufficient to satisfy the employer's burden. *Relco Locomotives, Inc*, 358 NLRB No. 32 (2012), citing *Hicks Oils & Hick Gas*, 293 NLRB 84, 85 (1989), enf'd 942 F2d 1140 (CA 7, 1999).

<u>The Prima Facie Case</u>

For reasons discussed below, I conclude that Charging Party has established a prima facie case of unlawful discrimination in Respondent's decision to contract with the County for police services. That is, I find that Charging Party presented sufficient evidence to support a finding that the patrol officers' protected activities were a motivating factor in Respondent's decision. First, I find that the evidence establishes that Peck, the Township supervisor, had animosity toward the patrol officers in the bargaining unit because they filed grievances under the collective bargaining agreement, an activity clearly protected by PERA. I base this finding on the following:

1. Peck's complaint at the December 8, 2011, Township Board about grievances filed, as well as lawsuits that apparently did not yet exist.

2. The incident between Cook and Peck in December 2011, during which -according to Peck's own statement – Peck mentioned grievances filed as a "behavior of the officers that needed to change," and held up a grievance as an example of Cook's bad behavior.

3. The television interview in December 2011 during which Peck again singled out the legal bills caused by grievances and lawsuits filed by officers as a factor preventing the parties from getting a collective bargaining agreement.

4. A statement made by Peck in a newspaper interview – and confirmed as essentially accurate by Peck at the March 7, 2012 meeting of the County Commission – identifying multiple grievances and lawsuits by the officers as examples of "behavior that needed to change."

I also find that Noeker, the Township treasurer, had animosity toward the patrol officers in Charging Party's bargaining unit because they concertedly supported the recall campaign against him in hopes that he would be replaced with a board member more favorably disposed toward the union and more willing to agree to its demands. I base this finding on the content of the ad placed in the Flushing Journal on October 30, 2011 and the flyer distributed around this same time. Both the ad and the flyer state that they were paid for by committees, and not by Noeker himself. However, I find it reasonable to conclude that in the election in this small municipality, the opinions expressed in the ad and the flyer were those of Noeker himself as well as his supporters. I also find that the concerted efforts of members of the bargaining unit to raise funds to support the recall constituted protected activity for "purposes of mutual aid and protection" within the meaning of §9 of PERA, as public statements made by the unit in support of the recall would have been. In *City of Detroit (Fire*

Dept), 1982 MERC Lab Op 1220, the Commission noted that a strict dichotomy does not exist between "political activity" and activity protected by §9. It held in that case that fire fighters were engaged in protected activity when they appeared in advertisements to oppose a city charter amendment dealing with promotions in the fire department wearing their uniforms. As both Noeker and his supporters and members of Charging Party's bargaining unit clearly recognized, the composition of a public employer's governing body may have a definite impact on employees' terms and conditions of employment.[2]

Second, I find that the evidence supports the conclusion that Peck's and Noeker's animus was a motivating factor in Respondent's decision to enter into the contract with the County. Respondent cites *Southfield Pub Schs,* 25 MPER 35 (2011), in which the Commission concluded that allegedly anti-union remarks made by a school board member were irrelevant to a determination of the employer's motive for subcontracting unit work. In that case, the allegedly anti-union remarks were made by the school board member to a custodial employee who was a bargaining unit member in private conversations while they were watching school basketball games. First, the expressions of animus by Peck and Noeker that I have cited above were made publicly, and in their capacities as members of Respondent's board. Second, unlike the school board member in *Southfield,* Peck's and Noeker's role in Respondent's decision was not limited to voting on a proposal. Rather, both were part of the committee created by the Board to explore alternatives for providing police services. The Board naturally relied on this committee for information about the contract and recommendations. Moreover, the minutes of the February 9, 2012 board meeting clearly reflect that Peck, the Township supervisor, provided the Board members who were not on the committee with information about the proposed contract, including reviewing with them the figures and recommendation set out in the February 8 study and answering most of their questions. As the Township treasurer, Noeker would have been the Board member the other members looked to for advice on decisions affecting finances. Third, the minutes indicate that the committee's third member, the Township clerk, was opposed to entering into the contract with the County at that time and voted against its adoption. Under these circumstances, I find it impossible to believe that the contract would have even been presented to the board for a vote on February 9, much less approved, had both Peck and Noeker not strongly supported it.

The evidence also supports a finding that both the patrol officers' support for the recall campaign and their filing of grievances were factors in Respondent's decision to contract with the County. In March 2011, according to the record, Whetstone tried to secure Respondent's agreement not to eliminate the police department by promising that the patrol officers would not participate in any further recall campaigns. I find that Respondent's response, that it "wanted a long-term commitment," was an implicit admission that the officers' participation in the previous recall campaign was at least one of the reasons that it was considering alternatives to operating its own department. Finally, at the March 7, 2012 meeting of the Genesee County Board of Commissioners, Peck admitted in response to questioning from County Commissioner Bailey that the patrol officers' filing of grievances was one of the reasons he, at least, supported contracting with the County and

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2 I note that Respondent did not assert that the unit members' support for the recall effort was unprotected because it violated §10(3)(1)(ii), now §10(2)(b), and there was nothing on the record indicating whether Noeker or Garner served as Respondent's representative in bargaining. Compare *Jackson EA v Grass Lake Cmty Schs,* 95 Mich App 635 (1980).

eliminating Respondent's police department. This admission was consistent with other statements made by Peck prior to the formation of the Board committee on December 21, 2012. I conclude that these facts are sufficient to satisfy Charging Party's initial burden and establish a prima facie case of unlawful motive.

Respondent's Burden

Once Charging Party establishes a prima facie case, the burden shifts to Respondent to present evidence both of a legitimate motive for its decision to contract with the County and that it would have taken the same action in the absence of concerted protected activity by the patrol officers and the animus shown by its agents toward that activity.

As Charging Party correctly points out, Respondent's overall financial health was better than that of many other municipalities in early 2012. Respondent's general fund was healthy, and its police millages had been renewed. The fact that Respondent was borrowing from its water department fund to carry over the police department between millages created no immediate emergency. In addition, the record indicates that the police department financial situation had improved since 2009 and was improving; the department was no longer running an operating deficit and was slowly building up its police fund balance.

However, I do not agree with Charging Party that the cost comparison study prepared by Respondent's financial advisory accounting firm was false and misleading, or that it predicted savings from the County contract that Respondent's Board knew or should have known did not exist. Rather than trying to estimate the actual cost of operating the department for the 2012-2013 fiscal year, the analyst simply used the budget figures from the previous fiscal year. The analyst's decision to use the previous year's police budget as the basis for comparison was not unreasonable. I agree that the study might have overstated the savings which Respondent might expect to have in the first year of the contract. For example, as the analyst noted, no actual dollars would be saved by eliminating the time spent by elected officials on contract negotiations, lawsuits, and arbitrations since these elected officials, unlike the board members, were paid salaries. Also, there was no explanation in the study for the analyst's estimate that the interest paid to the water fund would decrease by two-third in the 2012-2013 fiscal year and then disappear, since the police fund balance was still inadequate to cover the annual cost of the police services under the County contract. Finally, the study's estimate that Respondent's legal fees would drop from $40,000 per year to $30,000 during the next fiscal year, and then to $5,000 the year after, seems optimistic. Of course, if Respondent continued to have no police department it should eventually have no legal bills attributable to a police department. The items, however, constituted only a minor part of the savings identified in the study.

On the issue of pension costs, the record indicates that in 2012, Respondent had a large unfunded liability in its police department MERS accounts. Since the patrol officer account was 87.25% funded, almost all of the unfunded liability appears to have been incurred as a result of pension commitments to command officers, some of whom may no longer have been active employees. Charging Party argues that the study seriously overestimated the savings to be realized from the County contract by counting the $100,000 voluntary MERS payment Respondent made in 2011-2012 as a cost of continuing to operate the department while omitting any voluntary MERS

payments as a cost of contracting with the County for police services. However, the study provides an explanation. The analyst knew, as the analysis stated, that the required MERS contribution would actually increase under the County contract because of the accelerated amortization schedule for the unfunded liability required by the closing of the plan (since Respondent would no longer employ any police officers). Respondent would also be required to make a one-time payment to MERS in the first year to cover the costs of closing the plan. However, since the amount of the increase could not be determined until MERS did an actuarial evaluation, the analyst chose to assume, for purposes of the study, that the amount of Respondent's required MERS contribution would remain constant. The study makes this assumption perfectly clear. That is, persons reading the cost comparison were to understand that if Respondent opted for the County contract, it would probably have a MERS-required contribution somewhat higher than the figure listed in the cost comparison, although the additional required contribution would not necessarily exceed the amount Respondent had voluntarily chosen to pay in 2011-2012, and might chose again to pay, to reduce the amount of its unfunded liability.

As noted above, the cost comparison analysis used the police department budget figures from the 2011-2012 fiscal year as the cost to Respondent to operate the department in 2012-2013. The analysis did not take into account any of the economic concessions Charging Party had agreed to in contract negotiations but had not yet become finalized in a collective bargaining agreement, including the decrease in the pension multiplier and the substantial increase in the pension contribution.

However, even if the cost comparison may have overstated the savings to Respondent in the first years of the County contract, it did not even attempt to put a dollar figure on the long term savings from closing the defined benefit pension plan. Even if the cost of the County contract increased, the growth in Respondent's unfunded pension liability would at least slow because police officers would not be incurring additional service credits and none would be eligible for early retirement. In addition, Respondent would eliminate its obligation to pay retiree health benefits to these three individuals, an obligation Respondent had not even been setting aside money to fund. Finally, Respondent would get more hours of local police coverage under the County contract. Charging Party is, of course, correct in pointing out that Respondent could have obtained more coverage without entering into the County contract by assigning overtime or recalling some of its laid off officers, but this would have increased Respondent's costs. In sum, I find that the members of Respondent's Board could have concluded that County contract provided Respondent with an actual long term financial benefit as well as an increased police presence.

I further conclude that Respondent would have entered into the County contract for these reasons even in the absence of the concerted protected activity that provoked Peck's and Noeker's animus. Since about 2009, Respondent has had a fiscally conservative board that repeatedly cut services and other expenses, including its own compensation, to improve the Township's financial condition. Bolin's testimony demonstrated that Respondent was thinking about providing police services by some means other than maintaining its own department at least as early as March 2011. I note that this was before the patrol officers became involved the most recent recall campaign, and possibly before many of the grievances that angered Peck were filed. In fact, the patrol officers' concerted participation in the 2011 recall campaign was an attempt to prevent the Board from eliminating the department. The timing of the Board's decision to contract with the County is

explained in this case by the fact that until its voters approved the change to the millage language in the November 2011 election, Respondent could only use the police millage to operate its own department. After the voters authorized the change, the Board acted promptly to examine alternatives. I find that even if Peck acted in part out of anti-union animus, Respondent's decision to contract with Genesee County for police services and eliminate its own department was ultimately motivated by a legitimate desire to save money while increasing services, and not by the protected concerted activities of Charging Party's members. I conclude, therefore, that Respondent did not violate §10(1)(c) of PERA, and I recommend that the Commission take the following action.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 24, 2013