STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KEEGO HARBOR,
Public Employer-Respondent,

Case No. C10A-008

-and-

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

APPEARANCES:

Brendan J. Canfield, for Charging Party

Potter, DeAgostino, O'Dea & Patterson, by Rick J. Patterson, for Respondent

DECISION AND ORDER

On June 29, 2013, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order finding that Respondent City of Keego Harbor, violated § 10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by coercing, restraining, interfering with, discriminating against and retaliating against a member of the bargaining unit represented by Charging Party Police Officers Labor Council. The ALJ further found that Respondent violated § 10(1)(e) of PERA by failing to respond to Charging Party's request for information related to mandatory subjects of bargaining.

The Decision and Recommended Order was served upon the interested parties in accordance with §16 of PERA. After requesting and receiving an extension of time, Respondent filed its exceptions on August 21, 2013, together with a request for oral argument. Charging Party also requested and was granted an extension of time and filed its Response to Exceptions and Brief in Support of the ALJ's Decision and Recommended Order on October 3, 2013.

The Commission finds that oral argument will not materially assist in making its decision and Respondent's request for oral argument is hereby denied.

Respondent's exceptions ask that the record be reopened so that it may provide additional evidence about the financial considerations at issue when determining the 2010-2011 budget for

Keego Harbor. Rule 166 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.166 provides:

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

Respondent's request to reopen the record does not comply with the rule. The request does not state that the additional evidence could not have been discovered and produced at the hearing, that the evidence is newly discovered or that the evidence would require a different result. Respondent's request to reopen the record is thereby denied.

In its exceptions, Respondent contends that the ALJ erred in finding that Respondent's actions were in retaliation for the union activities of Charging Party's member. Respondent also takes exception to the ALJ's finding that Respondent breached its duty to bargain in good faith by failing to provide information requested by Charging Party. Respondent further objects to the ALJ's interpretation of the testimony presented at the hearing and to the ALJ's witness credibility determinations. Respondent requests that the Commission overturn the ALJ's Decision and Recommended Order in its entirety.

In its answer to Respondent's exceptions, Charging Party supports the ALJ's Decision and Recommended Order and requests that the Commission adopt it in its entirety.

On reviewing the record carefully and thoroughly, we agree in part and disagree in part with the findings and conclusions of the ALJ. Accordingly, we modify the ALJ's recommended order, as discussed below.

Facts:

The following facts are taken from the record.

In May 2005, Robert Alonzi (Alonzi) was hired as a police officer by the Keego Harbor Police Department and assigned to the midnight shift as a patrol officer. The police officers are exclusively represented by Charging Party Police Officers Labor Council.

Alonzi is also a licensed attorney. While employed as a police officer, Alonzi practiced law as a solo practitioner. When first hired, he notified then Police Chief Dennis Watkins of his off-duty employment. Chief Watkins approved Alonzi's supplemental employment with restrictions: He could not practice in the 48th District Court, which had jurisdiction over Keego Harbor, and could not accept any case adverse to the interests of Keego Harbor. This permission

was consistent with Keego Harbor Police Department Rules and Regulations, which require that an officer get prior approval from the Chief of Police before commencing supplemental employment. The rules are silent as to whether or how a subsequent Chief of Police can revoke permission given for off-duty employment by a prior Chief of Police.

On August 6, 2009, Kenneth Hurst (Hurst) was appointed Acting Chief of Police of Keego Harbor. At that time, Hurst also served as a sergeant for Oakland County Sheriff's Department. He was appointed as permanent Chief of Police on November 2, 2009.

From the beginning, Hurst and Alonzi engaged in a series of disputes which resulted in this unfair labor practice charge. Before Hurst was appointed Acting Chief, Alonzi had not been disciplined. Hurst disciplined Alonzi four times. Hurst first issued a five-day suspension, subsequently suspended Alonzi for thirty days, issued an indefinite suspension on the day Alonzi was to return to work from the thirty-day suspension, and finally placed Alonzi on indefinite layoff status. Each adverse employment action will be discussed separately.

The Five-Day Suspension

On September 6, 2009, Alonzi's work schedule was changed from Tuesday through Saturday to Saturday through Wednesday. Due to this change, Alonzi worked eight consecutive days from September 2, 2009 to September 9, 2009. Alonzi believed that this change in schedule entitled him to overtime for an extra workday on September 6. Article 27 of the collective bargaining agreement mandated overtime pay for all work over eight hours a day or forty hours a week. Alonzi interpreted a week to mean his personal workweek, rather than Monday through Friday. He testified that additional shifts of this nature had customarily been paid as overtime. Hurst did not believe Alonzi was entitled to overtime, based on his interpretation of department regulations.

Alonzi met with Hurst to discuss the claim for overtime. Hurst ordered Alonzi not to seek overtime for his shift on September 6 and told Alonzi that he would discipline him or charge him with criminal fraud if he claimed overtime pay. Alonzi later submitted his time sheet which claimed overtime pay directly to Hurst rather than to the payroll clerk. Alonzi testified at the hearing that he agreed that he was not entitled to the overtime pay, but that at the time he claimed it, he believed in good faith that he was entitled to it under the collective bargaining agreement. In a taped interview with Hurst (see below), Alonzi stated that he "elected to let it go. Our contract states anything over forty hours in one week. My interpretation was there was more than forty in one week." Alonzi changed the time sheet to reflect that no overtime was due. Alonzi chose not to grieve the matter, testifying that he feared Hurst would discipline and/or charge him with fraud if he did.

Even though Alonzi changed his time sheet and withdrew the request for overtime pay, Hurst convened a second meeting with Alonzi concerning the overtime issue on October 7, 2009. This interview was characterized as a *Garrity*-type interview.[1] Accordingly, Hurst "allowed"

[1] *Garrity* provides that while an employee is compelled to answer questions during an investigatory interview, any statements obtained from the employee may not be used against them in a subsequent criminal action. In other words, the employee may not be compelled to waive his/her Fifth Amendment rights under the United States

Alonzi to have a union representative, Gregory Palmer, present at the meeting. Hurst admonished Palmer to sit there, say nothing and not interrupt. He told Alonzi to only speak in direct response to Hurst's questions. He also instructed both Palmer and Alonzi to tell no one what transpired during the interview. He threatened to discipline both men, up to and including discharge, if either disobeyed his instructions. Hurst stated that he would be recording the entire meeting. He instructed Alonzi and Palmer not to record the meeting and asked them if they were doing so. Alonzi answered that he was recording the meeting, but Hurst apparently did not hear him.[2] In fact, Hurst recorded only part of the meeting; at some point, he turned off his recorder, even though the meeting continued. Alonzi, however, recorded the entire meeting using a wristwatch audio and video recorder.

During the part of the interview which Hurst thought went unrecorded, he became irate, using obscenities and a racial epithet ("fuckin' abudaba"). He also stated that he considered Alonzi's submission for overtime pay to be a violation of a direct order. He threatened Alonzi with increased discipline if Alonzi further crossed him, such as by filing grievances or "bad-mouthing" city officials. Hurst threatening statements included "if you do appeal it, there may be adjustments" [Discussing the decision to give Alonzi a five-day suspension rather than a thirty-day suspension.] "I want your clear-cut understanding, until I leave this fuckin' place I am the chief of police. . . If you can't live with that then I'll suspend you until I leave" "You make accusations against me, you open yourself up to a very, very strong response" "You keep this up you won't have a career here," "If you want to appeal it, I'll be more than happy to show you how foolish you sound," "… how about I give you 30 days off, you going to appeal that?" "The only thing that's going to save you from a real hard, hard spanking is what you said just now." [After Alonzi agreed to both accept whatever discipline was issued and to keep the matter between him and Hurst.] and "[b]ecause I tell you what, after this interview right here, I was fuckin going to fry you for 30 days. That's no lie."

At the hearing, Hurst testified that he turned off his own recorder after the interview was concluded. The full transcript of the interview is 150 pages, over 60 of which were recorded by Alzoni after Hurst turned off his recording device. When asked whether, after he turned off his recorder, any discussion about discipline continued, Hurst repeatedly said he "could not recall." He also testified that he had not, to his knowledge, threatened Alonzi after turning off his tape recorder, and that he remained calm and professional throughout the meeting.[3] Alonzi indicated during the meeting that he was willing to accept whatever discipline Hurst decided to impose and would not file a grievance. Hurst responded that given Alonzi's assurances, he would give him about one-fifth of the discipline he initially planned on giving. When asked "[a]fter he told you that he would accept the discipline and not file a grievance, did you decide to give him a less severe suspension?", Hurst replied "I believe I did." When asked if Alonzi filing a grievance

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Constitution. *Garrity v State of New Jersey*, 385 US 493 (1967) (individual threatened with discharge from employment for exercising his Fifth Amendment privilege had not waived it by responding to questions rather than invoking his right to remain silent.) See also *Minnesota v Murphy*, 465 US 420 (1984).

[2] Hurst testified that he had hearing problems. The ALJ asked witnesses to speak louder when they testified to be certain that Hurst could hear their testimony. In addition, the ALJ noted that Alonzi was soft-spoken and had to be repeatedly asked to speak up while testifying.

[3] The ALJ found Hurst's testimony to be "pugnacious and evasive at critical junctures" and concluded that Hurst's testimony was "repeatedly untruthful" and, therefore, found that he was not a credible witness.

over the suspension was contrary to his promise that he would accept the discipline, Hurst replied "[w]ell yeah. It goes in the face of it."

Alonzi's recording of the meeting also contains a discussion regarding when the discipline would be removed from his personnel file. Hurst said he guaranteed "it will be pulled from your record completely." When Alonzi asked if Hurst would "do six months", Hurst replied "[n]o. One year is standard." After Alonzi objected, Hurst stated "I've got news for you. You think I'm going to take it off in six months after you fight me? It will stay on for two years and then you've got another one coming."

On October 26, 2009, Hurst held another meeting with Alonzi. He gave Alonzi a memorandum dated October 16, 2009, which set forth four misconduct charges against Alonzi. The first was that Alonzi was engaging in surveillance of a bar, which Hurst said went against his order to officers not to park their patrol cars within view of liquor establishments. He did not want it to appear that officers were "overlooking or watching liquor licensed establishments." This was known as "sitting on the bars." While sitting in a parking lot next to a bar at closing time on September 24, 2009, Alonzi saw what he thought might be an intoxicated driver get into his car, followed him a short distance and arrested him. The recording of the October 7, 2009 meeting demonstrates that Hurst and Alonzi disagreed over whether Alonzi had disobeyed Hurst's orders by sitting on the bar before effectuating the arrest. Hurst maintained that he disciplined Alonzi after he saw Alonzi sitting in a bar parking lot for twenty-minutes on September 24, 2009. He also testified that he had not disciplined any other officers for sitting on bars. Charging Party introduced evidence at the hearing that other officers were observed sitting on bars but their conduct had been overlooked by Hurst.

The second misconduct charge was Alonzi's request for overtime pay for September 6, 2009, which Hurst said disobeyed a direct order.

The third misconduct charge alleged that Alonzi disobeyed a direct order by incorrectly recording the performance of his duties on a log sheet. The department uses log sheets to record police activity. After a meeting with Alonzi at the end of a shift, Hurst told Alonzi that, having reached the scheduled end of his shift, he was now "off the clock." Alonzi recorded on his log sheet that at the end of his shift he spent time talking to a fellow officer and refueling his patrol car, both of which ran several minutes past the end of his shift. He did not include those minutes on his payroll sheet, nor request overtime or any compensation for them. Hurst ordered Alonzi to remove the notation from his log sheet. At the hearing, Alonzi testified, in response to questions from the ALJ, that while fueling their cars, officers are in uniform and cannot tell someone who asks them for help that they are off-duty and unable to assist them. Alonzi explained that he noted all activity on his log sheets so if he were asked for help after his shift ended, he could demonstrate why he was in a position to be asked for police assistance.

Alonzi also testified that officers often refueled their patrol cars after their shift ended and noted it on their log sheets, so he had merely made an accurate notation on his log sheet. Hurst considered the log sheet entry a violation of both police department rules and the union contract. However, Hurst testified that police officers are asked to refuel their vehicles at the end of their shift. "They are asked to do that. We prefer it." When asked if, before he disciplined Alonzi for

the log sheet entry, he checked to see if Alonzi had submitted a request for overtime pay for that day, Hurst replied that he had not.

The fourth misconduct charge was Hurst's claim that Alonzi went outside the chain of command by complaining about Hurst to the Oakland County Sheriff's Department. Alonzi telephoned the Oakland County Sheriff's office to complain that Hurst was harassing him and had threatened to accuse him of crimes. At the time, Hurst was both the Acting Chief of the Keego Harbor Police Department and an active sergeant in the Oakland County Sheriff's Department. However, Hurst directly reported to the Keego Harbor City Manager. The Rules and Regulations, specifically Rule 60, of the Keego Harbor Police Department, state that a complaint about the Chief of Police shall be submitted in writing to the City Manager. Alonzi testified that he made the call based on his understanding that Hurst still reported to the Sheriff's Department even though he was serving as Acting Chief of Police in Keego Harbor. At the time, Hurst continued to wear the uniform and badge of the Oakland County Sheriff's Department and drove a sheriff's department automobile. He did not stop wearing the uniform and badge of the sheriff's department until November 2, 2009. The transcript of the recording of the October 7, 2009 meeting reveals that when discussing this issue, Hurst stated that "I'm detailed [inaudible] directly to the sheriff's office. I may be independent, but guess what, I still answer directly to the sheriff's office." He also asked Alonzi "[s]o what was your purpose of calling my supervisor?" At the hearing, Hurst testified that he was still employed by the Oakland County Sheriff's Department while he was Acting Chief for the Keego Harbor Police Department and remained employed by the sheriff's department until he was appointed permanent Chief of Police in Keego Harbor.[4]

On October 27, 2009, Hurst issued another memorandum which stated that "after careful consideration of charges outlined in a misconduct memo presented to you on October 26, 2009, you are hereby given a **five (5) day suspension without pay**." (Emphasis in original). Alonzi testified that Hurst told him that if he grieved the suspension, additional and more severe discipline would be imposed. Alonzi filed a grievance October 28, 2009.

On December 9, 2009, Hurst called Alonzi in for another meeting, which Alonzi also recorded. Hurst gave Alonzi a memorandum indicating the dates on which his five day disciplinary suspension would be served. In that memorandum, Hurst threatened that "any failure to comply with, or attempts to circumvent, this order will result in severe disciplinary action, up to and including termination." Hurst also voiced his displeasure at Alonzi for having grieved the five-day suspension. He stated "[y]ou want to show me you're right. You're going to show me – this whole five days, you're going to appeal that." Alonzi replied that he had a good record and did not want his record tarnished. Hurst said that he "could take if off" his record, but then stated "I've got news for you. You think I'm going to take it off in six months after you fight me? It will stay on for two years and then you've got another one coming." (The contract calls for removal after two years.) Hurst then told Alonzi that "when I dish out discipline, it's done. Because discipline isn't done until it's over with the union, too . . . so it keeps festering and it

[4] While the record is replete with Hurst's references to the chain of command and to the paramilitary nature of police departments, we have held that "[a]lthough it is important that chain of command be followed in a police department, the existence of a paramilitary operation does not grant the Employer an exemption from the requirements of PERA." *Mich State Univ*, 26 MPER 36 (2012).

keeps on going." He also stated that Alonzi was "beating a dead horse. Your fight ain't going to stand." Hurst went on to say that "[a]s long as it's an open wound, that's an open wound not caused by me."

The Thirty-Day Suspension

On January 13, 2010, Charging Party filed an unfair labor practice charge based on the above events. Three weeks later, on February 9, 2010, Hurst significantly restricted Alonzi's outside employment as an attorney by adding new conditions. Alonzi was prohibited from handling any criminal case, not just those in the 48th District Court, and he was prohibited from representing any resident of Keego Harbor. He was also ordered to submit a list of all pending cases in which he had filed an appearance as counsel. The list was to be supplemented within seventy two hours of filing an appearance on any new case. Alonzi grieved the new restrictions. However, he complied with Hurst's demand and provided a list of the clients for any case on which he had filed an appearance. Alonzi testified that he consulted with the State Bar of Michigan and received an ethics opinion from the bar which stated that he should not provide names or other information concerning his clients to Respondent. He did so anyway "[b]ecause Chief Hurst told me I would be terminated if I didn't." The ethics opinion was not introduced as an exhibit at the hearing.

On March 12, 2010, Hurst received a letter from the Holly, Michigan Chief of Police, Rollie Gackstetter (Gackstetter), complaining about letters Alonzi had written on behalf of Viva Breen (Breen), a Holly resident whose dogs were attacked, killed and partially eaten by dogs belonging to Joseph and Cheryl Hutchins, also Holly residents. When she tried to intervene to save one of her dogs, Breen was bitten by one of the dogs who killed her animals. Breen was the mother of one of Alonzi's clients. Alonzi was not the attorney of record for Ms. Breen and had not filed an appearance or appeared in court on her behalf.

However, he acted in his capacity as a private attorney to send a letter regarding Breen's claim to the Holly village prosecutor in a related criminal case against Joseph and Cheryl Hutchins. Alonzi also sent a letter to the Village of Holly City Council members to request that the criminal matter be transferred from the village attorney to the Oakland County Prosecutor's Office because members of the Hutchins family sat on the village council, which supervised the village prosecutor, thereby arguably creating a conflict of interest. The letters were written on stationery containing the letterhead "Alonzi & Associates, PLLC, Attorneys and Counselors at Law." Gackstetter wrote to Hurst to complain that the letters demonstrated Alonzi's "intent … to influence actions of the Village in the criminal case to further the interests of Officer Alonzi's client in the civil action, by inferring or implying improper handling of the matter in criminal court." Gackstetter accused Alonzi of "alleging impropriety on the part of the Holly Police and the Holly Prosecutor." Alonzi testified that he did not engage in any communications with the Holly Police Chief or any Holly police officers, nor did he send the letter to them. In the letters, Alonzi did not identify himself as a Keego Harbor police officer.

Hurst conducted a disciplinary interview with Alonzi on March 16, 2010, regarding the Breen letters and the letter to the Holly Village Council. Hurst asserted that Alonzi had violated his order to submit a complete client list because the list previously submitted did not include

Breen and he had failed to inform Hurst, within 72 hours, that he had become the "attorney of record" for Breen. The transcript of the October 7, 2009 meeting reveals that when they first discussed Alonzi's practice of law, Hurst stated that: "[a]s long as you're not the attorney of record. As long as you haven't been the attorney of record or filed any appearances. You can't stand up next to an individual." At the December 9, 2009 meeting, when discussing Alonzi providing his client list, Hurst stated: "I need to know not only the contact information, but the court information. That's public record. That's public record. If you file an appearance, if you represent somebody." Hurst also stated that if Alonzi withheld any information concerning his clients, Hurst would find out from tax records and Alonzi would be terminated.

Alonzi never filed an appearance as attorney of record for Breen, never filed a lawsuit on her behalf and never represented her in court. His name did not appear on any court documents as Breen's attorney. He testified that he received no compensation from Breen and she did not retain him to file a civil matter on her behalf. However, Alonzi did write in one of the letters: "We currently represent Mrs. Viva Breen." On cross-examination at the hearing, Alonzi admitted that he "represented" Ms. Breen by sending letters on her behalf but never considered himself her attorney of record. Hurst testified at the hearing that he had wanted a list of "anybody [Alonzi] was the attorney for." After receiving the thirty-day suspension, Alonzi took no further action on behalf of Breen. He filed a grievance, which Hurst refused to hear, despite contract language which required officers to present grievances to the Chief of Police.

On March 22, 2010, Hurst sent a memo to the Keego Harbor City Manager recommending the immediate termination of Alonzi's employment based on his failure to report Breen as a client. In the memo, Hurst wrote that "Officer Alonzi will simply demand litigation for any order he does not want to follow. In a law enforcement environment, this continued form of insubordination, resistance, and interference cannot be allowed to continue." Hurst described Alonzi as having a "litigation attitude towards established Rules & Regulations" and as "demanding litigation on issues not generally covered under Union contract." The memorandum also states that in his March 16, 2010 interview with Alonzi, "it became apparent that Officer Alonzi is the attorney of record for Ms. Viva Breen – who is **not** posted in his required client list and **has not been added** in accordance with the "Outside Employment" order issued to Alonzi on February 9, 2010. (Emphasis in original).

Hurst's memorandum recommending termination also alleged that Alonzi had failed to follow another direct order given by Hurst at the March 16, 2010 disciplinary interview. That order was based on an alleged bribe which Hurst ordered Alonzi to report to the Oakland County Prosecutor. In Alonzi's letter to the Holly Village Council, he questioned the appropriateness of a letter sent by the Holly prosecutor to the Hutchins' criminal defense attorney, in which the prosecutor discusses "money changing hands to reach a resolution" of the criminal prosecution. Hurst testified at the hearing that he thought this was a potential bribe. Alonzi did not report the matter to the Oakland County Prosecutor's Office as a bribery attempt because, according to his testimony, he did not believe a bribe had been attempted and "[t]he bribery was a characterization of Chief Hurst." Alonzi added that reporting the prosecutor's comment would have been tantamount to filing a false police report and to malicious prosecution. "I didn't want to get the city sued for malicious prosecution." The comment about money changing hands was, according to Alonzi, "just discussions between attorneys." Hurst testified that he did not conduct

an investigation to determine whether an illegal bribe had occurred before ordering Alonzi to report it. Nor did he himself notify the Oakland County prosecutor, the Oakland County Sheriff or the FBI about the alleged bribe. His testimony was that he did not "know if it happened or not."

On March 29 and March 30, 2010, Hurst hired four new part-time police officers. On April 2, 2010, Hurst issued a memorandum outlining charges against Alonzi arising from his involvement in the Breen case and his failure to report Breen as a client. Section D of the memorandum requires Alonzi to:

> "immediately provide to me (in writing) the case caption, case number, name of court and name of your client in any matter in which you currently are the attorney of record, whether the proceeding be criminal or civil in nature. Effective from the date of this Order and hereafter, you will provide me (in writing) with case caption, case number, name of court and name of your client within 72 hours of entering an appearance or otherwise becoming attorney of record in a legal proceeding.

On the same day, Hurst issued a second memorandum which states that "after careful consideration and review of charges … you are hereby given a thirty (30) day (work days) suspension without pay – to take effect immediately (work days affected are **starting April 3, 2010 – ending May 13, 2010**). Your first day back to work after the suspension will be **May 15, 2010**." (Emphasis in original). Hurst testified at the hearing that Alonzi's failure to provide him with a full client list and failure to follow a direct order to report the alleged bribe to the Oakland County Prosecutor's office were the reasons for the suspension.

On April 7, Alonzi filed a grievance over the suspension. Hurst issued a response the same day in which he denied the grievance and described Alonzi as "unwilling to accept any discipline without involving arbitration." On April 13, 2010, Charging Party sent a Demand to Arbitrate the matter. On May 5, 2010, Charging Party filed a second amended unfair labor practice charge for the thirty-day suspension.

On May 12, 2010, Hurst e-mailed Alonzi to inform him that "[d]ue to the inherent conflicts involved between attorneys and law enforcement, outside employment as an attorney is strictly prohibited by the City of Keego Harbor." Hurst stated that the city council had voted unanimously to restrict his ability to grant off-duty employment. City Councilman Sidney Rubin testified that council was concerned that a police officer working as an attorney could "get the city into deep trouble." Alonzi was the only police officer with a law degree. No city employees who were not police officers were prohibited from practicing law; the restriction applied only to the police department. After receiving notice of the ordinance prohibiting police officers from practicing law, Alonzi ended his law practice. On May 19, 2010, Charging Party filed a grievance on Alonzi's behalf, in which it alleged that the prohibition on any practice of law was "an unreasonable change in working conditions, violating Article 5, Section 1 of the Collective Bargaining Agreement."

The Indefinite Investigatory Suspension & The Layoff

Hurst telephoned Alonzi on May 14, 2010, telling him not to return to work on May 15, 2010 because his suspension, rather than ending, was being made indefinite. When Alonzi appeared at the station on May 17, 2010, Hurst immediately convened a disciplinary interview with Alonzi and a union representative. He gave them a memorandum stating that the suspension would be continued indefinitely, without pay. The reason given was the alleged misuse of Alonzi's police badge by Ben Tobin, a civilian who was then under criminal investigation by the Auburn Hills Police Department (AHPD). The AHPD was also investigating whether Alonzi had permitted Tobin to use his police badge. Hurst testified that he "went to Auburn Hills and asked for the investigation" of Alonzi. The suspension memorandum states that the suspension "will continue until completion of the A.H.P.D. complaint." When asked at the hearing if he suspended Alonzi without pay until the AHPD "investigation was completed", Hurst replied "[c]orrect." It also states that "any failure to comply with, or attempts to circumvent, this order will also result in immediate termination from the Keego Harbor Police Department."

Alonzi's testimony at the hearing was that Ben Tobin joined him and a group of friends to go to a bar in Rochester. Tobin could not enter the bar because he could not produce identification showing he was twenty-one years of age. (He was at the time twenty years old). Tobin claimed that he had left his identification in his car, which was parked at Alonzi's house. Alonzi gave his car keys to Tobin so Tobin could go retrieve his identification. Instead, Tobin entered Alonzi's house and took Alonzi's badge, which he then used to gain entrance to the bar. When asked if there were any charges filed against Alonzi related to the Rochester incident, Hurst replied "[n]o, not that I know of." There is no other information in the record indicating whether the Rochester Police Department conducted an investigation concerning Tobin's use of Alonzi's badge to enter the bar. Alonzi testified that he was never charged by any police department for the badge incidents. At a later date, Tobin tried to use Alonzi's badge at a shooting range in Auburn Hills and was seen on a video at the range presenting the badge. The AHPD administered a polygraph examination to Tobin, in an effort to determine whether Alonzi had given Tobin permission to use his police badge. After failing the polygraph, Tobin was charged with, and pled guilty to, one charge of impersonating a police officer, and the AHPD decided that Alonzi would not be charged. Hurst first testified that he did not know how the case against Tobin ended in Auburn Hills, but later testified that he was told that Tobin had gone to court and pled guilty. Hurst testified that he met more than ten times with Tobin concerning the badge incidents and met with Tobin's criminal defense attorney two or three times. He "could not recall" if he gave any information to Tobin's attorney. He testified that he intervened on Tobin's behalf with the criminal court judge in order to seek a lighter sentence for Tobin, who had pled guilty to impersonating a police officer.

The AHPD did not file any charges against Alonzi. The record reveals that Hurst received an e-mail from Thom Hardesty of the AHPD on June 8, 2010 which stated that "[t]he prosecutor this afternoon authorized 1 count of impersonating a PO against Tobin, nothing against Alonzi in our city. I don't think WB [West Bloomfield Police Department) is going to present. I sent our report to Rochester pd but I am not sure what they are going to do." Hurst admitted at the hearing that on June 8, 2010, he was not investigating Alonzi for the Tobin incidents. In fact, he testified that he never interviewed Alonzi concerning the badge incidents

and never conducted an investigation. Despite knowing that the AHPD would not charge Alonzi but would charge Tobin, Hurst did not end the indefinite suspension and call Alonzi back to work. He never sent a letter to Alonzi informing him that the AHPD investigation had ended and that no charges would be filed against him. He added that he believed Alonzi had done something wrong regarding the badges, but that he "was not completely clear on exactly what his involvement with the badges are." [sic]

Hurst testified that he continued the indefinite suspension, in part, because Alonzi had filed an unfair labor practice charge. His testimony was that Alonzi was not paid for the time he spent on indefinite suspension "[b]ecause it hasn't come to a head yet." When asked why not, he replied: "Because there is – well, two reasons. One he is laid off. Two, they have got this – there are several reasons. The unfair labor practice is going on." He then changed his testimony, stating that his reason was "because there is [sic] still investigations going on" as Alonzi was then the subject of a Federal Bureau of Investigation (FBI) investigation as well as an investigation by the Rochester Police Department. Those investigations, he testified, justified keeping Alonzi on indefinite suspension. Hurst subsequently admitted that he himself had tried to initiate an FBI investigation against Alonzi but that agency did not conduct an investigation. He also, after first testifying that an FBI investigation was "ongoing" at the time of Alonzi's indefinite suspension, later admitted that he did not meet with the FBI until almost a year later. Hurst also contacted the Michigan State Police to 'initially launch an investigation" but that agency likewise refused to investigate Alonzi. Hurst testified that there was no Waterford Township Police Department (WTPD) investigation, after first stating that department was also investigating Alonzi. In response to a question from the ALJ, Hurst testified that neither the State Police nor the FBI had subpoenaed any records from Keego Harbor regarding Alonzi. While those agencies did not subpoena any documents, Hurst testified that when he requested that those agencies investigate Alonzi, he gave them documents. Alonzi testified that the FBI never contacted him about any complaint Hurst made to them, nor was he ever contacted by the Michigan State Police, the Rochester Police Department or the West Bloomfield Police Department. Alonzi had also made allegations to the FBI concerning Hurst and he testified that the FBI did interview him concerning those allegations, but never interviewed him about Hurst's allegations and request for an investigation of Alonzi.

On cross-examination, when asked whether, at the time Hurst learned that the AHPD had cleared Alonzi of any wrongdoing, Hurst was aware of any investigations by the FBI, the State Police or the WTPD, he admitted that he was not, contradicting his prior testimony. He added that he was not aware of any investigations for the entire time from the indefinite suspension to the layoff. As for the WBPD, Hurst insisted that he did not mention WBPD in his indefinite suspension memorandum because he did not "have all the information" and while he believed that department was investigating Alonzi, that investigation was "probably" part of the indefinite suspension or was "indirectly" a part of it. He then testified that the WBPD had "not yet" charged Alonzi with any wrongdoing and that he did not "know what is going to happen." He testified that West Bloomfield did bring charges against Tobin and Tobin pled guilty, he believes, to impersonating a police officer.

On May 19, 2010, Alonzi filed a grievance over the indefinite suspension. Also on May 19, 2010, Hurst informed Alonzi by letter that he would be laid off and his position would be

eliminated effective July 1, 2010, due to cuts in the city's operating budget. The letter states that the city council adopted the 2010-2011 budget "which calls for the reduction of one full time position in the Keego Harbor Police Department." The city budget called for all departments to make cuts, but it did not, as Hurst claimed, specifically instruct him to lay off a full-time police officer. He had discretion to determine where and how the cuts in the police department budget would be made.

Less than two months before laying Alonzi off, immediately prior to issuing Alonzi's thirty-day suspension, Hurst hired four part-time police officers, all of whom retained their positions following Alonzi's layoff, despite Alonzi's greater seniority. Hurst assigned the part-time officers to work Alonzi's midnight shift. The collective bargaining agreement states that "[t]he hours of work of a full-time Union employee who is laid off shall not be filled by part-time employees."

Hurst testified that he met with the full-time police officers and they agreed to his assigning the part-time officers to Alonzi's shift. Officer Gregory Palmer, the union representative, testified that he did not ask the city to use part-time officers for the midnight shift and was not aware of any employees of the Police Officers Labor Council agreeing to the use of part-time officers on the midnight shift. However, he testified that he became aware that the full-time officers did informally agree to the use of part-time officers on the midnight shift. Neither party offered evidence of any written agreement between Respondent and Charging Party concerning this matter. The contract requires that probationary employees be laid off before regular employees.

Hurst testified that he hired the part-time officers because he was "having a hard time filling the schedule." The ALJ did not credit Hurst's explanation and instead concluded, from the timing of the hiring and Hurst's misrepresentations at the hearing, that Hurst hired the part-timers as part of a deliberate plan to get rid of Alonzi.

The Request for Information

On July 2 and July 7, 2010, Charging Party submitted a request for information to Respondent, asking for the work schedules of all police officers for July 2010. Charging Party was seeking to determine if Respondent was utilizing the part-time officers to fill-in for the laid off Alonzi in violation of the contract. On August 2, 2010, Hurst responded by refusing to provide the information because it was not subject to "public review." On August 6, 2010, Charging Party filed a third amended charge in which it alleged, *inter alia*, a 10(1)(e) violation for Respondent's failure to provide the work schedules. A partial schedule for July 2010 was provided to Charging Party on the first day of the hearing. It demonstrates that three of the four part-time officers were working the midnight shift which had previously been assigned to Alonzi.

Discussion and Conclusions of Law:

The Five Day Suspension

We disagree with the ALJ's finding that the five-day suspension imposed on Charging Party on December 9, 2009 was motivated by activity protected by PERA. This was the first time Alonzi was disciplined and when Hurst issued the discipline, Alonzi had not filed a grievance or engaged in any protected concerted activity. The ALJ considered the request for overtime pay (the time sheet entry) to be protected concerted activity. We disagree. For the activity to be considered concerted, the employee must be shown to be seeking a collective goal and may not simply be seeking to advance his or her personal claim. *City of Detroit (Dept of Water & Sewerage*), 18 MPER 34 (2005); *MERC v Cafana Cleaners, Inc.*, 73 Mich App 752 (1977). As for the bar-sitting incidents, all officers had been ordered not to engage in bar-sitting; Alonzi was not singled out due to any union activity. Accordingly, we reverse the finding of the ALJ that the five-day suspension violated § 10(1)(a) and (c) of PERA. The five-day suspension was neither based on protected concerted activity, nor was it motivated by anti-union animus.

We agree with the ALJ that, at the December 9, 2009 meeting, Hurst's threats to increase the discipline if Alonzi grieved the five-day suspension violated § 10(1)(a) of PERA, which makes it unlawful for a public employer or "an officer or agent of a public employer to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed by Section 9 of the Act." The ALJ is correct that the threats to increase the discipline if Alonzi filed a grievance constituted unlawful interference and coercion. An employer "cannot threaten either expressly or implicitly, to penalize employees for filing grievances." *Detroit Bd of Educ*, 1990 MERC Lab Op 167; *New Haven Comm Schs*, 1982 MERC Lab Op 1607; *Saginaw Twp*, 1983 MERC Lab Op 346 ("… an employer cannot threaten employees or retaliate against them for pursuing a grievance."). See also *Michigan State Univ*, 26 MPER 36 (2012) (no exceptions) which held that "[a]n implicit or explicit threat to terminate employees, reduce their wages or adversely change their working conditions if or because they have filed grievances or engaged in other types of activity protected by the Act violates Section 10(1)(a) of PERA." Even where an employee is erroneous in the merits of a grievance, the effort to exercise rights protected by PERA is immune from an employer's discipline. *MERC v Reese-Puffer Sch Dist.*, 391 Mich 253 (1974), superseded by statute on other grounds, *Employment Relations Comm v Cafana Cleaners, Inc.*, 73 Mich App 752, 756 (1977); *Algonac Cmty Schs*, 1991 MERC Lab Op 192. In determining whether an employer's statements constitute an implied or express threat, the Commission looks at both the content and context of the remarks. *New Haven Cmty Schs.* The standard is whether a reasonable employee would interpret the statement as a threat. *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *City of Greenville*, 2001 MERC Lab Op 55. We conclude that Hurst's statements could reasonably have been construed as threats to discipline, discipline more severely, or discharge Alonzi if he pursued grievances.

In *City of Inkster*, 26 MPER 5 (2012), the employer questioned an employee about a rumor regarding the assignment of union work to non-union employees. It demanded to know whether the employee made such a statement at a union meeting and threatened to conduct an investigation and suspend him if he made the statement. The Commission found that when the employer asked about statements made at a union meeting, it "probed into activities protected by

PERA" and violated § 10(1)(a) when it threatened to investigate and discipline the employee if the investigation revealed that he made the statement. Likewise, in *Hamtramck Bd of Educ*, 25 MPER 2 (2011) (no exceptions), the Commission found that the employer violated § 10(1)(a) when the school board president threatened to fire a teacher because of his actions as union president.

Proof of anti-union animus is not required to prove a violation of § 10(1)(a). *New Buffalo Bd of Ed* (Conduct which is inherently destructive of employee rights may violate § 10(1)(a) of PERA irrespective of the employer's motivation.); *Hamtramck Bd of Educ* (Evidence of unlawful motive is not required to find a violation of PERA § 10(1)(a)). "It is the chilling effect of a threat and not its subjective intent that would violate PERA." *Michigan State Univ*, citing *Univ of Michigan*, 1990 MERC Lab Op 272, aff'd in an unpublished opinion of the Michigan Court of Appeals, Docket No. 128 (1992).[5]

The February 2010 Restrictions on Alonzi's Practice of Law

We also agree with the ALJ that when Hurst put new restrictions on Alonzi's outside employment as an attorney in February 2010, three weeks after Charging Party filed the unfair labor practice charge, Hurst was motivated by anti-union animus and the desire to retaliate against Alonzi for filing the charge. Like the ALJ, we find the timing of the restrictions suspect; the timing is too close to attribute the new restrictions to Hurst's earlier stated concerns over Alonzi's law practice.

While an employer is generally permitted to monitor and restrict outside employment, it cannot use its discretion in doing so to discriminate against an employee because he has engaged in protected activity. *Wayne Co Sheriff*, 21 MPER 58 (2008); *MERC* v *Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974). Alonzi had, for five years and with Respondent's approval, engaged in a limited outside practice of law. The restrictions placed on that practice were reasonable, i.e. the prohibition on handling cases in the district court which had jurisdiction over Keego Harbor, and the prohibition on handling any case adverse to the interests of Keego Harbor. The ALJ is correct that the new restrictions imposed by Hurst, especially the demand that Alonzi disclose details about his clients, did not arise from any claimed problem caused by Alonzi's practice. The earlier restrictions order required Alonzi to disclose clients for which he was "attorney of

[5] In addition, Hurst's statement to Palmer at the October meeting that he should sit there and be quiet appears to be a *Weingarten* violation. While the violation was not addressed by the ALJ, presumably because Charging Party had withdrawn that portion of the charge that alleged a *Weingarten* violation, Hurst's refusal to let the union representative speak or in any way take part in the meeting constitutes unlawful interference and coercion under § 10(1)(a). It is well settled that a represented employee has a right to have a union representative present at an investigatory interview conducted by an employer when that employee reasonably fears that disciplinary action may result. *City of Kalamazoo*, 1996 MERC Lab Op 556. A violation of the *Weingarten* rule constitutes a violation of § 10(1)(a) of PERA. *Univ of Michigan*, 1977 MERC Lab Op 496. The union representative is "expected to play an active advocacy role, not merely serving as a witness, and is entitled to consult privately with the individual employee." *Kent Co*, 21 MPER 61 (2008). One fundamental purpose of having the union representative present is to aid the employee in answering questions asked by the employer and in presenting facts. *City of Oak Park*, 1995 MERC Lab Op 576. Here, by admonishing the union representative to remain quiet, Hurst defeated that fundamental purpose; he did not allow Palmer to aid Alonzi in answering questions and presenting facts. However, we make no findings on this issue, which is no longer before us due to Charging Party's withdrawal of the *Weingarten* allegation in the charge.

record." The new restrictions ordered Alonzi to disclose clients in which he became attorney of record "and/or representing through the signing of documents as Attorney to the client – Mrs. Viva Breen."

The new restrictions were, as the ALJ found, issued to punish Alonzi for filing grievances and for filing the unfair labor practice charge. As the ALJ noted, Hurst, in a conversation recorded by Alonzi, described how a deputy at the Oakland County Sheriff's Department had been allowed to engage in the outside practice of law. However, when the department imposed severe restrictions on his practice, the deputy quickly gave up and quit the department. The ALJ believed that Hurst's motivation for the new restrictions was to force Alonzi's resignation. However, rather than resign, Alonzi complied with the restrictions before filing a grievance over them. The ALJ found, and we agree, that the February 2010 restrictions on Alonzi's previously approved outside employment were unlawful retaliation under § 10(1)(c) of PERA. The ALJ also found that the restrictions violated § 10(1)(d), which makes it unlawful to "discriminate against a public employee because he has given testimony or instituted proceedings under this act." Charging Party did not allege a violation of § 10(1)(d). Nor did Charging Party amend the charge to add such an allegation. We, therefore, make no finding as to a possible § 10(1)(d) violation.

However, we disagree with the ALJ's finding that the Keego Harbor City Council's May 12, 2010 ordinance prohibiting all police officers from any practice of law was motivated by anti-union animus and violated §10(1)(c). While Hurst's many threats and comments throughout these events indicate that he was motivated by anti-union animus, Hurst was not the decision maker in this instance, though both Hurst and the city council members are agents of Respondent. The city council passed the ordinance. While council had been approached by Hurst with concerns about Alonzi's law practice - the events arising from the Breen case and the letter from the Holly Police Chief – those concerns were apparently shared by the council and it desired to avoid similar incidents in the future.

City Council member Sidney Rubin testified that the council had extensive conversations after receiving the letter from the Holly Police Chief. He stated that the council was "very concerned that one of our police officers or any of our police officers for that fact, especially one that was acting as an attorney as well could get the city in deep trouble, and I remember somebody flashing a letter and saying this is a perfect example." He added that "[w]e were concerned that we could be liable for the actions of one of our police officers."[6] The ALJ concluded that, since Alonzi was the only police officer who was also an attorney, the ordinance was "obviously directed solely at Alonzi." We disagree. Council had a reasonable basis for passing the ordinance. Accordingly, we reverse that portion of the ALJ's opinion which found a § 10(1)(c) violation based on the prohibition the city council placed on the outside practice of law by police officers.

[6] Rubin testified that he was aware of Alonzi's law practice before the Breen matter and before council received the letter from the Holly Chief of Police. He was not aware that Alonzi was already restricted from practicing in the court that had jurisdiction over Keego Harbor, nor was he aware of any other restrictions on Alonzi's practice that were in place before council enacted the ordinance. He conceded that the ordinance covered only the police department and other Keego Harbor employees were not prohibited from the outside practice of law.

We note that another Keego Harbor police officer, Jim Cote, owned a security company – Great Lakes Protection (GLP) - that provided services to a business in Keego Harbor. Hurst testified that there might be conflicts in that off-duty employment and if a conflict occurred, he would act on it. He also testified that he issued an outside employment letter to Cote on March 15, 2010 in which he told Cote he could not conduct any business in the City of Keego Harbor. Cote assured Hurst that he was no longer active in the company, was not the resident agent, and his wife ran the company. On the last day of the hearing, June 21, 2011, evidence was introduced that Cote continued to hold himself out as the owner and "Chief of Operations" of GLP. Cote submitted a letter to Hurst, dated May 23, 2011, in which he stated he was resigning from his position at GLP "due to any conflicts of interest with my employment with the City of Keego Harbor as a full time sworn police officer." Neither party introduced evidence or testimony as to whether Cote was ever expressly prohibited from all outside employment or was ever disciplined for violating any restrictions on his approved outside employment.

The Thirty Day Suspension

We agree with the ALJ that the thirty-day suspension violated § 10(1)(c) of PERA because Hurst imposed it in retaliation for Alonzi exercising his § 9 rights. To demonstrate a § 10(1)(c) violation, a charging party must demonstrate anti-union animus by establishing: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity; (3) union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. Thereafter, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action(s) would have taken place even in the absence of protected conduct. *Ecorse Pub Schs,* 1995 MERC Lab Op 384. *Univ of Michigan,* 2001 MERC Lab Op 40, 43. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra,* 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch,* 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc,* 662 F2d 899 (CA 1, 1981). See also *City of St. Clair Shores,* 17 MPER 27 (2004); *North Central Cmty Mental Health Services*, 1998 MERC Lab Op 427, 436. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA.*

Here, it is clear that Alonzi engaged in protected concerted activity and Respondent was aware of the activity. The record reveals ample proof that Hurst harbored anti-union animus, as demonstrated by the repeated threats to discipline or increase discipline if grievances were filed. The timing of several of Hurst's actions is also suspicious, as they coincided with Alonzi filing grievances or unfair labor practice charges. Hurst's repeated statements that Alonzi had a "litigation attitude" and "appears to be unwilling to accept any discipline without invoking arbitration" and "will simply demand litigation for any order he does not want to follow" are, as the ALJ stated "equally forthright and unlawful." The only litigation pending when Hurst sent the March 2010 memorandum recommending Alonzi's immediate termination and when he

issued the thirty day suspension were the several grievances filed by Alonzi and the unfair labor practice charge. The ALJ correctly found that Alonzi is protected under PERA in the bringing of such claims.

Hurst's purported reasons for the thirty day suspension were Alonzi's failure to disclose his involvement in the Breen case and his failure to report an alleged bribe to the Oakland County Prosecutor. The record demonstrates that when Hurst and Alonzi discussed Alonzi's law practice and the order to disclose his clients, Hurst repeatedly stated that the order was to disclose any case in which Alonzi had "filed an appearance" or was the "attorney of record" or in which he had "appeared in court." He stated that he wanted the court information, the stuff that was a matter of "public record." He stated "[a]s long as you're not the attorney of record"; "[a]s long as you haven't been the attorney of record or filed any appearances"; "You can't stand up next to an individual." In his March 22, 2010 memorandum to the city manager recommending immediate termination, Hurst wrote that Alonzi had failed to immediately disclose that he had become the "attorney of record" for Breen. The Breen case, as the ALJ noted, was "not a matter in litigation." We agree with the ALJ that the unreasonableness of the discipline imposed, together with the repeated threats of further discipline if Alonzi filed grievances, demonstrates unlawful motive for the suspension.

As for the failure to report the alleged bribe, testimony from both Hurst and Alonzi reveals that neither of them believed a bribe had been attempted. The ALJ noted that the alleged bribe arose from Alonzi's outside employment, was not related to his employment in Keego Harbor and did not occur in Keego Harbor. In addition, Hurst did not report the matter to any law enforcement agency, nor did he investigate it. Testimony demonstrated that it was Hurst who suggested that the language in the letter might be a bribe; Alonzi testified that he did not use the word bribe in his discussions with Hurst. Therefore, we find that the unreasonableness of the discipline imposed, when added to the repeated threats of further discipline if Alonzi filed grievances, demonstrates that Hurst's motivation for the suspension was unlawful and retaliatory.

The ALJ noted a pattern. We concur. The ALJ also noted that by the time the thirty day suspension was issued, Hurst had already hired four new part-time officers "who would immediately take over working Alonzi's midnight patrol shifts. While premised on Alonzi's involvement in the dog-bite case, the 30-day suspension was part of a retaliatory scheme by Hurst and was therefore, as alleged, unlawful under Section 10(1)(c) of PERA." We agree.

The Indefinite Investigatory Suspension & The Layoff

The ALJ correctly found that Respondent initially had a lawful basis for the indefinite suspension of Alonzi – the fact that he was being investigated by the Auburn Hills Police Department (AHPD) - but only until June 8, 2010. Once Alonzi was cleared by the AHPD regarding his alleged involvement in the Tobin incident, and Hurst was notified that no charges would be filed, it was up to Respondent to either return Alonzi to work or charge him for what Hurst suspected was his involvement in the Tobin incident. Hurst admitted at the hearing that on June 8, 2010, he was not investigating Alonzi for the Tobin incident. The record reveals that Hurst received an e-mail from Thom Hardesty of the AHPD on June 8, 2010 which stated that "[t]he prosecutor this afternoon authorized 1 count of impersonating a PO against Tobin, nothing

against Alonzi in our city." The record demonstrates, as stated by the ALJ, with whom we agree, that:

> "Even though Alonzi's suspension had been expressly defined as continuing "*until completion*" of the Auburn Hills investigation, Hurst did not recall Alonzi to work. Hurst in fact did nothing; he did not notify Alonzi of the Auburn Hills resolution of the investigation; he did not notify the Union of the conclusion of the investigation; Hurst did not bring disciplinary charges against Alonzi; and he did not reinstate him with back pay now that he had been cleared as is typically done. Instead Alonzi remained on unpaid suspension with no lawful basis."

We agree with the ALJ that the stated basis for the indefinite suspension expired when Hurst learned, on June 8, 2010, that Alonzi had been cleared of wrongdoing by the AHPD. By continuing the suspension after June 8, 2010, and until the already-announced layoff of July 1, 2010, Respondent continued to retaliate against Alonzi in violation § 10(1)(c).

As for the layoff, we also agree with the ALJ that it was in retaliation for Alonzi's exercise of his PERA rights. Given Hurst's repeated threats to discipline or increase discipline if Alonzi filed grievances, his role in Alonzi's thirty-day suspension, his attempt to get Alonzi immediately terminated, his failure to return Alonzi from indefinite suspension after Alonzi was cleared of wrongdoing in the Tobin case, and his failure to investigate or charge Alonzi for his role in the Tobin case, Respondent's decision to layoff Alonzi stemmed in substantial part from Hurst's anti-union animus and aggravation over Alonzi filing grievances and unfair labor practice charges. The ALJ stated that he did not believe that:

> "Hurst would have hired four new part-time officers in the face of a budget shortfall unless his intent had been to use them to replace Alonzi. An employer could of course defend the hiring of several part-time employees as an option cheaper than retaining one full-timer; however, here Keego Harbor had a clear contractual prohibition on using part-timers to work the hours of a laid off full-time officer.
>
> Although Respondent claimed that after laying off Alonzi, the other full-time officers asked it to use the part-timers for Alonzi's shift, Respondent did not secure an agreement from the POLC, which as exclusive bargaining agent could have released the Employer from the contractual obligation to not use part-timers to replace Alonzi. Instead of seeking POLC's concurrence, Hurst withheld from the POLC … the time records it sought, precisely because Hurst wanted to keep from the POLC proofs that they would have used to put Alonzi back on the job."

The ALJ was correct in concluding that Respondent's claim that Alonzi was laid off for lack of funds is a pretext for unlawful retaliation. Respondent hired four part-time employees just before Alonzi was indefinitely suspended, three of whom immediately began performing Alonzi's job duties on the same shift, in violation of the collective bargaining agreement. Moreover, evidence admitted at the hearing does not support Respondent's contention that the layoff was mandated by city council and was based on financial considerations.

The Request for Information

We agree with the ALJ that Respondent's failure to provide Charging Party with information concerning the time records for the midnight shift violated § 10(1)(e). The information was clearly relevant to the union's duty to police the contract. Where the information sought relates to wages, hours, working conditions or discipline, it is presumptively relevant and must be disclosed. *City of Detroit*, 1998 MERC Lab Op 205. The fact that Respondent provided a partial schedule on the first day of the hearing does not change our analysis. "The Commission has consistently found that to fulfill its bargaining obligation under Section 10(1)(e), an employer must supply in timely manner relevant information requested by a collective bargaining representative. By its failure to provide the information requested with completeness and reasonable promptness, the Respondent has failed to bargain in good faith in violation of Section 10(l)(e) of PERA." *Detroit Bd Educ*, 1992 MERC Lab Op 572, citing *Detroit Pub Sch*, 1990 MERC Lab Op 624. See also *City of Detroit (Fire Dept.)*, 1988 MERC Lab Op 1001; *Genesee Co Road Comm*, 1982 MERC Lab Op 1406; *Wayne Co Intermediate Sch Dist*, 1993 MERC Lab Op 317; *Southeastern Michigan Transp Authority*, 1985 MERC Lab Op 316.

In *Kent Co Deputy Sheriff*, 1991 MERC Lab Op 374, the Commission stated that "[i]t is a thoroughly entrenched principle of labor law that a union is entitled to receive from the employer information and documents the union needs to carry out its duties to represent its members. Specifically, the employer's failure to provide necessary information constitutes a refusal to bargain collectively with the employees' representative – an unfair labor practice under both the National Labor Relations Act and the PERA." See also *Ecorse Pub Sch*, 1995 MERC Lab Op 384. In *Detroit Pub Sch*, the delay in providing the information was two to three months and the employer provided only two of the documents requested - the day before the MERC hearing. The Commission found that "[r]espondent has treated the Charging Party in what verges on a cavalier manner. The Charging Party is entitled to receive the information requested in a reasonable time. Waiting two and three months for information that should be readily available to the Respondent is unreasonable." Here, Charging Party requested the information on July 2, 2010. Respondent provided a partial schedule on August 25, 2010, the first day of the hearing. The information was not provided "with completeness and reasonable promptness." Accordingly, we agree with the ALJ that Respondent's failure to provide the information violated § 10(1)(e).

Respondent's Exceptions

Respondent argues in its exceptions that the ALJ erred by not applying the "but for" test in determining whether protected conduct was a factor in Respondent's adverse employment actions. This Commission has consistently held that the "substantial" or "motivating factor" test

is the appropriate standard to use. See e.g. *Genesee Twp Police Dep't* 26 MPER 3 (2012), and cases cited therein. (Where it is alleged that an employer is motivated by anti-union animus or hostility toward the employee's exercise of his protected rights, the burden is on the party making the claim to demonstrate that protected conduct was at least a motivating or substantial factor in the employer's decision.) See also *Southfield Pub Schs*, 25 MPER 56 (2012). Respondent cites *Parchment Sch Dist*, 1973 MERC Lab Op 1973 MERC Lab Op 714 (no exceptions) for the proposition that if there are both lawful and unlawful motivations for an employer's adverse actions, the charging party must show that the unlawful reasons were the "but for" cause of the employer's decisions. Charging Party responds that Respondent cites only one case in which neither party filed exceptions, making that case an ALJ decision which is "non-binding" on the Commission. Charging Party is correct. Where the Commission adopts the ALJ's recommended decision and order, but makes no conclusions of law itself, the case is not binding precedent. As noted above, the Commission has consistently held that the standard to be used is the substantial or motivating factor test. Accordingly, we find no merit to Respondent's argument that the ALJ applied the wrong test in determining whether protected conduct was a factor in Respondent's adverse employment actions.

Several of Respondent's exceptions argue that the ALJ erred in finding that Hurst's testimony was not credible. When an ALJ's credibility finding is questioned by a party, the Commission has found "the ALJ is in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. This Commission will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary." See *City of Inkster*, 26 MPER 5 (2012); *Redford Union Sch Dist*, 23 MPER 32 (2010); *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499. The Michigan Court of Appeals has held that MERC must give due deference to the review conducted by the ALJ, in particular with respect to the findings of credibility. *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541 (1994).

We agree with the ALJ's determination that Hurst was not a credible witness and may in fact have testified untruthfully. The transcript contains several instances where Hurst changed his testimony or testified inconsistently. In addition, regarding the October 7, 2009 meeting, Hurst falsely claimed that the discussion ended when he turned off his tape recorder, when in fact the discussion continued for quite some time, as revealed by the recording of the entire meeting made by Alonzi. Respondent's exceptions ignore the cumulative effect of Hurst's testimony and attempt to establish credibility errors by claiming that certain individual statements were credible. However, Respondent is incorrect even as to those individual statements, as a thorough reading of the record reveals. Respondent's assertion that it is "clear from the transcript" that Hurst answered questions honestly ignores that fact that the ALJ observed Hurst's demeanor in addition to hearing his testimony and, as stated above, the ALJ is in the best position to evaluate witness demeanor and to judge credibility. Respondent's exceptions do not present clear evidence to contradict the credibility determinations made by the ALJ.

Respondent's exceptions also claim the ALJ's Decision and Recommended Order improperly cited the testimony and exhibits to support his recommendation. After a thorough review of the record, including the hearing transcript and all exhibits, we find this exception to be without merit. Respondent mischaracterizes the record when it argues in its exceptions that Hurst contacted the FBI regarding Tobin's use of Alonzi' badges. Hurst testified that his

contacting the FBI "had nothing to do with badges." Respondent also takes exception to the ALJ quoting Hurst by combining two separate statements made by Hurst during the December 2009 meeting. While the ALJ combined two quotes that occurred at different points in the conversation, both quotes, as the ALJ noted, show Hurst threatening Alonzi if he chose to grieve the five day suspension. In addition, the use of ellipses make it clear that the ALJ was citing two separate quotes. There was no error.

Respondent also argues that the ALJ erred by identifying Alonzi "as a veteran officer with a long approved supplemental employment as a lawyer." There is no merit to this exception. Alonzi was an officer in Keego Harbor for five years and practiced law while off duty for those same five years. We decline to respond to an exception that would require an examination of whether five years is sufficient to make Alonzi a "veteran officer" and whether five years equals "long approved supplemental employment." The ALJ's characterizations do not rise to the level of legal error.

Summary and Conclusion

In summary, we agree with the ALJ that the following actions were motivated in substantial part by Hurst's anti-union animus, his desire to retaliate against Alonzi for filing grievances and for filing this unfair labor practice charge and the issuance of those actions, therefore, violated § 10(1)(a), (c) and (e) of PERA:

1. The thirty-day suspension;
2. Hurst's initial change to the restrictions on Alonzi's law practice;
3. Respondent's failure to return Alonzi from indefinite suspension after Alonzi was cleared of wrongdoing in the Tobin case;
4. Respondent's decision to layoff Alonzi; and
5. Respondent's refusal to provide the information requested by Charging Party.

We disagree with the ALJ that the five-day suspension violated § 10(1)(c) and disagree that the City Council decision to prohibit all police officers from practicing law violated PERA.[7]

We have carefully considered all other issues raised by Respondent in its exceptions and have determined that they would not change the result. We, therefore, affirm in part and reverse in part the ALJ's Decision and Recommended Order and issue the following Order:

[7] We note that the ALJ also found that the facts supported a violation of §10(1)(d) of PERA, and an additional violation of § 10(1)(e), but since those violations were neither charged nor pled, and since any remedy for those violations would be duplicated by remedies the ALJ recommended, he did not make legal conclusions regarding those violations.

ORDER

Keego Harbor, its officers, agents, and representatives, including Kenneth Hurst, shall:

1. Cease and desist from:

    a. Interfering with, restraining, or coercing employees, including but not limited to Robert Alonzi, in the exercise of rights guaranteed in Section 9 of PERA, including the right to pursue grievances, or otherwise challenging in an appropriate time and manner, the propriety of management decisions on discipline, the application of contractual language, the interpretation of departmental rules and regulations, or the applicability of workplace benefits;
    b. Discriminating against employees, including Robert Alonzi, regarding terms and conditions of employment in order to encourage or discourage union membership or activity;
    c. Threatening employees, including Robert Alonzi, with retaliation for having engaged in conduct protected under PERA;
    d. Refusing to promptly and fully respond to information requests made by the Charging Party related to wages, hours, working conditions, or disciplinary matters.

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

    a. Rescind the thirty-day suspension imposed on Robert Alonzi in April of 2010, remove all record of the discipline and the allegations which led to that discipline, and make Alonzi whole by reimbursing him for lost pay[8], benefits, and restore any lost seniority accrual;
    b. Reinstate Alonzi from the indefinite investigatory suspension imposed on May 14, 2010, with the reinstatement effective beginning June 8, 2010, which is the date on which the Employer was notified of the conclusion of the investigation which was the stated basis for the suspension, and make Alonzi whole by reimbursing him for the entirety of lost pay on a full-time basis, lost benefits, and restore any lost seniority accrual for the period from June 8, 2010 through June 30, 2010, with the back-pay award arising from the May 14, 2010 suspension to cease as of the lay-off date of July 1, 2010;
    c. Rescind the permanent layoff of Alonzi, which had been effective July 1, 2010, and offer Alonzi reinstatement as a police officer. Alonzi must be made whole to the extent that he was disadvantaged by the unlawful motivation of Hurst in imposing the permanent layoff; however, the make

[8] While we would normally include interest as part of a back pay award, the ALJ did not recommend interest and Charging Party did not object to the ALJ's failure to include interest. We will consider only those issues which are raised by the parties in exceptions or responses to exceptions. See R 423.176(5), which states, in pertinent part, that "[a]n exception to a ruling, finding, conclusion, or recommendation that is not specifically urged is waived."

whole remedy will be limited to back pay, at Alonzi's regular hourly rate, and benefits and seniority accrual for only those hours during which the Employer after June 30, 2010, actually utilized employees to replace Alonzi on the 11-7 midnight shift to which Alonzi was previously assigned. If Keego Harbor during any portion of the period of Alonzi's layoff cut back to less than full police coverage during Alonzi's formerly assigned shift, then the recommended make-whole relief will extend only to the hours actually assigned to someone in Alonzi's stead. The recommended relief is not intended to give Alonzi any right to displace a more senior full-time officer, nor to compel the Employer to provide more hours of police coverage than it has in the interim determined are necessary.

3. Post the attached Notice to Employees in conspicuous places on Respondent's premises, including all places where notices to employees in Charging Party's bargaining unit are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: 9/11/14

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, **KEEGO HARBOR**, a public employer under the PUBLIC EMPLOYMENT RELATONS ACT (PERA), and its chief of police, **KENNETH HURST**, have been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Interfere with, restrain, or coerce employees, including but not limited to Robert Alonzi, in the exercise of rights guaranteed in Section 9 of the Act, including the right to pursue grievances, or otherwise challenging in an appropriate time and manner, the propriety of management decisions on discipline, the application of contractual language, the interpretation of departmental rules and regulations, or the applicability of workplace benefits;
b. Discriminate against employees, including Robert Alonzi, regarding terms and conditions of employment in order to encourage or discourage Union membership or activity;
c. Threaten employees, including Robert Alonzi, with retaliation for having engaged in conduct protected under PERA;
d. Refuse to promptly and fully respond to information requests made by the union related to wages, hours, working conditions, or disciplinary matters.

WE WILL

a. Rescind the thirty-day suspension imposed on Robert Alonzi in April of 2010, remove all record of the discipline and the allegations which lead to that discipline, and make Alonzi whole by reimbursing him for lost pay, benefits, and restoring any lost seniority accrual;
b. Reinstate Alonzi from the indefinite investigatory suspension imposed on May 14, 2010, with the reinstatement effective beginning June 8, 2010, through June 30, 2010, and make Alonzi whole by reimbursing him for lost pay, benefits, and restoring any lost seniority accrual;
e. Rescind the permanent layoff of Alonzi, which had been effective July 1, 2010, and offer Alonzi reinstatement as a police officer, and make Alonzi whole by reimbursing him for lost pay, benefits, and restoring any lost seniority accrual.

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.

KEEGO HARBOR

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.

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

KEEGO HARBOR,
Public Employer-Respondent,

-and- Case No. C10 A-008

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

APPEARANCES:

Brendan J. Canfield, for the Charging Party

Rick J. Patterson, for the Respondent

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC).

The Unfair Labor Practice Charge:

On January 13, 2010, a Charge was filed in this matter alleging that the Employer, City of Keego Harbor, had violated the *Weingarten* rights of a member of the Police Officers Labor Council (POLC), by denying Union representation during an investigatory interview and had threatened retaliation based on protected activity. I *sua sponte* issued an order for more definite statement of the Charge and directed that the Employer file a response once it received the more definite statement of the Charge. The Union timely responded. The Employer failed to timely respond after service of the amended charge; however, I again *sua sponte*, granted it additional time, as it appeared that the City had changed legal counsel. A response was filed within the new time limitation.

The Charge was subsequently amended on May 5, 2010 and August 6, 2010 and again during the hearing. The amendments to the Charge added allegations that the Employer had retaliated against police officer Robert Alonzi by suspending him from employment, by discriminatorily denying him the right to continue in his previously approved outside employment, and by ultimately terminating his employment. Charging Party POLC also alleged

that the Employer wrongfully refused to comply with information requests submitted by POLC related to the Alonzi disputes.

The several Charges alleged an escalating pattern of interactions between veteran Keego Harbor police officer Robert Alonzi, who also had a law degree and had long been approved for supplemental employment as a solo practitioner, and the then-newly hired acting police chief for Keego Harbor's five or six man police department, Kenneth Hurst, who had previously been a sergeant with the Oakland County Sheriff. The multiply amended Charges asserted that, in retaliation for Alonzi's protected activity:

1. Chief Hurst threatened Alonzi on or about September 9, 2009 with discipline or prosecution over submitting a request for overtime pay for hours worked where Hurst and Alonzi had disagreed over whether the collective bargaining agreement required payment;
2. On or about October 7, 2009, Hurst conducted an investigatory interview which led to a five day suspension and denied Alonzi his *Weingarten* right to have a Union representative present[9] and that at that meeting Hurst again threatened Alonzi with the assertion that his submission of an overtime request was attempted theft;
3. At the October 7, 2009 disciplinary conference, Hurst threatened that Alonzi's discipline would be increased if he filed a grievance over the matter;
4. On or about October 26, 2009, Hurst imposed a five-day suspension based on Hurst's finding of the following violations by Alonzi:

    a. Alonzi engaged in insubordination for submitting a request to Hurst for overtime for work on September 6 even though Hurst had already told Alonzi that Hurst did not believe Alonzi was entitled to overtime pay. There was no dispute over the fact that the time had been worked;
    b. That Alonzi had improperly parked his car within view of a liquor establishment, contrary to Hurst's instructions to not give the appearance of "sitting on the bars" and even though Alonzi had effectuated a drunk driving arrest;
    c. Alonzi had gone outside the "chain of command" in complaining about Hurst to the Oakland County Sheriff's department at a point in time when Hurst, while acting chief for Keego Harbor, was still employed by Oakland County;
    d. Alonzi failed to "correct" a log sheet, to delete time worked, despite having been ordered to do so;
5. Despite the threat of increased discipline, Alonzi filed a grievance on October 28, 2009;
6. In December 2009, Hurst advised Alonzi of the dates on which Alonzi would serve his suspension, referring to the then-pending grievance over the discipline as an "open wound which kept festering" and threatened that

[9] The *Weingarten* allegations were later withdrawn.

the discipline would remain in Alonzi's file longer because he had filed the grievance. It was also asserted that Hurst had claimed he would have let Alonzi serve the suspension on non-consecutive days, to minimize the financial impact, but because Alonzi had grieved the matter the suspension must be served on consecutive days;

7. In February 2009, Hurst restricted Alonzi's previously approved outside employment as an attorney, and required detailed information on Alonzi's clients, all allegedly in retaliation for Alonzi's protected activity;
8. In April 2010, Hurst suspended Alonzi for 30 working days on the following charges:
    a. Alonzi had violated Hurst's order restricting Alonzi's outside employment;
    b. Alonzi had violated various rules and regulations while communicating with Village of Holly employees regarding a legal matter arising in his approved outside employment;
    c. Alonzi had failed to report a purported "attempted bribe" to the Oakland County prosecutor, again arising from Alonzi's outside employment, where neither Alonzi or Hurst actually believed that any attempted bribe had occurred;
9. A grievance was filed over the matter, which Hurst refused to hear, despite contract language mandating the presentation of grievances to him as Chief;
10. On May 13, 2010, Hurst advised Alonzi that the Keego Harbor council had passed an ordinance prohibiting Alonzi from continuing his outside law practice if he wished to remain employed as a police officer;
11. On May 14, 2010, upon completion of the 30 day suspension, Hurst again suspended Alonzi, this time indefinitely, because Alonzi was allegedly under criminal investigation for supposedly allowing a civilian to use Alonzi's badge. The criminal investigation of Alonzi was quickly terminated and the civilian was prosecuted. Despite the conclusion of the investigation, Alonzi was not reinstated or compensated for the time off;
12. On May 25, 2010, Alonzi was issued a notice of permanent layoff, effective July 1, 2010. The layoff was supposedly based on a lack of funding for the officer position held by Alonzi, as the least senior full time officer, despite multiple part-time employees having been hired shortly before the notice of layoff of Alonzi was given;
13. In July 2010, the Union made a request for information consisting of records of work assignments, related to the question of whether the part-time employees had been used to replace Alonzi following his layoff. Hurst refused to provide the information.

After several adjournments, the matter was tried over multiple days. The parties submitted timely post-hearing briefs. On the Union's subsequent motion, I allowed it to file a supplemental post-hearing brief limited to addressing issues arising from a hearing exhibit which was not submitted until attached to the Employer's post-hearing brief.

Findings of Fact:

In August of 2009, Kenneth Hurst who was then a sergeant with the Oakland County Sheriff's Department, was assigned, apparently initially on loan, to serve as the acting chief of police of the small police department of Keego Harbor, consisting of a half-dozen officers. At first, he wore the uniform of a member of the Oakland County Sheriff's Department, only later in November of 2009 being appointed permanently as chief of the Keego Harbor department upon retirement from the Sheriff's Department.

At that time, Robert Alonzi was a police officer with Keego Harbor, having been hired in 2005. Alonzi also maintained an outside private law practice. The City had previously approved the supplemental employment, with the restrictions that Alonzi not take cases directly contrary to the interests of Keego Harbor, or cases in the 48th District Court, which had jurisdiction over Keego Harbor. Alonzi worked patrol on the 11-7 midnight shift for the Keego Harbor police.

Hurst was immediately in conflict with officer Alonzi. The initial incident sparking their conflict was a discussion between the two men, in early September 2009, in which Alonzi claimed that, due to a change in assigned days, he had worked more than 40 hours in a work week and therefore believed that under the collective bargaining agreement, and past practice, he was entitled to overtime pay. Hurst took the position that under his interpretation of departmental regulations, rather than the terms of the collective bargaining agreement, Alonzi was not entitled to the overtime pay. When Alonzi later submitted his time sheets, which included the claim for overtime pay, he gave them directly to Hurst, rather than merely slipping them to a payroll clerk. Hurst went, as they say, ballistic.

Hurst considered Alonzi's mere submission of the time sheets, which included the disputed claim for overtime, to have been an act of sheer insubordination. Hurst confronted Alonzi over the matter in a discussion on September 9, 2009. In Hurst's view, he had already advised Alonzi that he did not believe Alonzi was entitled to overtime pay and, therefore, for Alonzi to submit his claim was a direct challenge to Hurst's authority as chief of police, a breach of the chain of command, and an act of insubordination. That act of "insubordination" was cited as one of the bases for a five day suspension. Hurst also suggested that merely submitting the time sheets was an act of criminal fraud. Hurst removed the overtime request from the time sheet and Alonzi backed down, choosing not to confront the chief further despite his belief that he was contractually entitled to the overtime, testifying credibly that the chief was "really antagonistic" and "quite intimidating" in their discussion. Even though Alonzi had backed down, Hurst convened an October 7, 2009, investigatory interview of Alonzi.

The proofs at trial unfolded in a novel fashion. Hurst was initially called as an adverse witness. His testimony was guarded at best and both antagonistic to the point of being pugnacious and evasive at critical junctures. Hurst repeatedly asserted that he "could not recall" any facts which might be adverse to his position. He claimed to remember well what Alonzi had said in their multiple verbal exchanges, but "could not recall" what he himself had said in those same exchanges. Hurst was questioned closely regarding the October 7, 2009 investigatory interview of Alonzi, related to the overtime dispute. Hurst asserted that the entire interview had been recorded by Hurst and that nothing untoward had been said and certainly not by him. He

claimed to have been calm and professional throughout. He claimed he "didn't recall" continuing the discussion after turning off the tape recorder he was using, denied raising his voice, and when asked if he had threatened Alonzi after the recording device was shut off, Hurst's response was "*No, not to my knowledge*". Hurst's testimony was repeatedly untruthful.

In fact, the October 7, 2009 interview varied considerably from Hurst's portrayal. The interview was characterized as a *Garrity*-type interview; that is, an investigatory interview where answers are compelled, but where the target is guaranteed the minimal protection that his answers, because they were compelled, will not be used in a criminal prosecution. Such interviews are typically and appropriately used in police agencies where an investigation is being conducted into conduct which might legitimately be subject to both discipline and to criminal prosecution. Because Hurst stated that he recognized that it was an investigatory interview from which discipline might flow, he, as he put it, "allowed" Alonzi to have a Union representative present. Hurst indicated that he would be recording the entire meeting. In a seeming foreshadowing of events to come, Hurst demanded that the other participants not record the meeting. Hurst then insisted that they disclose to him if they were recording or had recording equipment. As reflected by the transcript of the meeting, Alonzi answered affirmatively, a fact which seemingly went unnoticed by Hurst.[10]

The recording revealed that at the outset of the meeting, Hurst ordered the Union representative to sit there and not interrupt, under threat of discipline, and demanded that both men affirm on the record that they would tell no one anything that transpired in the interview. When Alonzi attempted to say something at the outset, Hurst threatened him with discipline up to and including discharge if he said another word, other than in direct response to Hurst's questions. Hurst then grilled Alonzi in a wide ranging fishing expedition covering not just Alonzi's on the job conduct, but his entire work history prior to coming to Keego Harbor, and with a significant part of the supposed investigatory interview focused on Alonzi's conduct in calling the Oakland Sheriff's Department to attempt to complain about Hurst's conduct. Hurst repeatedly threatened Alonzi with termination if he withheld any information, including regarding Alonzi's law clients in his private practice, even though Keego Harbor had long approved that outside employment.

Alonzi was then called to testify, and he provided the big 'reveal'. Hurst had recorded much of, but despite his claims to the contrary, far from the entire interview meeting. Hurst had sought to create a false record at the time of the interview and, during his testimony in this proceeding, willfully sought to mislead the trier of fact. Alonzi had also recorded the entirety of the meeting, using a wristwatch audio and video recorder. Over the objections of Respondent, the recording and a transcript of the recording were admitted into evidence, as will be discussed more fully later. The transcript of the interview ran 150 pages; with a little over 60 of those pages being after Hurst turned off his recording device, which is the point at which, according to Hurst's testimony, the meeting had ended.

During the portion of the meeting which Hurst thought was unrecorded, he diverted from the seemingly professional demeanor exhibited while he was himself recording the interview,

[10] During the trial in this matter, Hurst both asserted and exhibited a considerable loss of hearing capacity. Further, Alonzi proved to be so soft spoken that he had to be repeatedly reminded to speak up while testifying.

and repeatedly launched into loud berating of Alonzi, amply laced with crude obscenities and racial epithets. Hurst made it plainly clear that he considered Alonzi's action in putting in for overtime, after Hurst had told him that he didn't think Alonzi was entitled to the pay, to be a violation of a direct order. Hurst bluntly and pointedly threatened Alonzi with increased discipline if Alonzi further crossed Hurst, including by grieving the intended initial discipline, or by "bad-mouthing" city officials. Hurst asserted that the suspension Alonzi was facing, which was initially five days, was "about one-fifth" of what Hurst had in mind, indicating that if Alonzi appealed the initial suspension, "there may be adjustments". Hurst's comments included such assertions as:

> You are not going to play a game with me. And if you want to survive here . . . I'm putting you on notice, I will dog you to death. And you can quote me on this.[11] I will watch over you like a fucking hawk. . .
>
> * * * *
>
> I want you clear-cut understanding, until I leave this fuckin' place I am the chief of police. . . If you can't live with that then I'll suspend you until I leave.
>
> * * * *
>
> You make accusations against me, you open yourself up to a very, very strong response.

Much of the formal portion of the interview was devoted to Hurst grilling Alonzi regarding any allegations Alonzi had made to the Oakland County Sheriff's Department about Hurst's conduct. Alonzi had called the Oakland Sheriff's Department to complain that he believed Hurst was treating him unfairly. Alonzi made the calls based on his understanding that Hurst still reported to the Sheriff's Department chain of command while detailed to Keego Harbor as acting chief of police, but still a Sherriff's Department sergeant.

Also during that meeting, Alonzi advanced a retaliation theory which conflicted with the theory advanced in the present case. Alonzi confronted Hurst with the accusation that Hurst was retaliating against Alonzi, asserting that "*this interview, along with discipline, has been in retaliation for me applying for the position of chief*" in competition to Hurst who was then still merely the acting chief. Alonzi also asserted that the chief was acting on behalf of the mayor of Keego Harbor in retaliating against Alonzi because Alonzi had, in July of 2009 before Hurst took over, filed a request for investigation against the mayor with the FBI, reporting, as Alonzi put it, "*threats . . . and the continued harassment, along with various violations of [*his*] civil rights*". In response to Hurst's detailed questioning about his prior employment, Alonzi disclosed that he had filed complaints or requests for criminal investigations against most, if not all, of his former employers.

The outcome of the interview was a five day suspension imposed on Alonzi on October 27, 2009. The rationale for the suspension was provided in a memorandum which made findings

[11] Far from actually intending that he quote him, Hurst had earlier threatened to fire Alonzi if he repeated anything that was said in the interview.

on four charges. On the first charge, Hurst found that Alonzi had disobeyed orders by engaging in surveillance of a bar and thereby making a successful arrest of a drunk driver.[12]

On the second charge, Hurst found that Alonzi had disobeyed a direct order by applying for overtime pay for work which he had performed. Hurst asserted that: "*You specifically disobeyed orders and attempted to be paid for the day in question by submitting an incorrect payroll timesheet."* The dispute was not over the accuracy of the time recorded on Alonzi's timesheet. The only dispute was whether or not Alonzi was correct in his belief that under the Union contract he was entitled to overtime pay for part of that week, due to a change to a 28 day assignment rotation.

On the third charge, Hurst again found that Alonzi had "disobeyed a direct order" because Alonzi had again, in a separate instance, accurately recorded his performance of duties on his log sheet. The department uses log sheets to record activity and separate payroll sheets to submit for payment. Hurst had come in early to confer with Alonzi at the end of Alonzi's night shift. During the conversation, Hurst insisted to Alonzi that Alonzi, having reached the scheduled end of his shift, was now "*off the clock*". Alonzi did not dispute that assertion, but did record on his log sheet the actual time at which he refueled his patrol car following the discussion with Hurst, which ran a few minutes past the normal ending time of his shift. He did not submit any request for compensation for that extra few minutes. The discipline was for recording the time accurately. Compounding his offense, according to Hurst, when ordered to remove the notation from his log sheet, Alonzi responded by questioning the content of other officers' log sheets and by implying "an individual special scrutiny" by Hurst of his conduct. Hurst found that this conduct constituted a violation of rules requiring obedience to lawful orders, respect for the commander at all times, and a rule requiring "*non-defiant*" compliance with orders.

On the fourth charge, Hurst found multiple violations, all based on the action of Alonzi in "going outside the chain of command" in making a single phone call to attempt to talk to the Oakland County Sheriff's office about his complaints regarding Hurst. At the time, Hurst was acting chief and still an active sergeant in the Oakland County Sheriff's department. Hurst found this conduct violated six separate rules and the Union contract. One of the rules prohibited an officer from seeking "intervention of any person outside the Department" for assistance.[13] Similarly, one of the cited Rules prohibited any critical or derogatory comment regarding any order issued by their commander.

On December 9, 2009, Hurst called Alonzi to another meeting at which, in the presence of the City clerk, Hurst gave Alonzi a memo indicating the dates on which his five day

[12] Hurst was insistent that department officers not "sit on" the bars; that is park their vehicles within view of liquor establishments. Hurst was convinced that doing so was somehow improper, gave the impression that officers were looking to pull over drunk drivers leaving local bars, and that such conduct could be considered "entrapment", thereby invalidating arrests. Based on his recorded comments during the October 7 meeting, Hurst seemingly had no problem with officers pulling over black males and "*fucking abudahbas*" (Hurst's term for foreign born residents) driving through Keego Harbor en route to or from Pontiac, as long as the selection process was not overt, but Hurst did have a problem with appearing overly aggressive in stopping drunk drivers exiting local drinking holes.

[13] Such a rule appears unlawful on its face in directly prohibiting conduct protected under PERA.

disciplinary suspension would be served. In that memo, Hurst threatened that "*any attempt to circumvent*" the suspension would result in "*severe disciplinary action up to and including termination*". Alonzi surreptitiously recorded this meeting. The transcript of the recording of the meeting reveals that Hurst asserted to Alonzi, in reference to Alonzi grieving the five day suspension:

> I'm just telling you . . . you're beating a dead horse. Your fight ain't gonna stand. . . As long as it's an open wound, that's an open wound not caused by me. I told you before when I dish out discipline, it's done. . . Because discipline isn't done until it's over with the union, too . . . So it keeps festering and it keeps on going . . . I've got news for you. You think I'm going to take it off in six months after you fight me? It will stay on for two years and then you've got another one coming.[14]

In the December meeting, Hurst also threatened Alonzi with further discipline for having supposedly discussed the September "Garrity" interview with co-workers, contrary to Hurst's order.

The initial unfair labor practice charge was filed on January 13, 2010. Three weeks later, on February 9, 2010, Hurst significantly restricted the long-standing approval of Alonzi's outside employment as an attorney, adding new and burdensome conditions. Alonzi was now prohibited from handling any criminal case, not just those arising in the 48th District Court, and he was prohibited from representing any resident of Keego Harbor in any matter. That order further directed that Alonzi disclose detailed information on any pending case in which he had filed an appearance as counsel, and that he supplement the list within 72 hours of filing an appearance in any new cases. Alonzi grieved the new restrictions on his outside employment, but complied with the demand for data on his clients.

Alonzi was next involved in what would have seemed to have been a run of the mill dog-bite claim involving residents of Holly, Michigan, which then became the focus of Hurst's attention. Acting in his capacity as a private attorney and with no reference to his status with Keego Harbor, Alonzi had engaged in an exchange of letters regarding the dog bite claim with the private law firm which was serving as city prosecutor for Holly in a related apparently misdemeanor criminal case against the owners of the dogs. Alonzi's final letter was addressed to the village council of Holly and in particular addressed Alonzi's request, on behalf of his client, that the criminal matter be transferred from the village attorney to the Oakland County prosecutor's office. The reason given for the proposed transfer was that members of the family of the criminal defendants sat on the village council, which supervised the village attorney, thereby arguably creating a conflict of interest.

The Holly chief of police took offense to Alonzi's efforts and, on March 12, 2010, wrote to Hurst to complain that the letters suggested wrongdoing by Holly police officers, which objectively they did not, and that the letters were somehow improper in seeking to advance the interests of Alonzi's client, which is, of course, the reasons such letters would be sent by an attorney. Hurst conducted a disciplinary interview with Alonzi on March 16, 2010, related to the

[14] Hurst had on October 7 indicated the discipline would be removed after one year, which he then described as the standard length of time. In fact the collective bargaining agreement sets a two year removal as standard.

dog bite letters. On March 22, 2010, Hurst sent a memo to the Keego Harbor city manager recommending the immediate termination of Alonzi's employment. While the purported impetus of the requested firing was the dog bite correspondence, Hurst's memo to the city manager transparently disclosed the origins of his request for Alonzi's termination. Hurst asserted, in pertinent part, that:

> It has also become apparent that Officer Alonzi . . . will simply demand litigation for any order(s) he does not want to follow. In a law enforcement environment, this continued form of insubordination, resistance, and interference cannot be allowed to continue.
>
> . . . Officer Alonzi continues to demonstrate a disregard for departmental orders and a "litigation" attitude towards established Rules & Regulations.
>
> . . . Officer Alonzi has continued to demonstrate a desire to be independent of departmental controls by refusing to comply with orders and demanding litigation on issues not generally covered under Union contract.

Hurst's March 22 memo addressed additional concerns. Hurst asserted to the city manager that it had been a violation of prior orders for Alonzi to have failed to immediately disclose to Hurst that he had become the "attorney of record" for the dog-bite client. Alonzi had not initiated litigation or filed a court appearance on behalf of the client and, therefore, his conduct would not appear to have been a violation, much less insubordination, regarding the earlier demanded disclosure of clients where he was the "attorney of record".

Hurst's memo similarly complained that Alonzi had failed to report a supposed bribery effort to the Oakland County prosecutor, as he had been ordered to do by Hurst during the March 16 disciplinary interview. Alonzi had in the dog-bite letter of February 25, 2010, questioned the appropriateness of a letter sent by the prosecutor to the criminal defense attorney which Alonzi quoted as suggesting "*money changing hands in reaching a resolution*" of the criminal prosecution. Hurst concluded that this assertion somehow constituted a claim that a bribe had been involved and that the bribery involved Alonzi in his official capacity, even though Alonzi was not a party to the correspondence and regardless was only involved in the dog-bite case in his private capacity as an attorney. Alonzi declined to report the matter to the Oakland County prosecutor's office as a bribery attempt as he did not believe it was a bribery attempt. Hurst apparently concurred with that conclusion as he likewise did not report the letter as a bribery effort.

The City manager did not, in response to Hurst's March 22 memo, approve the immediate termination of Alonzi. On March 29 and March 30, Hurst hired four new part-time police officers. On April 2, 2013, Hurst issued a memo detailing departmental charges against Alonzi arising from Alonzi's involvement in the dog-bite case. According to Hurst, that memo, while dated April 2, had been prepared on March 30.

On April 2, 2010, Hurst issued a second memo reciting that, "*after careful consideration and review of the charges*" from the first memo, he was imposing a thirty working days

suspension on Alonzi. Hurst cautioned that any further violation of orders or rules and regulations would result in termination, as would any "*attempts to circumvent"* the disciplinary order.

Alonzi filed a contractual grievance on April 7, asserting that there was not just cause for the discipline. That same day, Hurst issued a response, which again discloses his scarcely contained animosity at Alonzi's temerity in challenging discipline imposed by Hurst, and which asserted, in pertinent part, that:

> As usual, Officer Alonzi's grievance makes a simple, and non-descriptive, statement that the charges causing the suspension are "without just cause".
>
> Officer Alonzi appears to be unwilling to accept any discipline without invoking arbitration. Since it would also appear that Officer Alonzi is not dealing in good faith, or within the guidelines of the Union contract, I have no definitive reasons for a review. Therefore the grievance is denied.

Alonzi anticipated returning to work on May 14, 2010, after serving the 30 working day suspension. On April 30, 2010, the Union amended the pending unfair labor practice charge to add allegations related to the 30 day suspension. On May 12, 2010, Hurst notified Alonzi that the City Council had passed a resolution prohibiting any police officer from engaging in outside employment as an attorney. As Alonzi was the only police officer with a law degree, the new ordinance was obviously directed solely at Alonzi. On receiving notice of the new ordinance, Alonzi ended his outside practice.

On May 14, 2010, Hurst called Alonzi, on Alonzi's planned day of return to work from his disciplinary suspension, to advise Alonzi that he could not return to work as he was being placed on an indefinite suspension. Hurst's memo of May 17 detailed the reasons for the indefinite suspension. This suspension arose from the misuse of Alonzi's badge by a civilian, Ben Tobin, who was then under criminal investigation by the Auburn Hills police department, with the suspension to continue "until completion" of Auburn Hill's investigation.

The incident in question arose when Alonzi and a group of friends went to a bar in Rochester. Alonzi's testimony was that Ben Tobin, a casual acquaintance of Alonzi's, joined the group, but could not enter the bar because he was without any identification. In fact, despite his claims to the contrary, he was only 20 years old. According to Alonzi, Tobin return to Alonzi's house, where he had left his car parked, on the ruse that he needed to get his driver's license out of the car. Instead, Tobin entered Alonzi's home and took Alonzi's badge, which he used to gain entrance to the bar and later flashed at a store in Auburn Hills.

The second incident brought in the involvement of the Auburn Hills Police, which conducted an investigation, including a polygraph exam of Tobin, and concluded that Tobin was not telling the truth. Tobin ultimately pled guilty to a criminal charge of impersonating a police officer.

On June 8, 2010, Hurst learned from the Auburn Hills police that Tobin was to be charged and that the investigation of Alonzi had been terminated. Despite that knowledge, Hurst did not end the suspension of Alonzi, which had been premised on the pendency of the criminal investigation. Moreover, Hurst engaged in extraordinary conduct which reflected the depths of his desire to rid himself of Alonzi. Hurst admitted to meeting, at his own initiative, more than ten times with the criminal defendant and to having met with Tobin's criminal defense attorney two or three times and Hurst insisted, improbably, that he "could not recall" if he gave any information to the criminal defense attorney. Further, Hurst interceded, seemingly improperly and on an *ex parte* basis, with the criminal trial court judge to seek a lesser sentence for Tobin, notwithstanding his having pled guilty on a charge of impersonating an officer.

Even though Hurst was aware that Tobin had pled guilty, and that Alonzi had been cleared by the Auburn Hills investigation, he neither returned Alonzi to work nor paid him for the time spent on suspension, which would ordinarily have occurred where an officer was suspended pending a criminal investigation, but then cleared. At hearing, Hurst defended this by asserting that the "indefinite suspension" was still in place in part because Alonzi had filed the unfair labor practice charge. On the final day of hearing, after Hurst was recalled to testify, he acknowledged having sought to persuade the Rochester Hills police to also investigate Alonzi, which he waited to do for more than a year after the badge incident in question.

Further, after Alonzi pursued the ULP charge against Keego Harbor, and, significantly, after Hurst was embarrassed on the stand on the first day of hearing with the revelations from the surreptitious recordings, Hurst sought to induce the FBI to initiate a criminal investigation of Alonzi. Hurst attempted to mislead the tribunal by asserting that Hurst had been contacted by the FBI regarding a supposedly ongoing criminal investigation of Alonzi. On cross-examination, Hurst finally admitted that he had sought, not surprisingly unsuccessfully, to draw the FBI into his feud with Alonzi. Hurst had been pulled over by the Waterford Police Department for reasons not disclosed in the record. Hurst was convinced that somehow Alonzi had secured the cooperation of the Waterford Police department in seizing Hurst, who linked that police stop with the filing of the ULP by Alonzi. Hurst considered the two acts to be linked and directed at him by Alonzi. Hurst sought to have the FBI investigate Alonzi in the hope of having him charged with some form of criminal conspiracy against Hurst involving the cooperation of the Waterford Police Department, and for somehow violating Hurst's civil rights. Hurst also unsuccessfully sought to induce the State Police to open a criminal investigation of Alonzi. Despite Hurst's testimony that Alonzi was still the subject of criminal investigations at the time of the hearing in this matter, and despite Hurst's' efforts to provoke such investigations, neither the FBI, the State Police, Rochester Hills, or West Bloomfield Police ever contacted Alonzi regarding any supposed criminal investigations of Alonzi. For his part, Alonzi also sought, seemingly with an equal lack of success, to induce the FBI to initiate an investigation of Hurst.

Meanwhile, on May 25, 2010, Hurst notified Alonzi that he was to be indefinitely laid off, effective July 1, 2010. The layoff was purportedly an economic one based on the declining economy. The City Council had voted to reduce the police department budget, which Hurst implemented by eliminating one full-time police officer position. Alonzi was the least senior full-time officer then employed and; therefore, his layoff would be a foregone conclusion with the elimination of one full-time position. In his layoff notice to Alonzi, Hurst falsely asserted that

the city council had adopted a "*budget which calls for the reduction of one full time position*" in the police department. The council had reduced the budget of the police department but had not directed that the savings come from the elimination of a full time position. The POLC had been cautioned by the employer during bargaining in 2009 that the budget was tight and that a layoff of one officer might occur. The Union granted economic concessions in the hope of avoiding such layoffs, but with no *quid pro quo* promise regarding staffing levels.

Financial proofs, including audited financial reports for the fiscal years ending in June 2009 and June 2010 were introduced, which reflected a relatively stable economic picture. The City's revenue had dipped slightly, while its net assets had slightly improved, with a revenue decrease of approximately $55,000 offset by an expenditures reduction of some $229,000. The City's year end general fund balance had increased by $75,000, while its bond and debt load had decreased by more than $200,000. The salary for a full-time police officer tops out at less than $56,000 per year. The city did choose to not renew the city manager's contract and had his duties taken over at least temporarily by the city clerk. The treasurer resigned and those duties were given to the former assistant treasurer. Cuts were made in the department of public works (DPW) and ultimately the police chief was placed in charge of the DPW as well as the police department. City hall was sold to Oakland County and then leased back from the County in a maneuver to float bonds using the County's higher bond rating.

By the time of the budget vote by the city council, Keego Harbor had already reported to the Michigan Employees Retirement System (MERS), on May 19, 2010, that Alonzi had been terminated effective April 13, 2010.[15] While Hurst implausibly denied any knowledge of Keego Harbor's communications with MERS, he also asserted that he had communicated with the Michigan Commission on Law Enforcement Standards (MCOLES) who supposedly advised Hurst that the last date actually worked, April 13, 2010, should be reported as Alonzi's end of employment date.

Despite the clearance by Auburn Hills on June 8, Hurst kept Alonzi on indefinite suspension until the July 1 effective date of the layoff. The four new part-time officers, hired immediately after Hurst sought approval to fire Alonzi, were retained following Alonzi's layoff and despite Alonzi's obviously greater seniority. The parties' collective bargaining agreement at Article 8 requires that probationary employees be laid off before regular employees and Article 34 prohibits the use of part-time officers to fill in during the hours previously assigned to a laid–off full time officer. The Employer introduced testimony suggesting that the remaining officers agreed, after Alonzi's layoff, that a senior officer, Gregory Palmer, should remain on his day shift desk job rather than be transferred to midnights to fill in for Alonzi's former patrol shift, and that instead part-timers would be used. The Employer did not seek to be released by the POLC from the clear contractual mandate prohibiting the use of part-timers to fill in for a laid off full time employee.

In July of 2010, the POLC submitted an information request regarding the Keego Harbor police officer schedule for July 2010. The Union was seeking to determine if the department was

[15] Keego Harbor in fact entered Alonzi's status as "Terminated-Deceased" which later resulted in Alonzi's infirm mother being sent a condolence letter from MERS regarding her son's "death". There is no direct evidentiary support that the improper entry was anything other than an error.

improperly utilizing the newly hired part-time officers to fill-in for the now "laid-off" Alonzi. On August 2, 2010, Hurst responded, refusing to provide the information as it was purportedly not open for "public review". The pending ULP was amended regarding the information request, and a partial schedule for July 2010 was finally made available to the Union at the first day of hearing. It reflected that three of the four newly hired part-time officers were working the midnight shift which had previously been assigned to Alonzi.

Discussion and Conclusions of Law:

The Introduction of Surreptitiously Recorded Conversations

The Union proposed, and at hearing I allowed, the introduction of recordings as well as transcriptions of those recordings[16], made by Alonzi of two meetings with Hurst, one on October 7, 2009 and a second meeting on December 9, 2009. Although the Employer asserted, and the Union conceded, that Alonzi's recording of the October 7, 2009, interview was done surreptitiously, the transcript of that interview reveals that Hurst asked if either Alonzi or his Union representative was recording the meeting, or had recording equipment with them, and Hurst then seemingly ignored Alonzi when he answered in the affirmative. Alonzi recorded the December meeting surreptitiously.

In *Saginaw Township –and- Police Officers Association of Michigan*, 18 MPER 30, the Commission allowed the introduction of a tape recorded conversation while generally disallowing the covert use of recording devices in grievance or bargaining settings. The ALJ reviewed the extensive body of case law developed by the NLRB on the question of the admissibility of surreptitiously recorded conversations, finding:

> Although the Board excludes secret tape recordings of conversations that involve contract negotiations and contract proposals – *Maywood* and *Carpenter, supra,* and *Triple A Fire Protection,* 315 NLRB No. 55 (1994) – it has not extended this rule [against] secret recordings of grievance meetings to various other situations. See e.g., *Colburn Electric*, 334 NLRB 532 (2001) (taped conversation of a foreman saying that he would not hire employees because of their union membership); *International Fish & Meat,* 1997 NLRB Lexis 982 (1997) (conversations involving the alleged commission of unfair labor practices against several employees); *Williamhouse of California, Inc.,* 317 NLRB 699 (1995) (employee's tape recording of a speech by a management official made without the Company's knowledge or consent); *Consolidated Edison of New York,* 286 N.L.R.B. 1031 (1987) (surreptitious tape recording of an entire grievance meeting); *Florida Steel Corp.*, 224 LRB No. 78 (1976) (tape recording of an investigative interview). The Board has also held that the lack of consent for recording a conversation is not grounds for rejecting a transcript of the recording. *P*I*E Nationwide,* 232 NLRB 1060, fn. 5 (1987); *McAllister Brothers Inc*., 278 N.L.R.B. 601 (1986). The Board has also found that tape recordings of employer

[16] Counsel cooperated in securing a court reporter transcription of the sometimes inaudible recordings and both compact disks of the recordings and the transcripts were admitted into evidence.

meetings to be the best evidence of what was said. See, e.g., *Algreco Sportswear Co.*, 271 NLRB 499, 505 (1984); *East Belden Corp*., 239 NLRB 776, 782 (1978).

Surreptitious recording of negotiations or grievance meetings would, as MERC held in *Saginaw Twp*, detract from the good faith give and take necessary for productive negotiations. Here, the meetings recorded were not contract negotiation sessions, nor were they grievance meetings. The first was a purported investigatory interview and the second was a meeting to dispense discipline. There is no reason under PERA to deny admissibility to these otherwise competent proofs.

Hurst was arguably on notice that the first meeting was being recorded, as Alonzi replied affirmatively to Hurst's question of whether Alonzi or his Union representative was recording the meeting or had recording equipment with them, although it appears likely that Hurst either did not actually hear Alonzi's acknowledgement that he was using recording equipment, or that he simply ignored the fact that Alonzi was saying anything. Additionally, Hurst literally told Alonzi in the course of that meeting *"you can quote me on this"*, although again that was likely mere rhetorical flourish.

Moreover, on these facts, the Employer is estopped from challenging the admissibility of the evidence. Hurst openly purported to record the entire meeting of October 7, when in fact, what he actually intended, and did, was to record the civil and rational part of the meeting in an effort to create false evidence of what transpired. He excluded, from what he expected to be the evidentiary record that part of the meeting where he unleashed his obscenity laden, screaming and threatening tirade. Hurst then testified falsely regarding these events, and his own conduct, at that meeting. The admission of the Alonzi recording of the remainder of the meeting merely, and appropriately, serves to thwart Hurst's effort to create a false evidentiary record, and regardless serves as the best evidence of what transpired.

The question remains whether any other evidentiary basis compels exclusion. Under Michigan law any participant in a conversation may, without the knowledge of other participants, record a conversation. See, *Sullivan v Gray*, 117 Mich App 476 (1982), interpreting Michigan's eavesdropping statute, MCL 750.539a, *et seq.*[17] Moreover, Michigan has long allowed the admission of relevant evidence, even if obtained in an unlawful manner by a private party. *Cluett v Rosenthal*, 100 Mich 193 (1894); See also, Tukel, 87 Michigan Bar Journal 26 (2008). The recorded statements, while out of court utterances, are not hearsay as they were offered in evidence against an opposing party who made the statements. See, MRE 801(d)(2). Both recordings are evidence of a sort generally admissible under Michigan law and were, therefore, properly admitted into evidence.

Whether Charging Party Has Established Retaliation Unlawful Under PERA

[17] It is of note that Alonzi is a practicing attorney. Whether it is ethical for an attorney to surreptitiously record conversations has been an issue of some debate. See Michigan Ethics Opinion RI-309 (1998); *cf*, ABA Formal Opinion 337 (1974).

Charging Party asserts that the Employer discriminated against Alonzi in retaliation for his protected activity under PERA. Where materially adverse employment action has occurred, the elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employees' protected activities; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Wayne County Sheriff,* 21 MPER 58 (2008); *Warren Con Schs,* 18 MPER 63 (2005); *City of St Clair Shores,* 17 MPER (2004); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. Inferences of animus and discriminatory motive may be drawn from direct evidence or from circumstantial evidence, including the pretextual nature of the reasons offered for the alleged discriminatory actions. *Volair Contractors, Inc,* 341 NLRB 673 (2004); *Tubular Corp of America,* 337 NLRB 99 (2001); *Washington Nursing Home, Inc*, 321 NLRB 366, 375 (1966). Unlawful discriminatory actions may consist of formal discipline, as in this case, or of informal but objectively and materially adverse changes in assignments or working conditions, such as assignments to less challenging or more onerous work or to an undesired shift. *Burlington N & Santa Fe Ry Co v White*, 548 US 53 (2006).

Here, there is no dispute over the fact that Alonzi engaged in ordinarily protected activity, including seeking disputed overtime pay, filing grievances and filing a MERC Unfair Labor Practice Charge. It is undisputed that Alonzi was subjected to several rounds of formal discipline, including a five–day and a thirty-day disciplinary suspension, and to an unpaid indefinite investigatory suspension, each of which the Employer asserts were imposed for just cause. Additionally, Alonzi's previously approved outside employment was first restricted and then prohibited. Finally, Alonzi's position was eliminated and his employment was effectively terminated, in what the Employer asserts was an economic layoff and the Union asserts was a retaliatory action.

When a charging party alleges that the employer has taken adverse action which was motivated by anti-union animus, it must be demonstrated that protected concerted activity was a motivating or substantial factor in the respondent's decision to take the complained of action. *Charter Twp of Plymouth,* 18 MPER 46 (2005); *Schoolcraft College Ass'n of Office Personnel, MESPA* v *Schoolcraft Cmty College*, 156 Mich App 754, 763(1986). Where it is alleged or apparent that there was a "mixed motive", that is both lawful and unlawful reasons for the Employer's actions, the Charging Party retains the burden of establishing that the unlawful motive was a substantial basis for the Employer's adverse actions. Each adverse employment action which was imposed in this case must be viewed on its own merits, while at the same time recognizing the Union's theory that a pattern of retaliatory actions occurred.

Preliminary to reviewing the myriad of specific events, the credibility of the two antagonists must be addressed. Despite being expressly sworn under the potential penalty for perjury, Hurst gave strikingly and consistently dishonest testimony. On his first day of testimony when called as adverse witness, Hurst repeatedly asserted that he "did not recall" the salient details of his exchanges with Alonzi. On the return to the stand on direct exam in the Employer's case-in-chief, Hurst implausibly lost his earlier claimed inability to recall, and then could remember the smallest details of his exchanges with Alonzi. It is unfortunately not unheard of, but still perjury, for a witness to insist that they remember all the facts that they think may help

their case, but claim an inability to remember any inconvenient facts. Hurst flatly lied about his own conduct in the initial investigatory interview. Hurst actively sought to mislead the tribunal, including by his effort, when recalled as a witness, to persuade the tribunal that Alonzi was not fit to be reinstated to work as he was then still under criminal investigation, where in fact, Hurst had repeatedly sought and failed to enlist local State and Federal police agencies in investigating Alonzi. Hurst also aggressively sought to mislead regarding the disposition of the work that Alonzi previously performed. What came out on cross-examination, after prolonged obfuscation, was that Alonzi's shift has been covered by several part-timers who were hired March 29, 2010, just before Hurst suspended Alonzi, first for 30 days, and then indefinitely.

Hurst's underlying conduct reflects a striking pettiness and vindictiveness in dealing with subordinates, which suggests an overly glorified self-perceived importance. Hurst held the entirely unwarranted belief that he was entitled to severely punish a public employee for "going outside the chain of command"[18] to complain to the Oakland County Sheriff's department about the chief, at a point in time when the 'chief' was in fact still employed as a sergeant by Oakland County.

Hurst well matched Humphrey Bogart's famous elucidation of the mindset of a petty tyrant commanding the tiniest of warships, Captain Queeg. Hurst went after officer Alonzi with the misplaced and paranoiac zeal of Queeg, and with everything up to and including the FBI, after Alonzi put in a time sheet seeking overtime pay. There was nothing in the least dishonest, surprising, or improper about Alonzi seeking the pay, to which he may well have been entitled, as he worked the hours. Alonzi and Hurst had discussed, but disagreed on, the proper contractual method for calculating overtime. Alonzi's view of the CBA provision was at least as reasonable as Hurst's conflicting view of the department's regulations. For Hurst to turn it into a disciplinary event, accompanied by threats of potentially criminal fraud claims, and a promise to run Alonzi out of the department, was the height of unreasoned pettiness.

While Hurst was certainly an extraordinarily problematic manager, an employer could also well conclude from Alonzi's conduct throughout that in Alonzi the department had an especially ill-tempered, manipulative, unctuous and uncommonly self-righteous officer. Alonzi had filed a request for investigation with the FBI against the sitting mayor prior to Hurst's arrival as acting chief. He threatened or pursued efforts at criminal investigations against, essentially, all of his prior employers. He later sought an FBI investigation of Hurst. It does not reflect well on Alonzi that claims which he allowed to be articulated on his behalf in this proceeding had to be withdrawn as unmeritorious, in particular the claim that the decision to have him serve his five day suspension in one block of time rather than spread out was retaliatory, where to the contrary, Alonzi's own surreptitious recording revealed that he had asked that it be served in a single block of time. It may well be that Alonzi acted throughout with the knowledge that his eventual layoff was a foreordained economics-based certainty and that he, in part, knowingly goaded the bombastic Hurst into precipitous and unlawful action. That Alonzi may have willingly offered Hurst the rope to hang himself does not alter Hurst's willingness to act with the tools at hand. The adverse employment actions imposed on Alonzi must be judged against an objective legal standard and not against a subjective analysis of the attractiveness of Alonzi as an individual or as an employee.

[18] In this tiny department, the entire "chain of command" in fact consisted of Hurst individually.

The Initial October 2009 Five-day Suspension

Here it is undisputed that the original five day suspension was directly premised, in part, on Alonzi's requesting overtime pay for a disputed event in August 2009, after Hurst had opined that Alonzi was not entitled to overtime for the work admittedly performed. That is, the five-day suspension was expressly premised, in part, on what would ordinarily be considered protected concerted activity in that Alonzi was seeking to enforce rights under the collective bargaining agreement. The Employer defends the imposition of discipline for seeking the disputed overtime pay by recasting the application for pay as an act of insubordination. As characterized by Hurst in the disciplinary memo: "*You were specifically ordered not to apply for overtime [and] specifically disobeyed orders and attempted to be paid for the day in question by submitting an incorrect payroll timesheet.*" There was no dispute over the accuracy of the time recorded on Alonzi's timesheet. The only dispute was whether or not Alonzi was correct in his belief that under the Union contract he was entitled to overtime pay for part of that week, due to a change to a 28 day assignment rotation.

Additionally, another express reason for the five-day suspension was a similar charge of disobeying orders by Alonzi recording, on his log sheet for September 9, 2009, the time spent fueling up his patrol car. Hurst had directed Alonzi to treat the time following an impromptu meeting at the end of Alonzi's shift as "*off the clock*". Alonzi did not put in for pay for the time, but did record it on his log sheet. Again, this infuriated Hurst who considered it insubordinate of an officer to, in essence, correctly record his time, after being ordered "*off the clock*". While an order to fail to record time worked may be improper and a violation of Michigan's Wage & Hour statutes, it would not appear that Alonzi in recording the time was engaged in any form of concerted activity protected under PERA. However, Hurst, in explaining why the offense warranted discipline, added that when Hurst ordered Alonzi to "correct" the log sheet, Alonzi instead of obeying "*chose to question the content of other officer's log sheets and imply an individual "scrutiny" of your conduct*". Hurst characterized such conduct as a failure of Alonzi to be "*respectful and non-defiant*" with the Chief. Alonzi's conduct in implying improper individualized scrutiny of him by Hurst was conduct linked to his grievance filing and therefore protected under PERA.

There were other reasons given for the five day suspension. The first was that Alonzi had allegedly disobeyed orders by engaging in surveillance of a favored local liquor establishment, resulting in the arrest of a drunk driver. Discipline for such a reason would not violate PERA, as an officer is required to follow his chief's lead on law enforcement questions. The final reason given for the five-day suspension was Alonzi's having phoned the Oakland County Sheriff Department to complain to them about Hurst's conduct. This likewise is a reason which does not violate PERA.

The Employer's defense, regarding this incident and those that follow, is that Alonzi was subject to discipline because he violated the police chief's orders. Hurst's theory of command authority would certainly streamline, and indeed eliminate, the process of grievance handling. If a dispute over entitlement to a particular benefit arises, the chief can order any employee to refrain from seeking a disputed employment benefit. If the employee seeks the benefit, they are

then necessarily violating an order, insubordinate, and subject to discipline up to and including termination. The traditional labor relations maxim regarding an employee faced with what the employee believes to be an improper employer order is "*Obey now and grieve later*". That simple concept, which well maintains peace in a workplace, was translated by Hurst in practice at Keego Harbor as "*Obey now and shut up and don't even think about grieving later, or I will get you for it*". Such an expansive view of command authority cannot be countenanced without eliminating, as a practical matter, the entire right of employees to seek redress and engage in concerted activity.

It is properly recognized that there is a heightened need for adherence to orders in police departments, which are frequently referred to as "paramilitary" organizations. That recognition does not insulate every command decision from scrutiny, nor does it preclude challenge to such orders, at an appropriate time and in an appropriate manner. A police commander must be able to give and expect essentially unquestioned compliance with orders in a policing situation. There really is no time for debate or immediate second-guessing by subordinates when the orders are to fire your weapon, or don't fire your weapon; charge up those steps into that building, or don't and instead wait for backup to arrive; or arrest that man or break off that high-speed pursuit. The same cannot be argued for issues of whether or not to submit a request for overtime pay. Hurst, or any employer, is entitled to tell an employee to punch out, go home, not to work any more hours today, or even, do not work any overtime ever without express prior authorization. An employer is not, however, entitled to assign work, have it performed, and then discipline an employee for arguing after the fact that they think they are entitled to overtime pay for doing what they were told. Hurst is entitled to obedience to his orders, even if an order is arguably or even clearly improper; however, he is not entitled to insist on "*non-defiant*" compliance with his every whim, including in particular an insistence that his decisions not be challenged after the fact. It is clear that the core offense perceived by Hurst is that Alonzi failed to properly defer to the chief, by seeking to have the chief's decision on overtime pay reversed after the fact.

In *Michigan State Univ (Police Department)*, 26 MPER 36 (2012) (no exceptions), the Commission faced a strikingly similar dispute in which the MSU police department was found to have unlawfully retaliated against an officer who had sought, and been denied, overtime pay for time spent at home studying for a work-required licensing exam. The officer grieved the denial of the overtime pay and the employer responded by both denying the grievance and issuing a formal reprimand to the officer for insubordination for having sought the overtime pay after it was initially denied. The discipline was overturned in a contractual arbitration proceeding, in which the denial of the overtime pay was affirmed, and an unfair labor practice charge was pursued regarding a related threat against the officer of an adverse change in employment conditions. After noting that: "*Although it is important that chain of command be followed in a police department, the existence of a paramilitary operation does not grant the Employer an exemption from the requirements of PERA*", the decision found that the employer had unlawfully retaliated against the officer for having engaged in the unsuccessful, but protected, effort to secure disputed overtime pay.

The Employer relies on the analysis in *Ingham County v FOP*, 275 Mich App 133 (2007), of the interplay of the need for workplace discipline, in particular in a police department, with

the statutory entitlement of employees to engage in concerted activity allowed by PERA. In *Ingham County* a deputy sheriff was disciplined for releasing an internal police document contrary to a clear department rule against providing such documents to anyone outside the department. The employee had provided the document to the Union's attorney, in the process of seeking review of the propriety of the document itself. Although contacting a Union lawyer to seek advice on a work place matter is of course generally protected activity, the Court held that the employee could be properly disciplined, not for contacting the lawyer, but for the unauthorized release of an internal sheriff's department document. The Court found that application of such a rule did not necessarily restrict the Union's ability to represent its members.

The *Ingham* analysis simply does not fit these facts. Had Hurst ordered Alonzi to punch out on time and not incur overtime costs on a particular day or in general, and Alonzi instead decided that an investigation he was on was of utmost importance and warranted working several extra hours on overtime, then his conduct would have been insubordinate and warranted discipline. Instead, Alonzi worked the hours he was told to work, but applied for overtime pay, knowing that the chief disagreed with him over whether overtime was owed. That is not insubordination; if it were, no employee could ever safely challenge an employer decision after the fact. Alonzi was entitled to challenge his supervisor's interpretation of overtime rules, after the fact, without fear of retribution. Notwithstanding Hurst's threats and retaliation, Alonzi filed a grievance through his Union contesting the five-day suspension.

MERC has not infrequently had to address the arguably special status of police and fire employees in the context of discipline for actual insubordination or for merely offending their employers, and addressed that question in *City of Detroit (Police Department*), 19 MPER 15 (2006). In that case, a police officer was suspended for his off-duty conduct in maintaining a website titled "*Fire Jerry O*", in reference to then police chief Jerry Oliver. The website included and encouraged very disrespectful criticism of the police chief by officers, both named and anonymous. The website was not sponsored by the Union, but was focused on discussions and complaints regarding work place issues. MERC held that it would not allow the suppression of PERA protected conduct, including speech, simply because it occurs in conjunction with conduct or speech that is not protected by PERA, where there has been no showing of actual harm or adverse impact flowing from that speech.

In *Township of Redford*, 1984 MERC Lab Op 1056, MERC held that even when a Union official speaking to the press about a union-management dispute violated an otherwise legitimate rule of the employer, the employer must demonstrate a legitimate and substantial business justification for applying the rule to restrict the exercise of PERA rights. In a holding that presaged the court's holding in *Ingham County*, the Commission opined that where the concerted activity does not involve disclosure of confidential information or policy, and it is not shown that application of the rule is necessary to maintain order or discipline, then discipline for speaking to the press regarding a union-management dispute violates PERA. *Township of Redford*.

By way of contrast, the Commission held in *Ottawa Co Sheriff*, 1996 MERC Lab Op 221, that when crimes have been committed and an investigation is underway, a law enforcement agency has a legitimate interest in preserving confidentiality by requiring that rules regarding the release of information be strictly followed, the violation of which would not be protected by

PERA. In *Meridian Twp*, 1997 MERC Lab Op 457, the Commission held that a public statement by a fire fighters Union official that was false and had the potential of causing public alarm was not protected by PERA.

It is apparent that Hurst used his new authority as chief of a small police department to put into play a scheme to rid himself of the one officer who had the gumption, or ill-temper, to stand up to him in the slightest. While discipline in the ranks is of course important, a police officer is entitled to put in for overtime that he reasonably believes he is entitled to under the Union contract, after discussing it openly and politely with his superior officer, and not face the destruction of his career. While heightened discipline is often demanded within police departments on the explanation that they are paramilitary structures, here Hurst ran the Keego Harbor six officer department not as a paramilitary unit, but as a petty tyrant and as if it were his private business with at will employees.

The intermingling of reasons which do not violate PERA with reasons which constitute unlawful retaliation under PERA renders the discipline unlawful. Based on the above analysis, the five-day suspension was unlawful, contrary to PERA, Sections 10(1)(a) & (c), where a substantial and stated factor in the decision to impose discipline was to punish Alonzi for engaging in the protected activity of openly seeking to enforce his view of entitlement to particular contractual benefits.

The December 2009 Threats of Retaliation[19]

On December 9, Hurst met with Alonzi regarding the implementation of the five-day suspension. In the suspension memo itself, Hurst cautioned that "*any attempt to circumvent*" the suspension would result in severe disciplinary action. In his comments that day, Hurst made clear his animosity towards Alonzi for having grieved the five-day suspension, pronouncing that:

> I'm just telling you . . . you're beating a dead horse. Your fight ain't gonna stand. . . As long as it's an open wound, *that's an open wound not caused by me*. I told you before when I dish out discipline, it's done. . . Because discipline isn't done until it's over with the union, too . . . So it keeps festering and it keeps on going . . . I've got news for you. You think I'm going to take it off in six months after you fight me? It will stay on for two years and then you've got another one coming. (*Emphasis added)*

Hurst's December effort to threaten Alonzi into dropping the grievance, to thereby allow the "*festering wound to heal*", was an unlawful interference and coercion under Section 10(1)(a) of PERA. His announced intent to leave the discipline in place longer because of the filing of the grievance was unlawful retaliation under Section 10(1)(c) of PERA.

[19] The Union abandoned the claim that being ordered to serve the five day suspension in a single week was retaliation, instead of being allowed to spread the suspension for example one day per week. In fact, Alonzi's recording established that at the December 9, 2009, meeting, Alonzi indicated he'd prefer serving the time all at once.

The February 2010 Restriction on Alonzi's Outside Employment

Immediately following the January 2010 filing of the initial ULP charge, Hurst imposed new and burdensome restrictions on Alonzi's outside employment. To be sure, an employer, police department or otherwise, is in general well within its rights to monitor and restrict outside employment. However, such discretionary authority cannot be used to discriminate against an employee because he has engaged in protected activity. *Wayne County Sheriff*, supra; *MERC* v *Reeths-Puffer School District*, 391 Mich 253, 259 (1974); *City of Grand Rapids*, 1984 MERC Lab Op 118. Here, Alonzi had, with the Employer's approval, long engaged in a limited outside practice of law. His Employer had placed reasonable restrictions on him, prohibiting his handling of cases in the district court which had jurisdiction over Keego Harbor, and precluding the handling of cases adverse to Keego Harbor. The new restrictions on Alonzi, including the demand that he disclose extraordinary detail on his clients, did not arise from any claimed problem caused by the outside employment; rather, they were imposed for the purpose of punishing Alonzi for his concerted activity of filing grievances and for the filing of the ULP charge.

In the earlier recorded conversation, Hurst had telegraphed his intent in describing how one Oakland County Sherriff Deputy had been allowed to engage in the outside practice of law, but that when tight restrictions were placed on his outside employment the officer quickly gave up and quit the department. One would have to be willfully gullible to not recognize that a goal of the new restrictions was to force Alonzi's resignation and to thereby rid Hurst of an annoyance. Instead, Alonzi complied with the restrictions and grieved their implementation. The new restrictions on Alonzi's previously approved outside employment were an unlawful retaliation under Section 10(1) (c) of PERA.

The March 2010 Effort to Terminate Alonzi

On March 22, 2010, Hurst sent a memo to the city manager which laid out in undisguised terms Hurst's unlawful reasons for seeking the termination of Alonzi. Hurst had seized on Alonzi's otherwise unremarkable involvement in a dog-bite civil claim to attempt to rid himself of an employee who he considered unforgivably insubordinate for having challenged Hurst's' orders through the grievance procedure and by filing unfair labor practice charges. As Hurst put it in terms equally forthright and unlawful:

> . . . Officer Alonzi . . . will simply demand litigation for any order(s) he does not want to follow. In a law enforcement environment, this continued form of insubordination, resistance, and interference cannot be allowed to continue . . . Officer Alonzi continues to demonstrate a disregard for departmental orders and a "litigation" attitude towards established Rules & Regulation . . . [and] has continued to demand[] litigation on issues not generally covered under Union contract.

The March 22 memo clarifies that when in December 2009 Hurst threatened to fire Alonzi for "*any attempt to circumvent*" his suspension order, Hurst intended to unlawfully prohibit the filing or pursuit of a grievance or any other form of litigation. The only litigation

pending in March of 2010 which had been initiated by Alonzi were the several grievances and the initial unfair labor practice charge. The Employer has not raised, or supported, a claim that any of those grievances or charges were frivolous or brought in bad faith, although they of course disputed the merits. Alonzi is protected under PERA in the bringing of such claims. Hurst acted unlawfully and in violation of Section 10(1)(c) when he sought to terminate Alonzi's employment in retaliation for the bringing of claims.[20] Hurst's assertions in the March 22 memo support and enforce the conclusion that each of the several adverse employment actions were a part of a pattern, indeed plan, by Hurst to run Alonzi out of the department because Alonzi had engaged in protected activity.

The April 2010 Thirty-Day Suspension

The city manager did not approve Hurst's March 22 request to fire Alonzi outright; however, Hurst was obviously undeterred. On March 29 and 30, Hurst hired four new and otherwise unneeded part-time police officers. One would have to be inexcusably gullible to believe that Hurst was merely being prudent or amazingly prescient when he hired Alonzi's replacements in advance of Alonzi's departure. Hurst had maneuvered a thinly concealed scheme to get rid of Alonzi in retaliation for Alonzi's protected concerted activity.

Also on March 30, Hurst prepared charges which he would then use to place Alonzi on a 30-day suspension from which he would never return, in fulfillment of the threat made by Hurst on October 7th that:

> I want you clear-cut understanding until I leave this fuckin' place I am the chief of police. . . If you can't live with that then I'll suspend you until I leave.

On April 2, 2010, Hurst called Alonzi in and immediately imposed the 30-day suspension, again cautioning Alonzi against any "*attempts to circumvent*" the disciplinary order, which, as made clear by the as yet then undisclosed March 22 memo, Hurst considered to include any grievance filing. Alonzi filed a contractual grievance on April 7th, to which an increasingly openly retaliatory Hurst responded:

> Officer Alonzi appears to be unwilling to accept any discipline without invoking arbitration. Since it would also appear that Officer Alonzi is not dealing in good faith, or within the guidelines of the Union contract, I have no definitive reasons for a review.

The purported impetus for the suspension was Alonzi's failure to earlier disclose his involvement in the dog-bite case. As detailed above, that involvement was unremarkable. Alonzi had disclosed to Hurst, as ordered, all clients where he was either the attorney of record or had filed an appearance. The dog-bite case was not a matter in litigation; rather, Alonzi was lobbying

[20] Although not expressly pled, the facts support finding a Section 10(1)(d) violation premised on Hurst seeking to terminate Alonzi for having brought this unfair labor practice charge. Any remedy for a Section 10(1)(d) violation would merely duplicate remedies otherwise recommended.

by letter the Holly city prosecutor in order to plead for a maximum prosecution of the allegedly vicious dog's owners.

The proofs establish that by April 2nd, Hurst had fully in place his plan to never allow Alonzi to return to work, having already hired the otherwise unnecessary four new part-time officers who would immediately take over working Alonzi's midnight patrol shifts, for which the tiny department would otherwise not have had staffing. While premised on Alonzi's involvement in the dog-bite case, the 30-day suspension was part of the retaliatory scheme by Hurst and was therefore, as alleged, unlawful under Section 10(1)(c) of PERA.

The May 12, 2010 Prohibition of Alonzi's Outside Employment

The Union filed an amended unfair labor practice charge on April 30. Alonzi was scheduled to return to work from his 30-day suspension on May 14, 2010. In February 2010, Hurst had placed special restrictions on Alonzi's previously approved outside employment as an attorney. Hurst demanded intrusive information on Alonzi's clients, which after protesting, Alonzi provided. Even then, Hurst punished Alonzi in March 2010, for not disclosing a client, even though it was an individual on whose behalf Alonzi had not filed an appearance and had not made a court appearance. Alonzi had followed Hurst's written instructions precisely in reporting each client on whose behalf he was the attorney of record; yet Hurst then sought to expand that order to include issues clearly not encompassed by the original order.

Not satisfied with that, on May 12, 2010, on the eve of Alonzi's scheduled return to work, Hurst notified Alonzi that the city council had barred him from continuing to engage in any outside practice of law. While the new ordinance purported to cover all officers, Alonzi was of course the only one with a law license.

As noted above, there is nothing inherently improper and certainly not violative of PERA for an employer to prohibit such outside employment, absent of course, an unlawfully discriminatory intent. As with the earlier restrictions placed on Alonzi's previously approved outside employment, the city's authority to restrict outside employment cannot be used to discriminate against an employee because he has engaged in protected activity. *Wayne County Sheriff*, supra; *MERC* v *Reeths-Puffer School District*, supra; *City of Grand Rapids*, supra. Former mayor and then current city council member Sidney Rubin testified regarding the adoption of the anti-lawyer ordinance. He was notably lacking in any substantive understanding of the Holly matter which had purportedly led to the adoption of the ordinance. Given the sequence of events, and the insistence of Hurst at getting rid of Alonzi, as well as Hurst's earlier pointed allusions to the Oakland deputy sheriff who had been forced out by restricting his law practice, the evidence supports a conclusion that it was Hurst who engineered the resolution by the City Council barring Alonzi from continuing to practice law.

The prohibition on Alonzi's continued outside employment was unlawful because it was sought and adopted in retaliation for Alonzi's lawful and protected activity, and because it was secured as a mechanism to attempt to force Alonzi's resignation from the department. This adverse employment action violated Section 10(1)(c) of PERA.

The May 14, 2010 Indefinite Suspension of Alonzi

In a quickening of the pace of adverse employment actions, two days after announcing the prohibition on Alonzi's outside employment, on May 14, 2010, the very day Alonzi was scheduled to return, Hurst called Alonzi to tell him he was being placed on an unpaid suspension. The suspension was purportedly based on an investigation by the Auburn Hills Police Department of the unlawful use of Alonzi's badge by a civilian who was later charged with impersonating a law enforcement officer. At least at the early stage of the investigation, Alonzi was plausibly a suspect, or witness, and therefore his being placed on suspension status was to be expected. Neither the collective bargaining agreement nor the department's rules and regulations expressly cover the circumstance.

Notwithstanding the initial propriety of the suspension, the memo of May 17 announcing the suspension was notable. The memo failed to disclose, as more fully discussed below, that it was chief Hurst himself who had initiated the Auburn Hills investigation. Included in the notice of indefinite suspension was a separate highlighted notice to Alonzi that upon his return to work, the prohibition on his practicing law would be "in full effect". The apparent purpose of this reminder was to underscore for Alonzi that, even though on unpaid and indefinite suspension, he should proceed cautiously in undertaking any paying work as an attorney, as he would have to withdraw from any representation immediately upon his uncertain return to employment as an officer. This suspension notice, like prior disciplinary notices, threatened immediate termination if Alonzi "*attempts to circumvent*" the order, which Hurst had in the past interpreted to include efforts at litigating through grievances the propriety of his own orders.

Only three weeks later, Hurst was notified on June 8th by Auburn Hills that they had completed their investigation and had cleared Alonzi. Even though Alonzi's suspension had been expressly defined as continuing "*until completion*" of the Auburn Hills investigation, Hurst did not recall Alonzi to work. Hurst in fact did nothing; he did not notify Alonzi of the Auburn Hills resolution of the investigation; he did not notify the Union of the conclusion of the investigation; Hurst did not bring disciplinary charges against Alonzi; and he did not reinstate him with back pay now that he had been cleared as is typically done. Instead Alonzi remained on unpaid suspension with no lawful basis.

As revealed at the evidentiary hearing in this matter, Hurst was so obviously obsessed with trying to get rid of Alonzi that, in an extraordinary move for a police officer much less for a police chief, Hurst interceded, seemingly improperly and *ex parte*, with the criminal trial court judge, to seek a lesser sentence for the individual who had used Alonzi's badge, notwithstanding the charge of impersonating an officer. Hurst admitted to having met "at least" ten times with the criminal defendant, who admittedly had misused a Keego Harbor police department badge, and to having met two or three times with the criminal defense attorney.

I am persuaded that Hurst would have leapt on the Auburn Hills incident as an opportunity to fulfill his earlier threat to have Alonzi on layoff status until Hurst left the department, in retaliation for Alonzi having "disrespected" the chief by filing grievances. This would support a finding that this suspension was motivated by an unlawful retaliatory motive, prohibited under Section 10(1)(c) of PERA; however, again this indefinite suspension must be

found to be of mixed motive. The question remains whether the indefinite suspension would have occurred even in the absence of the then long standing animosity by Hurst of Alonzi based on Alonzi's lawful concerted activity.

Charging Party Exhibit 46 is a packet of information from the Auburn Hills police department investigation, which has multiple layers of hearsay and which I admitted over the hearsay objections of the Employer, precisely because chief Hurst had asserted that he relied on the reports in taking action regarding Alonzi. It provides a substantial, and in fact compelling, basis for Hurst's action, independent of the anti-union animus which I found to have permeated the other adverse employment actions he imposed on, or engineered regarding, Alonzi. As reflected in that report, Hurst initiated the investigation after he was informed by the city manager that the manager had received a call about a civilian flashing a Keego Harbor badge at a retail outlet. Hurst went to the retail outlet himself to investigate. Hurst, and later the Auburn Hills police, interviewed a store employee who asserted that Tobin and officer Alonzi entered the store together, as reflected in a store security camera video, that Tobin introduced himself as "Rob" and that he used the Keego Harbor badge to gain access to the store while carrying firearms and apparently to secure a discount on using the store's gun range. The suspicious store greeter asked "Rob" the name of the city manager of Keego Harbor, which "Rob" could not supply, and the greeter reported the incident.

The report details the interaction of Tobin and Alonzi with the Auburn Hills police and the West Bloomfield Township police. Tobin gave conflicting accounts of the events, including asserting that he had gone to a bar with Alonzi, and other friends of Alonzi, that the bouncer wouldn't let him in because he was underage, but would let him in if he had a badge, like the rest of the party. Tobin claimed that he then borrowed Alonzi's car and his house keys, went to Alonzi's house and took his badges, returned to the bar, secured entry and returned one of the two badges to Alonzi at the bar. The report details that when first confronted by the investigation, Alonzi went to the West Bloomfield Township police to belatedly report a break-in at his home in which his badges had supposedly been taken. After several more interviews of Tobin, and after Alonzi was called back in to the West Bloomfield Township police, Alonzi "reconsidered" his home invasion report and no longer wished to pursue charges against Tobin.

I do not take these police reports at face value or as proof of the matters asserted therein[21]; however, the reports provide facts which, if believed, provide a compelling basis for a police department to immediately suspend an officer. Tobin's version of events, as purported in the reports, is inherently more plausible than Alonzi's. Alonzi was twice in Tobin's immediate presence when Tobin improperly used Alonzi's police badge, while Alonzi was on suspension from Keego Harbor. The report quotes Tobin as asserting he used Alonzi's car and home keys, with Alonzi's permission, to secure the badges and that he returned one of the badges to Alonzi at the bar immediately after using it to gain entry to the bar. Alonzi's filing of an "information only" report with the West Bloomfield Township police alleging a home invasion, and then withdrawing that claim in the face of an investigation, makes Alonzi's version of events suspect in the extreme and could support a conclusion that he likely filed a false police report in an effort to protect himself from complicity in the unlawful use of his police badges. I am persuaded that

[21] The Union proposes an adverse inference from the failure of the Employer to call Tobin as a witness. Either party could have subpoenaed Tobin.

knowledge of the allegations in these reports would have been sufficient to persuade Hurst to indefinitely suspend any officer, even in the absence of the pre-existing animosity of the sort he harbored toward Alonzi.

Hurst's May 17, 2010, memo was not truthful; in fact, it was willfully misleading in asserting that Hurst had "been notified by the Auburn Hills police department" of Alonzi's involvement in an investigation, when in fact Hurst had brought the whole matter to Auburn Hills' attention. Hurst did fail to return Alonzi to work after the conclusion of the Auburn Hills police investigation, which was the stated basis for the suspension. He also never brought Alonzi up on charges related to the misuse of the badge incidents. These failings may have been unfair or might have been cognizable as defects in a contractual review of any imposition of discipline. Such arguable failings are contractual matters and are not determinative of the statutory question of whether discrimination unlawful under PERA occurred.

Based on this record I find that, although Hurst harbored unlawful anti-union animus toward Alonzi, he would have regardless indefinitely suspended Alonzi on May 14 based on the information that came to Hurst's attention regarding Tobin's misuse of Alonzi's badge. I therefore do not find that the imposition of indefinite suspension from May 14, 2010, through June 8, 2010, was for reasons unlawful under PERA.

However, the stated basis for the indefinite unpaid suspension ceased to be operative as of June 8, 2010, when Hurst received notice from the Auburn Hills police that their investigation, upon which the suspension was premised, had come to a conclusion without charges being brought against Alonzi. Given the failure of Hurst to bring departmental charges against Alonzi, or to proffer to Alonzi or the Union any reason for continuing the unpaid suspension, the period of the suspension following June 8, and until the then-already announced layoff of July 1, 2010, must be treated as a part of the unlawful scheme of retaliation by Hurst. The continuation of the suspension past June 8 was a violation of Section 10(1)(c) of PERA.

The May 25, 2010 Permanent Layoff of Alonzi

It is not the place of this agency to substantively second guess a public employer on the question of how much staffing is the appropriate amount given available resources and needs. The proofs related to the layoff decision are decidedly mixed. Keego Harbor was facing a budget crunch, which was addressed by cuts throughout the small workforce, with even high level positions eliminated. The proofs of economic motivation for the layoff were credible; however, proofs supporting a conclusion that there was an unlawful motive in the handling of budget related issues in a way designed to improperly target Alonzi are also credible.

By the time of the vote on the budget, Keego Harbor had already reported Alonzi's termination effective April 13, 2010 to MERS. I do not believe that Hurst would have hired four new part-time officers in the face of a budget shortfall unless his intent had been to use them to replace Alonzi. An employer could of course defend the hiring of several part-time employees as an option cheaper than retaining one full-timer; however, here Keego Harbor had a clear contractual prohibition on using part-timers to work the hours of a laid off full time officer. The Employer claims that after the layoff of Alonzi, the other officers asked it to keep officer Palmer

on days and divide up Alonzi's midnight shift hours amongst the part-timers; however, the Employer secured no such agreement from the POLC, which as exclusive bargaining agent could have released the Employer from the contractual obligation to not use part-timers to replace Alonzi. Instead of seeking POLC's concurrence, Hurst withheld from the POLC, as discussed below, the time records it sought, precisely because Hurst wanted to keep from POLC the proofs that they would have used to put Alonzi back on the job.

Based on the totality of the circumstances, I am persuaded that Hurst secured through the budget process his stated, and unlawfully motivated, intent to keep Alonzi suspended for as long as Hurst was chief. Hurst hedged his bets on how best to keep Alonzi off the payroll. He kept the status of the "indefinite suspension" equivocal, neither returning Alonzi or charging him with any offense that Hurst would have to actually prove. He sought to bargain a side deal directly with the individual officers under his command without knowledge of the POLC in order to use the newly hired part-timers to replace Alonzi.[22] Hurst utilized the part-timers to replace Alonzi knowing full well that the maneuver violated the clear mandate of the contract. Hurst played a major role in determining policy in Keego Harbor, in the police department and generally, and in fact council member Rubin testified that the city council did not intervene directly in the police department's affairs, and left it to Hurst to determine how to address the budget shortfall. Hurst used that latitude to unlawfully discriminate against Alonzi in violation of Section 10(1)(c) of PERA. Contrary to Rubin's testimony, when Hurst announced the layoff of Alonzi, he falsely asserted that the new budget "*calls for the reduction of one full time position*" when in fact Hurst was given the discretion by the council to determine how to implement the budget cut.

The right of the City to allocate resources must nonetheless be addressed regarding an appropriate remedy premised on the finding that the targeting of Alonzi for layoff was unlawful. Alonzi was unlawfully laid off and I will be recommending as relief his reinstatement and that he be made whole; however, the make whole remedy will be limited to back pay and benefits for only those hours during which the Employer actually utilized employees to replace Alonzi on the 11-7 midnight shift to which he was previously assigned. If Keego Harbor during any portion of the period of Alonzi's layoff cut back to less than full police coverage during Alonzi's formerly assigned shift, then the recommended relief will extend only to the hours actually assigned to someone in Alonzi's stead.[23]

The July 2010 Information Request Dispute

It is well-established that in order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must supply in a timely manner requested information which will permit the union to engage in collective bargaining and to police the administration of the

[22] Such direct dealing, while not charged, was an apparent violation of Section 10(1)(e).

[23] I also recognize that since the hearing in this matter, further events may have transpired regarding the Tobin affair, and that, in response to an order of reinstatement for Alonzi, the Employer may belatedly seek to pursue disciplinary charges against Alonzi regarding his role in the Tobin matter. This decision is not intended to address or in any way resolve such hypothetical events, which regardless would properly be subject to review in the contractual grievance procedure, particularly in that I have found that even without the established unlawful animus, the Employer would have relied on the Tobin-related allegations to consider adverse employment action regarding Alonzi.

contract. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. Where the information sought relates to discipline or to the wages, hours or working conditions of bargaining unit employees, the information is presumptively relevant and will be ordered disclosed unless the employer rebuts the presumption. *City of Detroit, Department of Transportation*, 1998 MERC Lab Op 205; *Wayne County*, *supra*. See also *E.I. DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538; 117 LRRM 2497 (CA 6, 1984). The standard applied is a liberal discovery-type standard. The employer has a duty to disclose the requested information as long as there exists a reasonable probability that the information will be of use to the union in carrying out its statutory duties. *Wayne County*, *supra; SMART*, 1993 MERC Lab Op 355, 357; *City of Detroit*, 19 MPER 34 (2006). See also *Pfizer, Inc*, 268 NLRB 916; 115 LRRM 1105 (1984), enforced 763 F2d 887 (CA 7, 1985).

It is transparent that Hurst dodged the Union's entirely legitimate information request. The Union sought the time records for the midnight shift following Alonzi's permanent layoff. The information requested was obviously relevant to the Union's grievance investigation where the contract explicitly prohibited the Employer from laying off a full-time officer and then turning that officer's hours over to part-time officers. Hurst knew that is why the Union wanted the records, and that those records would in fact establish that Hurst had blatantly violated the contract and had indeed replaced Alonzi with a team of newly hired part-time officers, and it is patently obviously that that knowledge is why Hurst withheld the records. The Employer did not produce the records until during the trial in this matter. In withholding existing records relevant to a grievance matter, especially where the Employer knew the records would clearly establish a contract violation, the Employer has acted unlawful and in violation of its duty to bargain in good faith under Section 10(1)(e) of PERA, and such a violation is not cured by showing up at trial with the earlier improperly withheld records.

Conclusion

From the outset, Hurst was honest with Alonzi, at least behind closed doors and after Hurst turned off his own tape recorder. Hurst warned Alonzi that he wouldn't tolerate Alonzi challenging his decisions, or treading on his overblown sense of self-importance, through grievances or otherwise, saying:

> *I want you clear-cut understanding, until I leave this fuckin' place I am the chief of police. . . If you can't live with that, then I'll suspend you until I leave.*

Through formal discipline and in extraordinary candor in writing, Hurst confirmed the carrying out of that unlawful threat, imposing a five day suspension on Alonzi premised on the finding that, regarding disputed overtime pay:

> *You specifically disobeyed orders and attempted to be paid for the day in question by submitting an incorrect payroll timesheet.*

And Hurst put it in terms equally forthright and unlawful when he sought approval from the city manager to fire Alonzi:

. . . Officer Alonzi . . . will simply demand litigation for any order(s) he does not want to follow. In a law enforcement environment, this continued form of insubordination, resistance, and interference cannot be allowed to continue . . . Officer Alonzi continues to demonstrate a disregard for departmental orders and a "litigation" attitude towards established Rules & Regulation . . . [and] has continued to demand[] litigation on issues not generally covered under Union contract.

Hurst ultimately kept his word when, within seven months of articulating the threat, he imposed a five-day suspension, a thirty-day suspension, an indefinite suspension; sought approval to fire Alonzi; and then arranged a permanent layoff. After thinking he was rid of Alonzi, Hurst was openly furious with having to face a trial in this ULP case, wherein he was embarrassed by being caught in his lies by his own tape recorded words. He then went after Alonzi with what he clearly hoped were bigger guns, by outrageously attempting to induce the FBI to open a criminal investigation of Alonzi, essentially for the crime of having offended the chief, and with Hurst attempting to mislead the tribunal with the claim that the FBI had independently initiated some new investigation of Alonzi.[24] Hurst willfully used his position of authority to violate State law and then lied under oath about his own conduct. Of course, Alonzi also did everything he could to go after Hurst, including seeking an FBI investigation of his boss; however, it was Hurst who misused his governmental authority as an employer to destroy Alonzi's career in an unrelenting fusillade of unlawful retaliatory adverse employment actions.

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Keego Harbor, its officers, agents, and representatives, including Kenneth Hurst, shall:

1. Cease and desist from

a. Interfering with, restraining, or coercing employees, including but not limited to Robert Alonzi, in the exercise of rights guaranteed in Section 9 of the Act, including the right to pursue grievances, or otherwise challenging in an appropriate time and manner, the propriety of management decisions on discipline, the application of contractual language, the interpretation of departmental rules and regulations, or the applicability of workplace benefits;

[24] Although not expressly pled, the facts would support finding a separate Section10(1)(d) violation premised on Hurst seeking to initiate an FBI investigation of Alonzi, over a then more than one year-old perceived slight, where Hurst acted following the first day of trial on this ULP, in which he was both furious with Alonzi for bringing the MERC case and for having been embarrassed by the fact that Alonzi had recorded Hurst's earlier threats, which in addition to supporting the original claim by Alonzi also revealed the dishonesty of Hurst's testimony when called as an adverse witness. Any remedy for such a Section 10(1)(d) violation would essentially duplicate remedies oterwise recommended.

b. Discriminating against employees, including Robert Alonzi, regarding terms and conditions of employment in order to encourage or discourage Union membership or activity;

c. Threatening employees, including Robert Alonzi, with retaliation for having engaged in conduct protected under PERA;

d. Refusing to promptly and fully respond to information requests made by the Union related to wages, hours, working conditions, or disciplinary matters.

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

d. Rescind the five-day suspension imposed on Robert Alonzi in October of 2009, remove all record of the discipline and the allegations which lead to that discipline, and make Alonzi whole by reimbursing him for lost pay, benefits, and restore any lost seniority accrual;

e. Affirmatively rescind the restrictions on Alonzi's outside employment which were imposed in February 2010 and rescind the ordinance adopted in May 2010 which prohibited Alonzi from engaging in outside employment as an attorney and make him whole for lost earnings opportunities. While a make whole remedy for earnings lost from outside employment will be necessarily somewhat speculative, a reasonable approximation of his losses can be accomplished by comparing his average declared outside earnings in prior years and presume comparable earnings would have been achieved during the period of February 2010 through June of 2010 during which his outside employment was unlawfully restricted;

f. Rescind the thirty-day suspension imposed on Robert Alonzi in April of 2010, remove all record of the discipline and the allegations which lead to that discipline, and make Alonzi whole by reimbursing him for lost pay, benefits, and restore any lost seniority accrual;

g. Reinstate Alonzi from the indefinite investigatory suspension imposed on May 14, 2010, with the reinstatement effective beginning June 8, 2010, which is the date on which the Employer was notified of the conclusion of the investigation which was the stated basis for the suspension, and make Alonzi whole by reimbursing him for the entirety of lost pay on a full-time basis, lost benefits, and restore any lost seniority accrual for the period from June 8, 2010 through June 30, 2010, with the back-pay award arising from the May 14, 2010 suspension to cease as of the lay-off date of July 1, 2010;

h. Rescind the permanent layoff of Alonzi, which had been effective July 1, 2010, and offer Alonzi reinstatement as a police officer. Alonzi must be made whole to the extent that he was disadvantaged by the unlawful motivation of Hurst in imposing the permanent layoff; however, the make whole remedy will be limited to back pay, at Alonzi's regular hourly rate, and benefits and seniority accrual for only those hours during which the Employer after June 30, 2010, actually utilized employees to replace Alonzi on the 11-7 midnight shift to which Alonzi was previously assigned. If Keego Harbor during any portion of the period of Alonzi's layoff cut back to less than full police coverage during Alonzi's formerly assigned shift, then the recommended make-whole relief will extend only to the hours

actually assigned to someone in Alonzi's stead. The recommended relief is not intended to give Alonzi any right to displace a more senior full-time officer, nor to compel the Employer to provide more hours of police coverage than it has in the interim determined are necessary.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 29, 2013

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, **KEEGO HARBOR**, a public employer under the PUBLIC EMPLOYMENT RELATONS ACT (PERA), and its chief of police, **KENNETH HURST**, have 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

f. Interfere with, restrain, or coerce employees, including but not limited to Robert Alonzi, in the exercise of rights guaranteed in Section 9 of the Act, including the right to pursue grievances, or otherwise challenging in an appropriate time and manner, the propriety of management decisions on discipline, the application of contractual language, the interpretation of departmental rules and regulations, or the applicability of workplace benefits;

g. Discriminate against employees, including Robert Alonzi, regarding terms and conditions of employment in order to encourage or discourage Union membership or activity;

h. Threaten employees, including Robert Alonzi, with retaliation for having engaged in conduct protected under PERA;

i. Refuse to promptly and fully respond to information requests made by the union related to wages, hours, working conditions, or disciplinary matters.

WE WILL

c. Rescind the five-day suspension imposed on Robert Alonzi in October of 2009, remove all record of the discipline and the allegations which lead to that discipline, and make Alonzi whole by reimbursing him for lost pay, benefits, and restoring any lost seniority accrual;

d. Affirmatively rescind the restrictions on Alonzi's outside employment which were imposed in February 2010 and rescind the ordinance adopted in May 2010 which prohibited Alonzi from engaging in outside employment as an attorney and make him whole for attendant losses;

e. Rescind the thirty-day suspension imposed on Robert Alonzi in April of 2010, remove all record of the discipline and the allegations which lead to that discipline, and make Alonzi whole by reimbursing him for lost pay, benefits, and restoring any lost seniority accrual;

f. Reinstate Alonzi from the indefinite investigatory suspension imposed on May 14, 2010, with the reinstatement effective beginning June 8, 2010, through June 30, 2010, and make Alonzi whole by reimbursing him for lost pay, benefits, and restoring any lost seniority accrual;

j. Rescind the permanent layoff of Alonzi, which had been effective July 1, 2010, and offer Alonzi reinstatement as a police officer, and make Alonzi whole by reimbursing him for lost pay, benefits, and restoring any lost seniority accrual.

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.

KEEGO HARBOR

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.