

7/22/11

STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL

Metropolitan Alliance of Police,	)	
Northern Illinois University, Chapter #291,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. S-CA-09-137
	)	
Board of Trustees of Northern Illinois	)	
University, <sup>1</sup>	)	
	)	
Respondent	)	

**ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER**

On December 22, 2008, the Metropolitan Alliance of Police, Northern Illinois University, Chapter #291, (MAP or Charging Party), filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board), pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Adm. Code, Sections 1200 through 1240 (Rules), alleging that the Board of Trustees of Northern Illinois University had violated Sections 10(a)(1), (2) and (4) of the Act. The charge was investigated in accordance with Section 11 of the Act and, on May 15, 2009, the Executive Director of the Board issued a Complaint for Hearing.

A hearing was held on January 20 and 21, 2010, in Chicago, Illinois, at which time all parties appeared and were given a full opportunity to participate, present

<sup>1</sup> In the Complaint, the Respondent was captioned as Northern Illinois University (Department of Administration and Human Services), but in its answer and brief, the Respondent asserted that its appropriate designation should be Board of Trustees of Northern Illinois University. The Charging Party raised no objection to the Respondent's assertion. I hereby re-caption this case to designate the Respondent as Board of Trustees of Northern Illinois University.

evidence, examine witnesses, argue orally and file written briefs. After full consideration of the parties' stipulations, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following.

**I. PRELIMINARY FINDINGS**

1. At all times material, the Board of Trustees of Northern Illinois University (Respondent) has been a public employer within the meaning of Section 3(o) of the Act.

2. At all times material, the Respondent has been subject to the jurisdiction of the State Panel of the Board pursuant to Sections 5(a-5) and 20(b) of the Act.

3. At all times material, the Metropolitan Alliance of Police, Northern Illinois University, Chapter #291, (Charging Party) has been a labor organization within the meaning of Section 3(i) of the Act.

4. At all times material, the Charging Party has been the exclusive representative of a unit of the Respondent's sworn full-time and probationary officers, below the rank of Sergeant, within the Police Department of Northern Illinois University (Unit).

5. At all times material, the Charging Party and Respondent have been parties to a collective bargaining agreement (Agreement) covering the Unit, entered into in March 2008, effective July 1, 2006 to June 30, 2011.

6. The Agreement contains a grievance procedure culminating in binding arbitration.

7. At all times material, the Respondent has employed Tony Ayala, Karen Clifton, Craig Diefenderfer, Anthony Kafka, Rachael A. Muszynski, Mike Rettig, Rich Scott and Cynthia Zimberoff as police officers below the rank of sergeant.

8. At all times material, Ayala, Clifton, Diefenderfer, Kafka, Muszynski, Rettig, Scott and Zimberoff have been public employees within the meaning of Section 3(n) of the Act, and members of the Unit.

9. At all times material, each of the following individuals has occupied the position opposite his name and is authorized to act on behalf of Respondent within the scope of the duties and responsibilities of their respective positions:

Donald Grady	Chief of Police
Larry Ellington	Patrol Sergeant
Steven D. Cunningham	Associate Vice, President, Administration and Human Resources
Todd Henert	Lieutenant
Curtis Young	Lieutenant

## II. ISSUES AND CONTENTIONS

MAP contends that the Respondent violated Sections 10(a)(1), 10(a)(2) and 10(a)(4) of the Act by unilaterally reducing the hours of work of bargaining unit members from 84 hours in a two week period to 37 ½ hour per week and unilaterally initiating a “flex hour” system resulting in a reduction of overtime opportunities. MAP contends that the Respondent failed to bargain or offer an opportunity to bargain such matters. MAP also contends that, under certain provisions of the collective bargaining agreement, the Respondent was barred from changing and reducing work hours in that manner. MAP further contends that the Respondent repudiated the labor agreement by refusing to arbitrate five grievances that MAP had filed on overtime issues, allegedly violating the collective bargaining agreement as well as refusing to bargain in violation of the Act.

MAP contends that the Respondent violated Section 10(a)(1) of the Act by threatening bargaining unit members at an October 10, 2008, meeting between the parties and also at a November 13, 2008, meeting and MAP also contends that remarks about

nuclear war made by Chief Grady at the November meeting constituted intimidation and interference. Finally, MAP contends that the Respondent disciplined members of the bargaining unit because they exercised their rights to file grievances and/or supported MAP's right to file an unfair labor practice.

The Respondent states the issues in this case as follows: whether its change in hours, work schedules and overtime opportunities, taken together or separately, constituted a repudiation of the contract and thus a violation of the Act and, secondly, whether the Respondent interfered with, restrained or coerced bargaining unit members in violation of the Act, and whether the Respondent refused to arbitrate certain grievances MAP filed. The Respondent insists that it did not repudiate the Agreement nor interfere with, restrain, coerce or discriminate against members of the bargaining unit. Moreover, Respondent submits that the underlying, complained of actions it took were based on budgetary constraints and operational concerns. According to the Respondent, the Agreement reserves to management the right to determine hours, schedules and overtime and does not guarantee a certain number of work hours or overtime opportunities. During collective bargaining negotiations, the Respondent informed MAP that it could not afford overtime changes the Union had proposed and that, if the provisions were included in the Agreement, the Respondent would be forced to cut employees' hours and adjust schedules. Ultimately the Respondent agreed to MAP's proposals regarding overtime. MAP and the Respondent agreed knowing that cuts in hours and changes in schedules were coming. Therefore, the Respondent claims that it is MAP that is attempting to change the Agreement. Finally, the Respondent denies that it refused to

arbitrate grievances but delayed the processing of arbitration requests pending resolution of this unfair labor practice proceeding.

The Respondent also denies that it coerced, interfered with, restrained or discriminated against union members or threatened them. It insists that any discipline of employees that was issued was based on legitimate operational concerns and not on any protected, concerted activity.

### **III. FINDINGS OF FACT**

#### Organization of the Department

Donald Grady has been employed as Chief by the Northern Illinois University Department of Public Safety (Department) for 8½ years.<sup>2</sup> He is responsible for organizing, planning, staffing, recruiting and selection of officers and for policing and maintaining the safety of the Northern Illinois University community.

In the Department's organizational structure, below the chief are three lieutenants: Curtis Young, Darren Mitchell and Todd Henert. Young is responsible for administrative matters, including logistics, supplies, records and purchasing. Mitchell, the Director of Emergency Management and Planning, is responsible for compliance with all emergency management laws and all training. Henert, the Director of Police Operations for two years, is responsible for day to day patrol operations, scheduling, reviewing reports and other paperwork, and oversight of discipline.<sup>3</sup>

Below the three lieutenants in the organizational structure are 11 sergeants who are responsible for day to day activities and operations and who directly oversee officers.

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<sup>2</sup> Grady was formerly the chief of police of the University of New Mexico in Albuquerque and the Chief of Police of the City of Santa Fe. He has also worked with the U. S. State Department and the United Nations in various capacities.

<sup>3</sup> Henert has been employed by NIU for 21 years.

Below the sergeants are line officers responsible for day-to-day policing. The Department typically has 48 such officers but had only 43 at the time of the hearing in this case.

#### The University's Agreements with the FOP

The Fraternal Order of Police represented the University's police officers prior to MAP becoming the officers' exclusive representative. The agreements between the Department and the FOP, effective July 1994 to June 30, 1996 and July 1996 to June 30, 1999, defined in Article IX employees' shifts as 0700 to 1500, 1500 to 2300 and 2300 to 0700 hours; defined a work day as eight hours and a work week as forty hours and had various other provisions with respect to hours, schedules and overtime. In contrast, the initial agreement between MAP and the University did not specify the times of shifts, or particular work hours. As in the previous agreements with the FOP, the management rights clause provided that the University had the right to direct employees, including the right to assign work and to schedule employees in positions.

#### Negotiations for the Current Contract

Grady was the chief when the current Agreement was negotiated and was on the University's bargaining team.<sup>4</sup> That team also included all the lieutenants; Ronda Wybourn, the chief negotiator for the University; Jesse Perez, an assistant to Wyburn; and, in addition, others who provided assistance to the team such as Karen Baker and

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<sup>4</sup> Grady was not involved in any negotiations for contracts effective in 1999 or before then. Grady was not present for all negotiations for the current Agreement because early in the negotiations he was acting as the senior advisor to the Minister of Interior in Iraq. However, he was informed of what occurred every day during negotiations. The University did not authorize Grady or anyone else to agree tentatively to any proposal.

Steve Cunningham.<sup>5</sup> Wybourn, Perez and Baker all work in the University's Department of Human Resources.

The Union negotiating team consisted of Ronald Cicinelli, the chief negotiator; Richard Scott, who was the Union president during negotiations,<sup>6</sup> and unit members Dana Allen, Lucinda Brunner and Karen Clifton.<sup>7</sup>

During negotiations for the current agreement, MAP wanted overtime to accrue both on a daily basis and after 84 hours, but the Respondent wanted overtime to continue to accrue after 86 hours. Grady was adamant on that point.<sup>8</sup> At the hearing in this case, Grady himself testified that during negotiations maintaining the status quo on overtime was important to the Department. At the hearing in this case, Grady testified that during negotiations MAP took the position that it would go to arbitration on the issue of overtime.

At the hearing in this case, Grady further testified that he said during negotiations that it was not in the best interests of the Department or the University to change the language so as to restrict the Department to an absolute time for overtime or to otherwise depart from the Federal Labor Standards Act (FLSA) guidelines that allowed officers to work 86 hours before accruing overtime. According to Grady, giving up that language meant that the Department would have had to pay overtime to officers after 84 hours and

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<sup>5</sup> Cunningham and Baker joined the University's team toward the end of negotiations.

<sup>6</sup> Scott has worked for the Respondent since September 16, 1999, as a police officer and is assigned to patrol. Scott attended all bargaining sessions except that he did not participate in discussions when the final agreement was reached. Scott served as a vice president of MAP for a half-year, and as Union president for a year and a half during negotiations for the current Agreement. By October 2008, Scott was no longer the Union president.

<sup>7</sup> Clifton has been a police officer for the Respondent since February 5, 1995, and holds the rank of corporal.

<sup>8</sup> Scott testified at the hearing in this case that at some negotiation meetings, Grady was calm; but at other meetings he "seemed sort of angry or mad."

on a daily basis. Grady testified that at negotiation sessions he said that if MAP insisted on such a change he would have to cut officers' hours.<sup>9</sup> According to Grady, MAP responded that it did not care if Grady cut hours, it wanted the language it had proposed. Ultimately, the University agreed to MAP's proposal to accrue overtime after 84 hours and on a daily basis. However, the Agreement did not guarantee a certain number of hours. Grady acquiesced because the University controlled the schedule and would probably end up reducing the officers' hours, thus offsetting the cost. According to Grady, MAP never claimed during negotiations that the Respondent had no right to change schedules, cut hours or limit overtime under the proposed agreement. MAP offered no testimony or other evidence at the hearing in this case that it took the position during collective bargaining negotiations that the Respondent could not change schedules, reduce hours or limit overtime.

At the hearing in this case, Henert testified about a discussion on the final day of negotiations. Present for the University were Chief Grady, Baker, Wybourn, Perez, Henert and the other lieutenants. Present for MAP were Scott, Allen, Clifton, Brunner and Cicinelli. Grady said that the University did not believe in applying overtime at the end of every day should someone work beyond their regularly scheduled time and that the point at which overtime should apply should not be reduced to 84 from 86 hours. Grady said that the University controlled scheduling and if it agreed to the proposals two things would likely occur: a reduction in the number of hours and a restriction on

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<sup>9</sup> Scott testified at the hearing in this case that he did not recall that hours were discussed during collective bargaining negotiations and no one indicated that there would be a reduction of work hours as a result of settling the overtime issue. I credit Grady's testimony that he did make such remarks during negotiations. I believe it more likely that Grady accurately remembered his own remarks on that issue. Further, Grady's version of his remarks was corroborated by Henert, Mitchell and Brunner.

overtime because the budget would not likely accommodate the additional overtime. According to Henert, Grady's demeanor was professional and direct when he made those remarks.

Lieutenant Mitchell<sup>10</sup> attended the last negotiation session when overtime was still an outstanding issue. MAP wanted the officers to start earning overtime for work beyond their regularly scheduled hours on a particular day as well as for the pay period. The University was not in agreement. Mitchell testified at the hearing in this case that there was discussion that if MAP got what it wanted, the Department would have to do something to counterbalance the economic impact. Mitchell recalled that Chief Grady mentioned that the Department might reduce hours and that MAP's response was that that was okay.

Sergeant Brunner, who was the treasurer of MAP and served on the bargaining team for the current contract,<sup>11</sup> testified at the hearing in this case that she was present at the final negotiation session and that the Union wanted guaranteed hours and also overtime pay every day it accrued overtime instead of waiting until an officer's hours exceeded 86 hours in a two-week period. Brunner testified that Chief Grady stated at the final negotiation session said that if he no longer had the benefit of the FLSA, he would be unable to manage his budget effectively and he would have to make adjustments.<sup>12</sup>

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<sup>10</sup> Mitchell has worked for the Respondent for 15 years and has been the Director of Loss for Emergency Management and Planning for five years. Also, he is in charge of CAP(Coordination, Analysis and Planning), the Safe Unit and the Dispatch Center.

<sup>11</sup> Brunner has been employed by Respondent for 6 years and was promoted to sergeant on April 1, 2008.

<sup>12</sup> On brief, MAP argues that Brunner's testimony at hearing was not credible because she was a probationary sergeant and was promoted shortly after the agreement was ratified. It also cites testimony of Scott and Clifton, that they did not recall any discussion during negotiation about a reduction in hours. I credit the testimony of Brunner, Grady and Mitchell as to Grady's

MAP's request for guaranteed hours was denied. According to Brunner, when MAP agreed to the final contract with the new overtime language, there was no guarantee of hours in the new contract.

The successor Agreement was signed in March, 2008. Also in 2008, the lieutenants received a pay raise of about nine percent.

#### Provisions of the Agreement

Section 8.1 of the Agreement provides as follows:

This article shall define the normal work hours for employees covered in this agreement and provide a basis for the calculation of, and payment of overtime. Nothing herein shall be interpreted as a guarantee of hours of work per day or per week.

Section 8.2 of the Agreement provides as follows:

Each year the Chief will present a shift schedule in April. The shift schedule shall remain in effect for the duration of the yearly bid period unless emergency circumstances require changes.

According to Grady, Section 8.2 of the Agreement merely addresses the issue of a shift schedule, either days or nights. Under that section, the Chief informs officers what shift, either days or nights, they will work for the oncoming year.<sup>13</sup>

Under Article III, the Management Rights provision of the current Agreement, Section 3.1(c), the University has the right to assign work; under Section 3.1(e), the University has the right to "hire, examine, promote, train and schedule employees in positions with the employer." In the University's view, the Agreement provided no guarantee of hours of work per day or per week; no guarantee of a minimum number of

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statements that the Department would have to adjust hours because of the agreement to lower the threshold for overtime pay.

<sup>13</sup> Annually Lieutenant Henert issues a form with a seniority list explaining what shifts are available and giving officers the opportunity to bid in writing for shifts.

hours or overtime opportunities, and no prohibition on adjustments to schedules. Further, the University insists that it anticipated that at some point it might have to reduce hours.

MAP interprets these provisions to mean that the Chief sets the schedule at the beginning of each mid-year that determines the hours of work per day for each individual officer and that schedule remains in effect from July to July.<sup>14</sup> However, an officer's individual schedule might be changed to allow for training. Officers bid for either a day or night assignment. Then the Chief would set a shift schedule and assign an officer a particular assignment. The schedule would be good for one year.

Effective October 6, 2008, Henert issued a two week schedule with hours to be worked. At the hearing in this case, he testified that he did so because officers were claiming they worked an annual schedule and he wanted to make clear that officers worked on a two-week schedule which was the basis for calculating overtime. Henert also wanted to show the exact times officers would be starting and ending their shifts. Additionally, the Department provided officers with an Excel spreadsheet to help them track hours and overtime. Prior to October 2008, officers had a reasonable idea of when they would be working but would not be absolutely sure of the days. After October 2008, schedule changes were communicated in writing.

Before and after October 2008, there were exceptions to the two week schedule. Officers had different schedules depending on their assignments. For example, under HELP (Housing Education and Liaison Program), a residence hall program, officers work four days a week, ten hours a day, Tuesday through Saturday. Officers in the SAFE (Secure Areas For Everyone) foot patrol program work Monday through Friday; but

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<sup>14</sup> Under the current Agreement, officers bid for shifts which take effect the first week of July, enabling officers to work the same shift for an entire school year instead of switching shifts in the middle of semesters.

might work other shifts such as Wednesday through Thursday or Tuesday through Saturday to provide additional coverage.<sup>15</sup> Officers assigned to EMP (Emergency Management and Planning) and CAP (Coordination, Analysis and Planning) units also work Monday through Friday. Officers worked 12 hours, eight hours, or eight and one half hours for a total of 84 hours in a 14 day cycle prior to the reduction in hours in October 2008. The Department tried to maintain schedules so that all officers worked the same number of hours.<sup>16</sup>

Patrol officers worked two days, then were off two days, worked three days, then were off two days, worked two days and then were off three days. This schedule gave them every other weekend off. The only exception to the schedule would be made for training or special events.<sup>17</sup> When officers on twelve hour shifts transferred to the SAFE or HELP units, their days off and hours would change. Sometimes an officer might work fewer hours or more hours than normal.

Each year, officers bid on shifts for the oncoming year. For example, if an officer bid for a day shift and was successful, he would work days for a year and the majority of the officer's hours would be between 5:00 a.m. and 5:00 p.m.<sup>18</sup>

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<sup>15</sup> Officers assigned to SAFE may patrol on bicycles.

<sup>16</sup> At the hearing in this case, Lieutenant Henert testified that when compiling the schedule for officers, he tries to make it as similar from one week to the next as possible based on operational needs.

<sup>17</sup> Prior to October 2007, officers' schedules were adjusted for events such as the Book Buy Back. The Department used officers from the CAP or EMP units for the event because their hours correlated with the Book Buy Back hours.

<sup>18</sup> In the most recent shift bid announcement for shifts scheduled to be effective July 2009, officers were informed that certain assignments are not eligible for bid and that the predominant hours of a night shift were between 5:00 p.m. and 5:00 a.m. CAP and EMP units were not eligible for bid because they are filled through appointment at the discretion of the Chief as they require additional training and expertise. After officers leave a specialized unit, they can still bid on a shift.

### Respondent's Budget

Between March and October 2008, the Respondent had budget difficulties university-wide. Departments were instructed to reduce their budgets and employees were not to be replaced. Administrators were allowed to determine how to cut their budgets.

Within the Department, personnel costs account for 90 percent of the operating budget. Notwithstanding the general directive to cut costs, the Department hired a significant number of officers, approximately 11 or 12 between March and October 2008, because of a particular criminal campus incident that occurred on February 14, 2008.

On April 15, 2008, the sergeants were informed of the requirement of prior authorization for overtime. In late June or early July 2008, Grady issued an order that no one was to work overtime, including sergeants, without the express approval of a supervisor. Grady issued the order to save money and because he believed the Department had an inordinate amount of overtime worked. For example, an officer might wait until the end of shift to write a report and then need an additional 15 to 30 minutes to complete the report. Also, with the hire of additional officers, Grady believed that the Department would be able to make adjustments such that overtime would not be required. There were no restrictions imposed on officers' hours until October 2008, because early in the year, the staff was only 37 although it was budgeted for 46. During the summer of 2008 with nine officers in training plus the regular training of officers, the Department could not reduce individual officers' hours until October 2008. According to Grady, officers' hours were then reduced to stay within the budget and to comply with the Respondent's directive to cut the budget.

At the hearing in this case, Grady testified that he made cuts at his own discretion and that he cut the officers' hours but not the sergeants' hours because the Department had far more officers than sergeants. Additionally, the sergeants' hours were not cut because under their agreement, they could work 86 hours in a two-week period before incurring overtime. Additionally, the Department had to maintain the same number of sergeants with the same number of hours to maintain appropriate coverage and the Department could not cover all the shifts with sergeants if the sergeants' hours were cut. The lieutenants' hours were not reduced because they sometimes had to work 13 or 14 hours in a day and they are salaried and are not paid overtime. Grady also testified at the hearing in this case that he does not believe he discriminated against officers.

The Flexing of Hours: The September 20, 2008, Football Game

Section 8.7 of the Agreement provides in relevant part as follows:

After the employer has determined the makeup of any on-campus details requiring police personnel, the Employer agrees to first offer such assignments to members of the bargaining unit in accordance with contractual provisions regarding such assignments. Events of this nature shall be initially posted for voluntary assignment. In all instances where there is an insufficient number of volunteers, the department may assign these duties by inverse seniority. Gridlocks shall not be considered as voluntary duty for purposes of this section.

The same provision of the Agreement defines contract service special events as events requiring additional police support, such as, but not limited to, designated athletic events, special Greek events, Book Buy Back, VIP protection, science fair, the spring show, and concerts. The Department determines whether an event is a special event under the Agreement and the Chief determines whether an event requires additional police support. When he so determines, the provisions of Article 8.7 come into effect.

According to MAP, prior to September 20, 2008, hours were flexed only by mutual agreement of the parties, provided that doing so did not violate seniority. Officers were not ordered to flex hours, and their seniority was never violated. MAP offered testimony as to the practice regarding football games. Officer Richard Scott testified at the hearing in this case that he has worked almost every football game since he was hired in 1999 and that prior to September 2008, his hours were not flexed.

For the September 20 game, officers were assigned to work that day, but not based on seniority, and overtime assignments were not posted. Thus, MAP contends that the Respondent changed the past practice with respect to football games in that officers were called in on their off days to work the football games and their hours were flexed to avoid overtime beginning with the September 20, 2008, football game.

Article 8.7 was the basis for certain grievances MAP filed regarding a September 20, 2008, football game. Only two officers had been originally scheduled to work that day. However, additional officers were reassigned from their normal work hours to work that day. Previously, it was the practice that a signup sheet was posted on a bulletin board in the squad room. Officers could bid for the assignment based on seniority.

Officer George Mildner, a NIU police officer since January 2, 2002, testified at the hearing in this case that in September 2008, he worked a Monday to Friday schedule and had Saturdays off. On September 12, 2008, Sergeant Meyer told Mildner to take off on Tuesday so that he could work the following Saturday and not incur overtime. Also, according to Mildner, in September 2008, Meyer told a group of officers that overtime was reduced and officers' hours would be flexed to avoid overtime. Subsequently, on

December 7, 2008, Lieutenant Henert told Mildner to report for work two hours earlier the next day so as not to incur overtime while training at the pistol range on that day.

On September 8, 2008, MAP filed a grievance with respect to the flexing of hours (# 04-2008). The Respondent's answer to the grievance was memorialized in a memo from Jesse Perez to Anthony Kafka dated September 10, 2008, as follows:

The Department of Public Safety agreed to cease and desist in the "flex" scheduling practices mentioned in the above grievance. In addition, the department will compensate employees with comp time as requested by the grievants.

However, the Respondent later changed its position. The Respondent introduced into evidence its Exhibits 6, 7, 8, 9, and 10 which are its responses to Step Three grievances the Charging Party had filed on September 24 and December 12, 2008. Respondent's Exhibit No. 6 is a memo from Perez to Cicinelli, regarding Overtime #5-2008 and dated January 27, 2009, and recites that Kafka filed three grievances alleging violations of Section 8.3d of the collective bargaining agreement because the Department failed to pay overtime to officers that were rescheduled from their regular schedule of work to work a special event, that is, a football game. Perez asserted in the memo that under Section 3.1e of the agreement, management has the right to schedule officers as needed and did not violate the agreement where the officers did not work over 84 hours during the pay period.

Respondent's Exhibit No. 7 is another memo from Perez to Cicinelli, also dated January 27, 2009 and "Regarding Contracted Services/Special Events #6-2008". In the memo, Perez recites that the grievance concerned whether the Department violated Section 8.7 of the Agreement when it did not post a football game as a special event which would have given officers an opportunity to work additional hours. Perez

concluded that the Department had a management right to schedule officers as needed and did not violate the collective bargaining agreement.

Respondent's Exhibit No.8, a memo from Perez to Cicinelli, dated January 26, 2009, "Regarding Seniority #7-2008." The grievance alleged that the Department violated Section 7.1 of the Agreement because it did not use seniority in determining the scheduling for a football game. The Department scheduled officers who were already scheduled to work during the hours of the football game to work that assignment rather than schedule additional officers to work by utilizing the seniority list assignment process described in Section 7.1 of the Agreement. Perez asserted that under Section 3.1e of the Agreement it had a management right to schedule officers as needed and did not violate the Agreement.

Respondent's Exhibit No.9 is a memo from Perez to Cicinelli, dated January 26, 2009, "Regarding Work Schedules #9-2008." The grievance alleged a violation of Section 8.2 of Agreement in that the Department changed the shift schedule that had been posted during the prior summer. Perez noted that the first occurrence of a change was dated October 6, 2008 but the grievance was not filed until December 12, 2008. Under Section 13.1 of the Agreement, MAP has five days from the occurrence to file a grievance. The Respondent asserted that MAP did not provide a satisfactory reason for its failure to timely file a grievance. Additionally, the Respondent asserted that because it has a management right to schedule within shifts, and no changes in shifts occurred, it did not violate the Agreement.

Respondent's Exhibit No.10 is a memo from Perez to Cicinelli, dated January 27, 2009, "Regarding Association Membership #10-2008." The grievance alleged a violation

of Section 8.2 of the Agreement where the Department reduced the number of scheduled work hours from 84 hours to 75 hours per pay period and discrimination because sergeants' and lieutenants' hours were not similarly reduced. In support of its position that no violation occurred, Perez asserted that under Section 8.1 of the Agreement, there was no guarantee of hours and, under Section 3.1 of the Agreement, management has the right to schedule hours. According to Perez, because sergeant and lieutenants are not part of the officers' bargaining unit, no violation occurred.

In a letter dated February 2, 2009, MAP demanded that the Respondent arbitrate grievances 05-2008 through 10-2008. In a response to that letter on the same day, the Respondent stated that the alleged contractual violations were also alleged in the unfair labor practice charge filed before this Board. The Respondent asserted that arbitration was thus not appropriate at that time. The Respondent declined to request arbitration at that time.

#### The October 1, 2008 Meeting

On October 1, 2008, approximately one week after three of the grievances were filed, sergeants and police officers attended a meeting in the squad room. In attendance were Sergeants Ellington,<sup>19</sup> Jackson, Wright and Meyer, officers in the CAP and the SAFE units, and patrol officers including Grant Erickson, Christy Gray, Clifton, Scott, Mildner and Zimberoff. Sergeant Ellington, who was the primary speaker for the Respondent, told officers that their scheduled hours would be reduced from 84 to 75 hours, that a new schedule would be posted and that officers should check the schedule daily. Ellington stated at that meeting that the officers' hours were cut because of the

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<sup>19</sup> Ellington has worked for the Respondent since September 22, 2003. He was promoted to sergeant in July or August 2005.

economy and the Agreement. The reduction of hours to 75 would serve as a buffer to avoid the payment of overtime for occasions such as when officers had to go to court. Under the Agreement any hours worked over regularly scheduled hours would be paid as overtime.

At the hearing in this case, Officer Mildner testified that Ellington told officers their hours were cut to save money because the Department could not afford overtime. Mildner asked Ellington whether, on the last day of the two week pay cycle when an officer had only 75 hours worked, if the officer could work straight time up to 84 hours. Ellington said, "no" because the Department needed a buffer so officers would not work over 84 hours.

Thereafter, on October 6, 2008, officers' hours were reduced from 85 to 75 hours per pay period. Thus, an officer had to work nine hours at straight time before reaching the 84 hour threshold to be paid overtime. MAP filed a grievance, No. 10-2008, alleging discrimination because the number of working hours per pay period was reduced for officers but not for sergeants.<sup>20</sup> Also, according to MAP, officers were subjected to a change every two weeks in their scheduled days off, eliminating the opportunity to bid for events.

MAP offered testimony as to the hours officers worked prior to October 2008. Kafka testified at the hearing in this case that when he started working for the Department, he worked 40 hour weeks with eight hour shifts. Later, according to Kafka, the Department switched to 12 hour shifts. Since then his hours were never reduced

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<sup>20</sup> The grievance hearing on the discrimination grievance was on or about December 22, 2008, at the Human Resources department on the NIU campus. Present were Jesse Perez, Chief Grady, Lieutenants Mitchell and Henert, and possibly Young. Present for the Union were Cicinelli, Kafka, Ayala, Clifton and Rich Tracy. At the meeting, Grady referred to the reduction in hours as good business sense or good business management.

below 84 hours until October 2008.<sup>21</sup> According to Scott, when he was hired in 1999, he worked 8 hour shifts, 40 hours a week. Between 1999 and 2008, Scott's hours were not reduced.

The sergeants' hours were not similarly reduced. In fact, after the overtime policy was announced, some sergeants worked overtime accumulating as much as 30 hours of overtime per pay period. Chief Grady testified at the hearing in this case that the sergeants' hours were not reduced because there were not enough sergeants to cover their areas of responsibility if they worked fewer than 84 hours. However, sergeants still had to get prior approval to work overtime. Also, there had been no changes in the sergeants' agreement regarding overtime similar to changes in the officers' Agreement.<sup>22</sup> The hours of lieutenants were not reduced because they are exempt under the Fair Labor Standards Act (FLSA) and are paid the same amount regardless of the number of hours they work and are not eligible for overtime.

#### The October 10, 2008 Meeting

On October 10, 2008, at MAP's request, MAP and Respondent met to discuss the reduction in hours. The lengthy meeting was held in Grady's office. Present for the

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<sup>21</sup> However, Lieutenant Henert, who has been responsible for scheduling since February 2007, testified at the hearing in this case that officers did not always work 84 hours during a two week period, and did not have an annual schedule prior to October 2008. According to Henert, a schedule is particular to an officer – days and hours to be worked and days off. Annually, Henert issues a form with a seniority list explaining what shifts are available and giving officers the opportunity to bid in writing for shifts.

<sup>22</sup> Sergeants received two incremental increases amounting to nine percent in their then current contract.

At the hearing in this case, on cross-examination by MAP, Grady testified that around the time of the reduction in hours, sergeants did not tell him they were unionizing and he did not talk to sergeants about not unionizing.

Charging Party were Chapter president Ayala,<sup>23</sup> Kafka, and two board members, Clifton and Zimberoff. Present for the Respondent were Grady, and Lieutenant Curtis Young.<sup>24</sup>

At the hearing in this case, Grady testified that during the meeting, MAP stated that it wanted to keep open the line of communication to see whether certain matters could be resolved. A serious issue was the reduction in hours. Union members wanted hours back and wanted to know what they could do to get their hours back, that is the 84 hours biweekly. A Union member asked whether if MAP rescinded grievances it had filed,<sup>25</sup> then bargaining unit members would go back to working 84 hours biweekly. Grady stated at the meeting that in his view, to change the Agreement in that regard would require a memorandum of understanding (MOU). The possibility of a memorandum of understanding was discussed. Grady testified that he explained at the meeting that he did not like memoranda of understanding and that, because of the economy, there was no guarantee that things might return to the way they were. Grady testified that he further stated that even if the parties could go back, because the economy

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<sup>23</sup> Ayala, an NIU police officer since November 9, 1998 has been on disability since June 2009 and Tony Kafka has been the acting president since then.

<sup>24</sup> At the hearing in this case, Grady testified that Lieutenant Henert was also present.

The Charging Party disputes that Henert was present at the October 10 meeting. Clifton testified at the hearing in this case, that according to the minutes she took at the October 10, 2008, meeting, Henert was not present. Also, Zimberoff and Kafka testified at the hearing in this case, that Henert did not attend the October 10, 2008, meeting.

Henert did not recall the date when he attended a meeting with MAP representatives in Grady's office. Some of his testimony about the meeting was consistent with most of the testimony of individuals whose presence is undisputed. Henert testified that at the meeting Grady said he could not guarantee a reversion to previous language regarding overtime and that he did not like the idea of a MOU but would take the matter to the University. According to Henert, at the end of the meeting, MAP said it would meet with members. On the other hand, Henert testified that MAP proposed the MOU, but I find that Grady introduced the idea of a MOU at the meeting. It is possible that Henert was testifying about another meeting. However, I find it unnecessary to resolve this dispute in order to address the substantive issues in this case.

<sup>25</sup> At the hearing in this case, Grady testified that he did not recall a union representative suggesting MAP would rescind grievances it had filed in exchange for overtime pay starting after 84 hours.

had changed dramatically, the University would have to consider economic issues. Grady also stated he would have to talk about such a MOU with his immediate supervisor, Vice President Eddie Williams.<sup>26</sup>

According to Grady, the meeting ended amicably with an agreement to talk again after MAP discussed matters with its membership. MAP offered no testimony that at the close of the meeting, those participating acted in a hostile manner toward each other. Thereafter, Union members met to discuss the overtime issue. One membership meeting occurred on October 17, 2008. Zimberoff explained at that meeting what had happened at the October 10, 2008, meeting with Chief Grady. The members discussed having the Chapter's attorney draft a MOU that would take away the two-hour difference between the two agreements on the threshold for overtime. The officers would revert to the 86 hour threshold and eliminate calculating overtime on a daily basis. On October 28, 2008, there was a secret ballot vote. The membership voted against the MOU. Kafka informed Grady of the union vote.

#### The November 13, 2008 Meeting

On November 13, 2008, there was another meeting in Chief Grady's office between MAP and the Respondent. Present were Kafka and Zimberoff,<sup>27</sup> Grady, and Lieutenants Mitchell, Henert and Young.<sup>28</sup> Kafka informed Grady that on October 17, 2008, union members had discussed the MOU but ultimately voted not to agree to it and

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<sup>26</sup> Zimberoff's testimony at the hearing in this case was that Grady said that if MAP would propose a memorandum of understanding, he would see what he could do to get back the hours but that he would not promise anything.

<sup>27</sup> According to Henert, also present for the Union were Dana Allen, Clifton, Brunner, Scott, Wybourn, Karen Baker and Cicinelli.

<sup>28</sup> Grady testified at the hearing in this case that Ayala was present at the November meeting.

that, at another union meeting, on November 11, 2008, the members voted to file an unfair labor practice charge and to pursue grievances.

#### Grady's nuclear war remarks

There is no dispute that during the course of the meeting, Grady made remarks regarding "nuclear war." According to Zimberoff, the Chief said, "[I]f we filed a ULP, it would be like pressing this button, which was kind of like nuclear war and if we filed the ULP, he would be forced to press this button." Grady denied saying that if the Union pushed the button, he would have to push the button.<sup>29</sup> According to Kafka, at the November 13, 2008 meeting, Grady told Kafka that he considered the Union's actions a threat, the equivalent of "nuclear war," and that nobody would win.

Grady's version of his nuclear war remarks is as follows. Grady testified at the hearing in this case, that when the Union representatives entered the meeting, one of them said, "[W]e want to keep the lines of communication open." Then a union representative said that the Union had decided to file unfair labor practices and seven new grievances. Grady responded,

[H]ow is that keeping the lines of communication open? I don't understand how we can keep the lines of communication open when you walk in and essentially say, we are not going to talk any more. We are going straight for the nuclear option.

In Grady's view, even though MAP said it wanted to keep the lines of communication open, it went to the extreme of filing a charge and grievances rather than of first talking with him to resolve issues, which, according to Grady, was as far in the system as MAP could go. At the hearing, Grady further explained that he used the

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<sup>29</sup> Mitchell testified at the hearing in this case that he did not recall Grady saying that, "[I]f you push the button I'll have to push the button." Mitchell did remember the Chief saying something about a button but nothing specifically.

nuclear war comment as an analogy and that there are many things the parties could do that would get them where they needed to go that did not involve going to extreme circumstances. Grady thought that if the parties were to keep the lines of communication open, it would be a better option to talk and work through issues because no one wins with the nuclear option. Rather, everybody ends up losing, straining the relationships between the administration and MAP unnecessarily, when the parties had other options.<sup>30</sup>

I credit Grady's version of his nuclear war remarks but I also credit that Zimberoff's and Kafka's versions reflect their imputation of his intentions.

At the November 13, 2008 meeting, Grady also discussed overtime grievances that MAP filed. Grady told Union representatives that the four pending Union grievances were frivolous. Grady believed that they had no merit because he believed there was no violation of the contract.<sup>31</sup> According to Mitchell, Grady said that just because MAP could file a frivolous grievance did not make it right. Grady explained his position with regard to the grievances in some detail.

At hearing, Grady testified that he said at the November meeting that other police departments had priced themselves out of the market. He did not believe he said that

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<sup>30</sup> Mitchell's testimony at hearing was consistent with Grady's and Henert's. Mitchell was present for the November meeting. He testified at the hearing in this case that at the meeting, the Union representatives mentioned that they would pursue grievances and had voted to file an unfair labor practice charge. At the start of the meeting, MAP talked about keeping open lines of communications. Mitchell testified at the hearing in this case that Grady said that MAP's comments ran counter to the concept of open lines of communication and fostering a relationship. According to Mitchell, Grady said that what the union representatives had done was to say, "I'm going to punch you in the face" before they did so. Grady also stated that MAP was declaring nuclear war and said MAP should think about it because nuclear war doesn't benefit anybody and that everybody loses. Then the Chief said that MAP should think about what it was saying. The Chief also asked what he had done to harm MAP. According to Mitchell, there was no response by the Union representatives.

<sup>31</sup> At the November 13, 2008 meeting, Grady denied that he said that lieutenants and sergeants received a nine percent raise compared to the officers' five percent raise. Grady recalled talking about the fact that sergeants got a bigger raise than officers but did not recall whether he said so at the November meeting.

unions had priced themselves out of the market. He did not recall asking why probationary offices were not allowed to vote on Union matters.<sup>32</sup>

#### Grady's Alleged Threats

According to MAP representatives, Kafka, Ayala, and Clifton, Grady made threats at the October meeting. Mitchell testified as to remarks that Grady made at the end of the November meeting that MAP representatives might have interpreted as threats.<sup>33</sup> Kafka testified that at the October meeting, Grady said that "if you hold me to the letter of the law, I'll hold you to the letter of the law."<sup>34</sup> Kafka interpreted Grady's remarks to mean that any violation of policy, law, procedure or contract would be dealt with by disciplinary action. Ayala testified at the hearing in this case that at the October 10 meeting, Grady pointed at Zimberoff, Ayala, Kafka and Clifton and said he could get rid of senior officers within six months. Clifton testified that Grady referred to getting rid of an officer by following the rules, regulations and policies of NIU.

At the hearing in this case, Grady denied saying at that meeting that any violation of a statute, rule, regulation or procedure would be dealt with by harsh disciplinary measures.<sup>35</sup> Grady denied saying that if the Union held him to the letter of the law, he

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<sup>32</sup> Henert recalled that, between four and six times during the discussion that Grady said there would be a reduction in hours and a restriction on overtime.

Mitchell's testimony was consistent with Grady's. Mitchell additionally testified that Grady said that just because the Union could file a frivolous grievance did not make it right.

<sup>33</sup> Whether Grady's remarks occurred at the October or the November meeting is not dispositive of any issue in this case.

<sup>34</sup> Henert testified at the hearing in this case that Grady did not say that if the Union held him to the letter of the law, he would hold Union members to the letter of the law or "if you push the button, I will have to push the button." Henert denied that Grady threatened the Union.

<sup>35</sup> On cross examination, Grady was asked whether Ayala's testimony that Grady made threats at the October meeting was true.

would hold the Union to the letter of the law. Grady flatly denied saying anything that could be construed in that manner.<sup>36</sup>

Mitchell's testimony at the hearing in this case provides a context for the Union's allegations of threats. According to Mitchell as the November meeting ended, Grady talked about officers being accountable. Grady said that the Department could hold officers for every little violation such as one involving an officer's uniform. Grady said he could do that, and had a right to do it, but just because he could do it, that did not make it right and he did not do those kinds of things.<sup>37</sup> At the hearing in this case, Mitchell testified that he did not interpret the Chief's remarks as threatening. At the end, the Chief talked about fostering a healthy dialogue and asked, "[W]hat have I done to harm you?" There was silence. At the end, Officer Lydowski said it wasn't their intention to start a nuclear war. The Chief then said, "Well, okay, why don't you think about this conversation, and go back and talk to your Union members, and let's see where we go from here."

Grady testified at the hearing in this case that he believed both the October and November meetings ended amicably.<sup>38</sup> At the end of the November meeting, the Union representatives said they would go back to its members. There was no meeting scheduled between MAP and Grady thereafter on that matter. After that November 13, meeting,

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<sup>36</sup> Henert denied that Grady made threats or said he would have union officers' jobs.

<sup>37</sup> Mitchell did not recall the Chief saying "If you hold me to the letter of the law. I'll hold you to the letter of the law."

<sup>38</sup> Henert also testified at the hearing in this case that the closing of the meeting was amicable, with the parties shaking hands. Additionally, Henert testified that at the end of the meeting, Grady figuratively picked up the gauntlet and challenged Zimberoff and Ayala saying, "[Y]ou really didn't come in here to do this. You would like this back." They responded they did not come to the meeting to declare nuclear war.

MAP filed an unfair labor practice charge on December 22, 2008. MAP also filed two more grievances, 09-2008 and 10-2008 at Step Three.<sup>39</sup>

#### Respondent's Disciplinary Procedure

A sergeant or a lieutenant initiates discipline by making a request for discipline that is addressed to the Chief. They may or may not recommend discipline in the request. The Chief forwards his recommendation to Respondent's Human Resources department which authorizes the discipline. Only after the Chief files his recommendation for discipline would the disciplined employee file a grievance.

#### Alleged Retaliatory Actions

##### Ayala

According to Ayala, based on his contacts with fellow officers Diefenderfer, Kafka, Rettig, Muszynski, and Clifton, after November 2008, there were more requests for discipline. At the hearing in this case, Ayala testified that he believes the requests for discipline of bargaining unit members were retaliatory and discriminatory because Grady had said, at the October 10 meeting, that he could get rid of any officer at any time by just following policy and procedure.

On October 14, 2008, Sergeant Ellington requested disciplinary action against Ayala for failing to request prior authorization to work overtime on October 11, 2008. Lieutenant Henert recommended a three day suspension but Grady reduced the discipline to a written reprimand.

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<sup>39</sup> The grievance procedure has four steps with Step Three being the final step before arbitration.

Jesse Perez was the hearing officer for the Respondent on the grievances. He found in favor of the Respondent on all six grievances that had been filed. After his decision, MAP proposed to arbitrate the grievances. Thereafter the parties arbitrated the chapter's but not the individual grievances.

## Kafka

In November 2008, Kafka received a three day suspension because of a vehicle crash. The grievance was pending arbitration at the time of the hearing in this case.<sup>40</sup> Subsequent to the filing of the instant charge, Kafka was the subject of one request for discipline and is also currently being investigated. He has been interviewed once with respect to the current investigation.

The only discipline Kafka received since the charge in this case was filed concerned his involvement in an accident on November 23, 2008. Kafka backed into another vehicle damaging the bumper and a tail light. A request for discipline issued December 5, 2008. That was Kafka's second accident, the first one occurring in late 2001 or early 2002. He was not disciplined for the first accident. Kafka does not dispute that he was at fault in the second accident but questions the severity of the discipline of three days. He is not aware of anyone being suspended for three days. Kafka is aware of two officers disciplined for traffic accidents, one who received a letter of reprimand and another who received a one day suspension for their first accidents. Kafka is the only officer disciplined for two at-fault accidents since 2002.

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<sup>40</sup> Previously, Kafka had been involved in an investigation of an allegation regarding violation of a student's Fourth Amendment rights. During the summer of 2008, Kafka responded to a call to assist the Community Director at a campus housing complex who had found burnt cannabis. The Community Director told Kafka that the matter was just a housing issue. In the past the police had not treated such a matter as criminal. The Community Director said that under the lease, she could enter the apartment but Kafka did not verify that the lease so provided. Kafka entered the apartment, verified that the substance appeared to be cannabis, put it in a paper bag but did not process it as if a criminal offense had occurred. Kafka returned to the Department's office, reported the matter to his supervisor and destroyed the substance by flushing it down the toilet in the supervisor's presence. Then Kafka wrote a report.

A request for discipline was initiated by Lieutenant Ellington who was acting as sergeant at the time. The request alleged that Kafka failed to follow the chain of command. The Chief refused the recommendation of discipline and Kafka received no discipline. No other discipline was cited as influencing Kafka's three day suspension.

On January 1, 2009, Kafka was transferred to SAFE which is mostly foot patrol. Kafka did not ask for the transfer. The Employer provided no explanation to Kafka for the transfer. During the summer of 2009, six months later, Kafka asked why he was transferred but he received no response. Kafka had asked a sergeant if he had been instructed to not allow Kafka to drive a vehicle. Kafka's SAFE assignment did not require him to drive a car although he might drive a vehicle to accomplish certain tasks such as going to court or performing an investigation. When Kafka was transferred, his hours were not reduced and he was still on the day shift. At hearing, Kafka acknowledged that since his transfer, other officers have been transferred, that transfers of officers among divisions occur regularly and that most officers do foot patrol.<sup>41</sup>

Rich Scott

Scott was disciplined for not showing up in court. Lieutenant Henert made a request for discipline of Scott and recommended a three day suspension on or about November 17, 2008, but Chief Grady reduced it to a written reprimand. Scott has received three other written reprimands, two of which were issued after 2008. The Charging Party offered no evidence that the written reprimand for being a no-show was more severe discipline than is usually given for that type of misconduct.

Michael Rettig

Michael Rettig was employed as a police officer by Respondent from April 4, 2002 until May 2009 when he was terminated. During his employment, he was mostly assigned to patrol. However, in 2004, he was assigned to the investigations division and, in 2007, he was assigned by Lieutenant Mitchell to the North Central Narcotics Task

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<sup>41</sup> At hearing, the Respondent objected that the allegation of discriminatory transfer was not within the complaint. I discuss whether that constitutes a violation of the Act for which Charging Party can seek a remedy later in this decision.

Force run by the Illinois State Police. He performed undercover work, surveillance and so forth for between a year to a year and a half. With respect to his undercover assignment, Rettig's supervisors were Master Sergeant Murphy of the Illinois State Police and Sergeant Bill Backus, neither of whom was in Rettig's regular chain of command. Within the chain of command, Sergeant Ellington was Rettig's supervisor.

Rettig was informed that the reasons for his termination were a last chance agreement arising from an incident in 2007 and position abandonment because of overtime he incurred. At the hearing in this case, Rettig testified that on July 21, 2007, during an undercover buy of four ounces of cocaine, he "suffered a sympathetic reflex". Rettig's weapon discharged, striking another undercover officer in the shoulder. The Illinois State Police, Department of Internal Investigations and the Respondent conducted investigations. Thereafter, Rettig was recommended for termination. The matter went to arbitration but was settled by way of a last chance agreement. The Respondent also sought to pursue criminal charges against Rettig but the DeKalb County State's Attorney declined to file such charges. Rettig agreed to the last chance agreement so as to return to his job at the Department. The last chance agreement provided for a two year (24 month) probationary period in which the Chief, in conjunction with Respondent's legal services department, would make future decisions as to Rettig's retention. It was Rettig's understanding that he would have to commit a major infraction of Respondent's rules to warrant discharge under the last chance agreement.

During the month of November, 2008, Rettig attended five days of training in Sugar Grove, Illinois, Monday through Friday, on undercover survival techniques.<sup>42</sup> He

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<sup>42</sup> Previously, Rettig, in connection with his undercover assignment, attended training on combat handguns on September 22-23, 2008 in Harvey, Illinois. He claimed overtime and was paid.

claimed 2½ hours at straight time. Rettig handed in his time sheet on November 30 and was notified of discipline by Lieutenant Ellington on December 3, 2008. Subsequently, there were additional requests for discipline from Lieutenants Mitchell and Henert.<sup>43</sup> Rettig continued working for the task force.

No one at the Department knew of the November training beforehand and no one there told Rettig that the training was mandatory. Under the Respondent's rules, only an officer in its chain of command can decide that a job duty or training is mandatory. Rettig attended the fire arms training because he was sent by the Illinois State Police. Although Rettig asked for 2½ additional hours over his regularly scheduled time, the collective bargaining agreement requires overtime for all time worked over normally scheduled hours. Prior to November 21, 2008, Rettig was aware of a standing order issued in September 2007, of no overtime without prior approval. Rettig was also aware that, under the collective bargaining agreement, any hours worked over regularly scheduled time required paid overtime. On November 22, 23, and 24, 2007, Rettig worked beyond his normally scheduled hours but did not ask for approval of overtime.

Rettig filed his grievance regarding discipline for requesting overtime on December 17, 2008. His grievance was premature because Chief Grady had not yet made a recommendation in 2008. Rettig did not receive paperwork regarding his discipline from the Chief until May 2009.

On May 7, 2009, Rettig received a call from Lieutenant Mitchell to meet with Grady and to bring Department-issued equipment. Grady told Rettig that he had violated the Last Chance Agreement and that he could resign or be terminated for job

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<sup>43</sup> On December 12, 2007, Rettig got a notice from Respondent's Human Resources Department that he was terminated due to job abandonment.

abandonment. Grady gave him a notice of termination. The charges against him were accruing straight time for overtime. Rettig appealed his termination pursuant to a grievance No. 14-2008 but the University refused to arbitrate. Rettig also appealed his termination to the Illinois University Merit Board but his appeal was denied because of the Last Chance Agreement in which he had been represented by MAP and its counsel.

Rettig testified at the hearing in this case that he believes that Grady retaliated against him by terminating him because when he was a new employee in December 2003, he helped Sergeant Mitchell return a table and chairs Mitchell had rented and returned the truck used to transport the items back to the Transportation Department.

#### Clifton

On September 19 and 22, 2008, Clifton helped teach CPR classes to new officers. The class started at 6:00 p.m. and was to finish by 9:30 p.m., but Clifton did not finish by that time because she was still testing those who attended the class. Clifton testified that she believed that if she had left at 9:30 p.m., she would have violated American Heart Association standards for such classes, or caused problems involving certification of new officers..

On October 2, 2008, Sergeant Wright informed Clifton that he had made a request for discipline in that she had worked a total of one hour of overtime without obtaining prior approval for the overtime.<sup>44</sup> Lieutenant Mitchell requested discipline for Clifton on December 9, 2008. On December 15, 2008, he informed Clifton that he had done so in a

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<sup>44</sup> According to Clifton, in October 2008, Wright told her that the Department would not authorize the half hour of overtime but later the Department said it authorize the overtime.

letter to the Chief dated December 5, 2008. The Chief issued the written reprimand on May 5, 2009.<sup>45</sup> A statement on the letter of reprimand was as follows:

It would not be unreasonable to consider termination in this circumstance due to Officer Clifton's blatant disobedience of the Chief's lawful order and department policies, procedures, rules and regulations. Officer Clifton must be placed on notice that continued actions of the sort mentioned in this document are unacceptable and that further infractions could, and may well result in severe disciplinary actions, up to and including termination."

At the hearing in this case, Clifton testified as follows:

I was not – well at that time I did not believe that I was disobeying a direct order. I knew that there was a problem as far as with overtime. I didn't realize that there was going to be disciplinary action for anyone if you had overtime. I was not under the impression that we had to get prior authorization from our sergeant if indeed we were going to incur overtime, from the meeting that we had on the 1<sup>st</sup> of October.

Rachel Muszynski

Rachel A. Muszynski, a NIU police officer since March 31, 2003,<sup>46</sup> served on the same North Central Narcotics Task Force as Rettig. Master Sergeant Joe Perez was in charge of all three counties: DeKalb, Kane and McHenry and Master Sergeant Murphy was in charge of the DeKalb unit. There were also Illinois State Police Troopers on the task force. Prior to August 2008, Muszynski had attended training for the task force and had accrued overtime without incident.

Muszynski attended training in undercover techniques and survival training for the task force on November 17, 18, 20 and 21, 2008. She did not attend the training on November 19, 2008. Sergeant Ellington did not order her to attend the training.

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<sup>45</sup> Prior to the written reprimand, Clifton had been suspended for three days and had received oral reprimands.

<sup>46</sup> Muszynski later became MAP's treasurer in 2009 but that fact has no relevance to this case.

However, the Master sergeants had said that they expected her to attend the training. During the training, Muszynski accrued eight hours of overtime on a daily basis. When she attended the November training she knew that the Department limited overtime. She requested overtime for Monday, Tuesday and Wednesday. On December 8, 2008, Sergeant Ellington made a request for a seven day suspension because Muszynski asked for overtime for the training but did not request prior approval. Muszynski appealed her discipline and it was reduced to a three day suspension for insubordination.

#### Other Disciplined Officers

Officer Craig Diefenderfer received a written reprimand for his failure to get prior permission to work overtime on December 8, 2008.

#### Disciplined Sergeants

Sergeant Katik Ramakrishnan was disciplined for failure to get prior approval for overtime worked on September 6, 2008. Sergeant Meyer was similarly disciplined for allowing officers to work overtime without prior approval on September 3, 2008. Sergeant Donald Rodman committed a similar infraction on September 23, 2008 and received an oral reprimand. Sergeant Alan Smith was counseled in April 2009 for allowing an officer to work overtime without prior approval.

#### **IV. DISCUSSION AND ANALYSIS**

At issue in this case is whether the Respondent violated Sections 10(a) (1), (2) and (4) of the Act.

#### The Alleged 10(a)(1) Violation

Section 10(a)(1) of the Act provides that it shall be an unfair labor practice for an employer or its agents to interfere with, restrain or coerce public employees in the

exercise of the rights guaranteed in the Act or to dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it. MAP alleges that the Respondent violated Section 10(a)(1) by reducing officers' hours in retaliation for the new contract language regarding overtime and the Charging Party's filing of grievances and by making threats and by disciplining bargaining unit members.

A violation of Section 10(a)(1) of the Act is generally found where it is shown, by a preponderance of the evidence, that a public employer has engaged in conduct which reasonably tends to interfere with, restrain or coerce employees in the free exercise of rights guaranteed by the Act. County of Jersey, 7 PERI ¶2023, at p. X-117 (IL SLRB 1991); aff'd by unpub. order sub nom. County of Jersey v. Illinois State Labor Relations Board, Docket No. 4-91-0462, 8 PERI ¶4015 (Ill. App. Ct. 4<sup>th</sup> Dist., June 18, 1992); City of Chicago, Chicago Police Department, 3 PERI ¶3028, at p. IX-153 (IL LLRB 1987). Although the public employer's motive or intention is usually not considered in the context of a Section 10(a)(1) violation, if an alleged adverse employment action is taken against an employee for engaging in protected, concerted or union activity under the Act, the public employer's motivation is examined in the same manner as cases arising under Section 10(a)(2) of the Act. County of Jersey, 7 PERI ¶2023, at p. X-117; Chicago Park District, 7 PERI ¶3021, at p. XI-115 (IL LLRB 1991).

In City of Burbank v. Illinois State Labor Relations Board, 128 Ill.2d 335, 538 N.E.2d 1146 (1989), the Illinois Supreme Court established the standard to be applied to cases under Section 10(a)(2) of the Act. A charging party must show, by a preponderance of the evidence, that (1) he was engaged in union or protected concerted

activity; (2) the employer knew of his conduct; and (3) the employer took the action against him in whole or in part because of anti-union animus or was motivated by his protected conduct. City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 339, 538 N.E.2d 1146, 1150, citing NLRB v. Transportation Management Corp. 462 U.S. 393, 401 (1983).

The employer's unlawful motive may be established by direct or circumstantial evidence, including the timing of the employer's action in relation to the protected activity, the employer's expressed hostility toward unionization, disparate treatment between union employees and other employees, inconsistent reasons between the employer's proffered reasons for the adverse action and other actions of the employer, shifting explanations for the adverse employment action, and a pattern of targeting union supporters. City of Burbank, 538 N.E.2d at 1150.

If a charging party establishes a prima facie case, the employer can avoid a finding that it violated the Act by demonstrating that it would have taken the same action for legitimate reasons even in the absence of the protected activity. Id. However, merely proffering a legitimate business reason for the adverse action will not satisfy a respondent's burden. It must first be determined whether the employer's reasons for the adverse treatment are bona fide or pretextual. As the Illinois Supreme Court explained:

If the suggested reasons are mere litigation figment or were not relied upon, then the determination of pretext concludes the inquiry. [citation omitted] However, where the employer advances legitimate reasons for the discharge and is found to have relied upon them in part, then the case is characterized as one of "dual motive" and the employer must demonstrate by a preponderance of the evidence that the employee would have been terminated notwithstanding his union involvement. [citation omitted]. Id.

### Reduction and Flexing of Hours

The record evidence establishes that the parties signed off on the current agreement in March 2008. Overtime was an issue over which the parties had been at impasse. Ultimately, the Respondent agreed to MAP's demands lowering the threshold for overtime from 86 to 84 hours and allowing overtime to accrue on a daily basis. Thus, MAP established that it engaged in contract negotiations and the Respondent was obviously aware of MAP's insistence on the overtime provisions. MAP established that in September 2008, certain officers were required to change, or "flex", their hours so that they could work a Saturday football game without incurring overtime. MAP also established that in October 2008, six months after the agreement had been signed, the Respondent reduced officers' hours. Thus, MAP established the first two elements of a violation.

However, MAP failed to establish the third element of unlawful motivation. The Respondent explained that by October 2008, the additional 10 or so officers it had hired earlier in the year after a February 14, 2008, shooting incident had completed their training and were ready to be assigned. I note that the hiring of the officers increased the size of the bargaining unit by about one third. With additional officers available, I find it reasonable that the Respondent would reduce opportunities for overtime to save money especially in light of the fact that, earlier in the year, the Respondent had instructed its departments to reduce their budgets. The Respondent does not appear to have acted in derogation of the Agreement, but claims under the Agreement that it had a management right to schedule officers and no provision of the then current Agreement, unlike previous agreements, required that officers work a certain number of hours.

MAP notes that, notwithstanding the reduction in hours for officers, sergeants were allowed to work overtime and were not required to flex their hours to avoid overtime. At hearing, Chief Grady credibly explained that he did not reduce sergeants' hours because there were not enough sergeants to cover their areas of responsibility if they worked fewer than 84 hours. MAP did not rebut this assertion by Grady. Also, there had been no changes in the sergeants' agreement regarding overtime similar to changes in the officers' Agreement. Sergeants still had to get prior approval to work overtime. The record evidence reveals that in September 2008, the Respondent agreed to cease and desist from flexing officers' schedules. I am at a loss to understand how the flexing of hours constituted retaliation when the Respondent's initial response to the first grievance was to admit it erred.

For these reasons, I find that MAP failed to prove by a preponderance of the evidence that the Respondent reduced or flexed officers' hours in retaliation for the new contract language regarding overtime. Even if MAP had proven such retaliation, in my opinion, the Respondent has proven that it had a legitimate business reason for reducing hours. Thus, I believe that, in any event, Respondent would have reduced or flexed hours for business reasons.

#### Alleged Retaliation for Filing Grievances

Similarly, I reject MAP's contention that the Respondent flexed hours to retaliate for the filing of grievances. There is no record evidence that any particular grievance precipitated the flexing of hours. MAP failed to prove by a preponderance of the evidence that the filing of any particular grievance precipitated the Respondent's attempt to flex officers' hours.

MAP also alleges that the Respondent reduced officers' hours from 84 to 75 to retaliate against the Chapter for filing grievances and to "get around" the Chapter and, also, retaliated by refusing to arbitrate certain grievances. MAP's arguments in this regard are confusing and convoluted. Apparently, MAP believes that under the current Agreement, officers have a right to work a certain number of hours, and, contrary to the Respondent's assertions, Respondent did not have a right to change officers' schedules to reduce the hours worked in a two-week period. In support of this theory, MAP cites the fact that the parties reached impasse during negotiations on the subject of overtime. MAP denied that during negotiations, Grady talked about reducing bargaining unit members' hours because of MAP's insistence on a lower threshold for overtime. According to MAP, this alleged lack of truthfulness bolsters its argument that the reduction of hours was retaliation. MAP claims that the Respondent could have reduced officers' hours to 80 hours in a two week period rather than 75 hours but that Grady

went as low as he could to retaliate against us for writing Grievances after his attempts to get around the Contract when he first attempted to "flex" officers' hours during the 2008 football season.(It's good business).

I reject MAP's contentions and I find that MAP failed to prove by a preponderance of the evidence that the Respondent's motivation for reducing officers' hours was retaliation for their protest of the reduction in hours. However, even if I found that MAP had established a prima facie case of retaliation, I would find that the Respondent had established legitimate business reasons for its reduction in hours. It had hired at least ten additional officers who had completed their training by the fall of 2008 and the Department had been directed to reduce its budget. It makes sense that, with the

workforce increased by one third, there would be less opportunities for officers to work overtime.<sup>47</sup>

### Threats

MAP argues that the Respondent made a threat in violation of Section 10(a)(1) of the Act when Grady stated at the October 10, 2008 meeting that MAP would have to prepare a memorandum of understanding (MOU) to return to previous contract language regarding overtime.

The record evidence establishes that at the October 10, 2008, meeting a union member asked whether, if MAP rescinded grievances it had filed, Union members would go back to working 84 hours biweekly. Grady responded that in his view, a change in the Agreement in regard to overtime would require a memorandum of understanding. Grady explained that he did not like memoranda of understanding and that, because of the economy, there was no guarantee that things might return to the way they were and that even if the parties could go back, because the economy had changed dramatically, the University would have to consider economic issues. Grady also stated he would have to talk about such a MOU with his immediate supervisor, Vice President Eddie Williams. I am at a loss to understand how Grady's remarks constituted a threat to members of the bargaining unit. Grady merely pointed out that the Respondent might not accept the Union's proposal. For this reason, I reject MAP's contention that Grady's remarks about a possible MOU constituted a threat.

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<sup>47</sup> The Respondent filed a Motion to Strike Portions of the Charging Party's Brief alleging that those portions were either improperly before the Board, not admissible or lacked factual support in the record. I have generally addressed the Charging Party's arguments in this decision and find it unnecessary to specifically discuss the Respondent's objections to Charging Party's Brief.

### The Nuclear War Remark

MAP contends that Grady's nuclear war remarks at the November 13, 2008, meeting threatened and interfered with bargaining unit members. The record evidence establishes the following. Grady testified that after Union representatives told him they wanted to keep the lines of communication open but intended to file an unfair labor practice charge and new grievances, Grady responded by asking how that would keep the lines of communication open: "[W]hen you walk in and essentially say, we are not going to talk anymore. We are going straight for the nuclear option." Thus, Grady did not threaten nuclear war; instead, he described MAP's statements as amounting to starting a nuclear attack.

The test used by the NLRB to determine whether an employer has made a threat or a promise of a benefit to employees or whether the employer is exercising its legitimate rights of free speech is whether the alleged threat is such that it may reasonably tend to coerce employees in the exercise of their rights protected by the Act. NLRB v. Brookwood Furniture, 701 F. 2d 452 (5<sup>th</sup> Cir. 1983). However, to the extent that an employer may lawfully make pre-election predictions of economic harm that would result from unionization, whether such comments constitute unlawful threats or whether such comments are within the employer's right of free speech depends upon whether the predicted harm is within the employer's control and whether the employer has demonstrable objective reasons for the particular prediction. City of Freeport, 3 PERI ¶2046 (IL SLRB H.O. 1987), at p. VIII-315-316, citing NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

In a majority of cases in which the Board has addressed the issue of whether or not an employer's statement was permissible, the Board has found the statement permissible. City of Rantoul, 6 PERI ¶2009 (IL SLRB 1989) (no issue for hearing where city's statements that police officers would be better off without a union and that officers should ask certain questions of the FOP before voting for a union was permissible under Section 10(c) of the Act. There was no promise of granting any specific benefit). State of Illinois (Department of Police), 7 PERI 2007 (IL SLRB 1990) (chief's statement that union-related conduct could come back to haunt employees did not contain a threat of reprisal but merely an expression of his personal views of, and experiences with, labor unions. Champaign County Clerk of the Circuit Court, 8 PERI 2025 (IL SLRB 1992) (county clerk's comment that there would not be a Christmas party because of dissension in the office was not evidence of animus and comment that an employee had a right to take a sick day as long as she was not working for the union reflected nothing more than the employer ensuring that employee was not abusing sick leave.). City of Mattoon, 11 PERI 2016 (IL SLRB 1995) (mayor's letter to employees prior to election urging that they reflect seriously upon whether a union is necessary and stating that the city's employees fare much better economically than union-represented employees in other cities was permissible under Section 10(c) where it contained no threat of reprisal or force). Village of Frankfort, 15 PERI ¶2012 (IL SLRB 1999) (employer's literature and statements at a mandatory meeting urging employees to vote "no" in the representation election did not amount to threats of reprisal or promises of benefits). Downers Grove Professional Firefighters Union, Local 3234, IAFF and Village of Downers Grove, 22 PERI 161 (IL LRB-SP 2006) ( statements by employer's agents about a member of the

union bargaining team that allegedly undermined the member's status among his peers were protected under Section 10(c) where they contained no threats or promises). Douglas Biller and Anthony Sortino and American Federation of State, County and Municipal Employees, Council 31, 23 PERI 51 (IL LRB-SP 2007) (taunts by coworkers of charging parties contained no threats or promises and thus were permissible under Section 10(c)). Service Employees International Union, Local 73 and Sarah D. Culbertson Hospital, 24 PERI 26 (IL LRB-SP 2008) ("vociferous" expression of opinion that contained no threat or promise was permissible under Section 10(c)). Aurora Sergeants Association and City of Aurora, 24 PERI 118 (IL LRB-SP 2008) (chief's expression of views contrary to charging party's was not accompanied by threats or promises and was permissible under Section 10(c)). Metropolitan Alliance of Police, Chapter No. 357 and Village of Niles, 27 PERI 9 (IL LRB-SP) (village manager's remark that village intended to layoff personnel if arbitrator awarded union's final offer was permissible under Section 10 (c) because assertion was attributable to financial resources and was not a threat).

Hearing officers and administrative law judges have followed the Board's precedent and found no violation of the Act in the following cases. Village of Lyons, 3 PERI ¶2064 (IL SLRB H.O. 1987), at p. VIII-424-25 (no violation of Act where Respondent's agent said that employees would be better off with a civil service board than a union. Statement was a mere expression of opinion that was within the protections of the Act). County of DuPage and DuPage County Sheriff, 6 PERI ¶2030 (IL SLRB H.O. 1990) (statement by the employer's deputy chief that he was part of management and had to be on the side of management was not a threat). Village of Homewood, 7

PERI ¶2022 (IL SLRB H.O. 1991) (village did not violate the Act in its campaign letter because the letter contained no threats of reprisals. Village relied on factual information in stating that the Teamsters Union had been dominated by organized crime for over 30 years and the U.S. Department of Labor had filed a lawsuit to place the union under government control). City of Rock Island (Department of Parks and Recreation), 8 PERI ¶2002 (IL SLRB H.O. 1991) (letter that Respondent's agent sent to employees stated that the union campaign resulted in employees' low morale and that employees would lose their right to free speech if they voted for the union. In a letter, agent urged the employees to vote "No union." Letter did not violate Section 10(c) because there were no threats of reprisal or force or promise of benefit. Statements in letter merely reflected agent's views about union representation). County of Peoria, 8 PERI ¶2003 (IL SLRB H.O. 1991) (letter sent to employees suggesting that union allow them to vote on accepting a memorandum of agreement did not violate Section 10(c) of the Act where there was no threat of restraint or coercion by the employer). City of Pekin, 9 PERI ¶2037 (IL SLRB H.O. 1993) (open letter from city council that stated the union did not have any magic which allowed anyone to ignore economic reality including the fact that the more costs of employment escalate, the fewer jobs there are was not evidence of animus where it merely communicated the employer's views on the possible adverse effect of union activity and was free of threats of reprisal). Randolph Hospital District, 18 PERI ¶2022 (IL ILRB-SP ALJ 2002) (employer's statement that it would "fight" bargaining unit was permissible under Section 10(c) because it contained no promise of benefit or threat of reprisal.) Illinois Fraternal Order of Police, Labor Council and Village of Franklin Park, 19 PERI 68 (IL LRB-SP ALJ 2003) (police chief's remark in conversation about

reduction in sergeant positions was protected under Section 10(c) where chief stated that “[H]ow do you put somebody in there that’s not going to go with the program? You need somebody that’s going to go with the program, not make waves.”).

The then Local Labor Relations Board had also found that statements by employer representatives did not violate the Act. Chicago Transit Authority, 15 PERI ¶3018 (IL LLRB 1999) (employer’s statements to employees regarding shift and duty changes were informational and non-coercive and permissible under Section 10 (c) of the Act). County of Cook, 16 PERI ¶3001 (IL LLRB 1999) (statement by employer’s supervisor that it would be good to join union was mere statement of opinion and did not contain a threat of reprisal or force or promise of benefit. Employer’s agent’s statement that he did not blame employees for shift change and that union and arbitrator were responsible for change was not a threat). Chicago Joint Board (Folami), 17 PERI ¶3015 (IL LLRB 2001) (union president’s statement not to sign shift switch sheet and to refrain from using slurs were permissible under Section 10(c) and did not contain threat of reprisal or promise of benefit.)

The Board has found statements unlawful in the following cases: Clerk of the Circuit Court of Cook County, 7 PERI 2019 (IL SLRB 1991) (employer violated the Act when it issued a memorandum stating that employees did not need to vote to ratify the contract to get a cost of living increase; statement trivialized the union’s effort on behalf of the bargaining unit and demonstrated that union’s role was dispensable). County of Woodford, 14 PERI 2017 (employer’s letter to employees regarding decertification petition and union’s unfair labor practice charge raised issue for a hearing.) American Federation of State, County and Municipal Employees, Council 31 and Champaign-

Urbana Public Health District, 24 PERI 122 (IL SLRB-SP 2008) (employer's request for authorization card was not protected under Section 10(c) because it violated employees' interest in confidentiality).

Hearing officers and administrative law judges have found the following statements unlawful. City of Freeport, 3 PERI ¶2046 (IL SLRB H.O. 1987), at p. VIII-315 (employer violated the Act where chief commented that firefighters risked losing lieutenant positions if lieutenants were included in the bargaining unit). City of Evanston, 5 PERI ¶2041 (IL SLRB H.O. 1989), at p. X-287 (fire chief's statements constituted threats where he said union president and chief would return to unit as captains indicating that if union prevailed in unit clarification case, certain individuals might be demoted. Remarks that certain employees might be demoted or laid off had a chilling or coercive effect on union's right to seek clarification of the bargaining unit). County of Cook, 18 PERI ¶3023 (IL LRB-LP ALJ 2002) (letter from employer's deputy director was not permissible under Section 10(c) where director implied that if charging party filed another grievance he could be charged with violating the employer's confidentiality rules). Pleasantview Fire Protection District, 18 PERI ¶2054 (IL LRB-SP. ALJ 2002) (fire chief's statements that if captains unionized, their jobs would be eliminated was a threat and not protected under Section 10(c)).

In my opinion, Chief Grady's remark about nuclear war is merely hyperbole and an expression of his opinion about the Charging Party's tactics. No reasonable person would interpret his nuclear war remark to mean that the Department intended to wage war on its own employees. To interpret that remark as a threat would require inferences

upon inferences to even establish a threat. For this reason, I find the nuclear war remark to be permissible under Section 10(c) of the Act.

#### Alleged Disciplinary Retaliation

MAP argues that the Respondent retaliated against members of the bargaining unit generally and that the Respondent specifically retaliated against Rettig by terminating him five months after a disciplinary recommendation was made and that it refused to arbitrate his termination. MAP further contends that Chief Grady tried to “break the morale, spirit and backbone” of the Union by disciplining officers for submitting time-sheets for extra pay although sergeants were earning over 30 hours overtime in a pay period.

#### Rettig

The record evidence establishes that the Respondent terminated Rettig in May 2008 because he had violated a last chance agreement by accruing straight time for overtime. In 2007, Rettig shot and wounded a coworker during an undercover drug buy. After an investigation, his termination was recommended but, instead, a last chance agreement, providing for a 24 month probationary period, was instituted. However, during that period, in November 2008, Rettig attended training and claimed 2½ hours of straight time in excess of his regular working hours. At the time, Rettig was aware of a standing order of no overtime without prior approval. A recommendation for his discipline was made in December 2008 which Rettig then grieved prematurely as Chief Grady did not act upon that recommendation until May 2009. I note that at the hearing in this case, Rettig himself testified that he believed he was terminated because of a 2003

incident, shortly after he was hired, that involved his helping a sergeant return tables and chairs.

In my opinion, MAP has failed to establish that the Respondent was motivated to terminate Rettig because of any protected, concerted or union activity. I find no evidence supporting an inference that the Respondent terminated Rettig for any reason other than that he violated his last chance agreement by failing to obtain approval for working overtime. Additionally, Rettig testified that he believed Chief Grady terminated him for an incident occurring in December 2003, which involved his assisting a sergeant to return tables and chairs. For these reasons, I find that MAP failed to establish that the Respondent was motivated to terminate Rettig based on union animus or protected, concerted activities. I conclude that the Respondent did not violate Section 10(a)(1) of the Act when it terminated Rettig.

#### Other Officers

The record evidence establishes that the following officers were given written reprimands for failing to obtain prior approval for working overtime: Ayala, Clifton and Diefenderfer. Muszynski received a three day suspension for that offense.

The Respondent also disciplined sergeants for countenancing the failure to obtain prior approval. Sergeants Ramkrishnan and Meyer were disciplined for allowing officers to work without prior approval. Sergeant Donald Rodman received a lesser penalty, an oral reprimand, and Sergeant Alan Smith was counseled for allowing an officer to work without prior approval. Thus, the evidence reveals that officers in the bargaining unit as well as higher ranking officers that were not in that bargaining unit were disciplined for working overtime without prior approval or allowing officers to work without prior

approval. MAP failed to establish that bargaining unit members were punished more harshly for failing to obtain prior approval for overtime than were higher ranking officers of the Department for countenancing officers' working such unapproved overtime. Thus, I do not find a particular pattern of discrimination as to officers.

There is record evidence that Officer Kafka was suspended for three days for his second vehicular accident. Although MAP introduced evidence that other officers were disciplined less severely for vehicular accidents, those accidents were the officers' first, not second, offense of that nature. Thus, MAP did not establish that Kafka was treated more harshly than he would have otherwise been treated. For that reason, I conclude that the Respondent did not retaliate against Officer Kafka by suspending him for three days.

Finally, there is record evidence that Officer Scott was disciplined for failure to appear in court. There is no record evidence as to how other officers were disciplined for similar offenses. Thus, there is no evidence that Officer Scott was treated more harshly than other officers who committed the same offense. I find that the Respondent did not retaliate against bargaining unit members by disciplining them for misconduct.

Since MAP has the burden of proving its case in unfair labor practices, I find that MAP failed to establish a prima facie case of discrimination and discipline in violation of Section 10(a)(2) of the Act. I further conclude that MAP failed to prove that the Respondent retaliated against members of the bargaining unit by disciplining them for filing grievances in violation of Section 10(a)(1) of the Act.<sup>48</sup>

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<sup>48</sup> At the hearing in this case, Kafka testified that in January 2009, he was transferred to the SAFE unit and that six months later he asked why he was transferred but received no answer. Kafka also testified that other officers have been transferred, and that transfers occur regularly. I do not view Kafka's testimony as establishing a prima facie case of retaliatory transfer. Further, I note that MAP did not seek to amend the complaint to allege a retaliatory transfer.

### Refusal to Bargain

MAP alleges that the Respondent bargained in bad faith, refused to bargain in good faith and breached the collective bargaining agreement in violation of Section 10(a)(4) of the Act. It contends that the Respondent's refusal to move certain grievances to arbitration, its flexing of hours as well as the reduction of officers' hours violated the bargaining agreement. In Village of Creve Coeur, 3 PERI ¶2063 (IL SLRB 1987), the Board held that a breach of contract does not constitute an unfair labor practice unless the breach amounts to a repudiation of the collective bargaining agreement and thus a unilateral change in the employees' working conditions. In this case, it is not obvious that the alleged contract breaches either violate the Agreement or, if they do, amount to repudiation. With respect to the refusal to arbitrate, I note that the Respondent did not outright refuse to arbitrate but took the position that arbitration should be delayed pending the outcome of the Board's investigation of the charges herein. For these reasons, I conclude that MAP has failed to prove that the Respondent refused to bargain in violation of Section 10(a)(4) of the Act.

### **V. CONCLUSIONS OF LAW**

The Respondent did not violate Section 10(a)(1) and (2) of the Act when it directed officers to flex their hours to avoid overtime.

The Respondent did not violate Section 10(a)(1) and (2) of the Act when it reduced officers' hours from 84 hours to 75 hours.

The Respondent did not violate Section 10(a)(1) of the Act when its police chief made his nuclear war remark. That remark was permissible under Section 10(c) of the Act as an expression of opinion.

The Respondent did not violate Section 10(a)(4) of the Act when it directed officers to flex their hours, when it reduced officers' hours from 84 to 75 hours and when it refused to arbitrate immediately several grievances the Charging Party filed regarding those matters.

The Respondent did not retaliate against members of the bargaining unit in violation of Section 10(a)(1) and 10(a)(2) of the Act for their exercise of rights under the Act by disciplining them and by disciplining them more harshly.

#### **VI. RECOMMENDED ORDER**

I recommend that the complaint be dismissed.

#### **VII. EXCEPTIONS**

Pursuant to Section 1220.60 of the Rules, parties may file exceptions to the Administrative Law Judge's Recommendation and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses **will not** be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the

exceptions and/or cross-exceptions have been provided to them. Exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

**Issued at Chicago, Illinois on this 22nd day of July 2011**

**Illinois Labor Relations Board  
State Panel**

  
**Sharon B. Wells, Administrative Law Judge**