STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CLAY TOWNSHIP,
Public Employer-Respondent, MERC Case No. C18 A-002

-and-

MICHIGAN ASSOCIATION OF FIRE FIGHTERS,
Labor Organization-Charging Party
_____/

APPEARANCES:

Fahey, Schultz, Burzych & Rhodes, PLC, by Helen E. R Mills and Ryan P. Stecovich, for Respondent

Pierce, Farrell, Tafelski & Wells, PLC, by M. Catherine Farrell, for Charging Party

DECISION AND ORDER

On November 13, 2018, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Issued: February 15, 2019

[1] MAHS Hearing Docket No. 18-000616

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CLAY TOWNSHIP,
Respondent-Public Employer,

Case No. C18 A-002
Docket No. 18-000616-MERC

-and-

MICHIGAN ASSOCIATION OF FIRE FIGHTERS,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Fahey, Schultz, Burzych & Rhodes, PLC, by Helen E. R Mills and Ryan P. Stecovich, for the Respondent

Pierce, Farrell, Tafelski & Wells, PLC, by M. Catherine Farrell, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On January 8, 2018, the Michigan Association of Fire Fighters (MAFF or Charging Party) filed the present unfair labor practice charge against Clay Township (Township or Respondent). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). Based upon the entire record, including the transcript of hearing held on March 16, 2018, the exhibits admitted into the record and post hearing briefs filed by the parties, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

MAFF's initial filing was premised on two distinct theories of violation. First, Charging Party claims that after it was certified by the Commission on January 13, 2017, as the bargaining representative for the Respondent's paid on-call fire fighters, Respondent failed and/or refused to bargain a first collective bargaining agreement in violation of Section 10(1)(e) of the Act. Next, Charging Party alleges that the Respondent terminated fire fighters Michael Olderman and John Siecinike - two individuals who had been involved in the organizational efforts that brought in the MAFF – in violation of Sections 10(1)(a) and (c) of PERA.

At the onset of the hearing on March 16, 2018, Charging Party withdrew those portions of its charge that related to the allegations involving John Siecinike. After a lengthy off the

record discussion, I indicated that the remaining two allegations would be bifurcated; the Section 10(1)(a) and (c) allegations involving Olderman were to be docketed with a new MAHS Case Number and heard during that day's hearing, while the remaining allegations would retain the original docketing information and be heard at a later date. Testimony was taken and exhibits were received regarding the allegations involving Olderman on March 16, 2018.

On April 2, 2018, prior to administrative action being taken to bifurcate the charges as indicated above in the docketing system used by MAHS, Charging Party withdrew its allegations that the Respondent failed to bargain in good faith in violation of Section 10(1)(e) of the Act. As such the only issue remaining before the undersigned, the allegations premised on Olderman's termination, remain as docketed originally and are addressed below.

Findings of Fact:

Clay Township is located on Lake St. Clair and encompasses Harsens Island. The Township's Fire Department (Department) provides both fire and basic medical needs and, at the time of the hearing, is comprised of twenty-eight (28) fire fighters, many of whom are also certified as paramedics and/or emergency medical technicians. The Department traditionally operates using a mix of paid on-call responders and paid on-call members working 12 or 24 hour dedicated shifts at the Township's two fire stations, one on Harsens Island and the other on the mainland.2 The latter situation is described as "duty shifts"; the distinction between the two will be discussed in more detail below.

In June of 2014, Michael Olderman was hired by then-Chief Daryl DuPage as a paid on-call fire fighter/EMS member of the Department. Olderman had recently retired from the Westland Fire Department where he had been employed for over twenty-two (22) years and had reached the rank of Assistant Chief. Olderman testified that he became a paid on-call member of Respondent's Department because he liked the job of fire fighter, missed it, and wanted to help his community.

Following Olderman's hire, he helped Chief DuPage apply for the Staffing for Adequate Fire and Emergency Response (SAFER) grant through the Federal Emergency Management Agency (FEMA); Respondent was awarded the grant sometime in September of 2016. The grant allowed the Department to fund seven full-time fire fighter positions – prior to the grant the Department was comprised of only paid on-call positions. Olderman, who had been promoted to lieutenant, held one of the Department's full-time positions.

Sometime following the award of the SAFER grant, Olderman contacted a representative of the Charging Party to inquire about representation for a bargaining unit comprised of both full-time and paid on-call positions. Olderman subsequently began working with Jerald James, a MAFF labor representative, on organizing the Department. Olderman testified that he told then-Chief DuPage of his efforts to organize. Olderman received authorization cards from Charging Party which he then distributed to the Department's other fire fighters.

In December 2016, Chief DuPage left the Department. Sometime shortly after DuPage's

2 For a brief period between 2015 and 2017, described more fully later, the Department was able to fund several full-time positions thanks to a federal aid grant.

departure, Jerry Doan was appointed as Interim Fire Chief.

Following a Commission held election, Charging Party was certified on January 13, 2017, as the bargaining representative for the Department's "full-time, part-time and on-call Fire Fighters." Jerald James, the MAFF representative assigned to the unit, testified that following Charging Party's certification in January of 2017, he made a couple of phone calls to Respondent's Township Supervisor, John Bryson, in order to set up dates to begin bargaining over a first contract. Initially James received no response from Respondent to his phone calls or a subsequent email. On January 20, 2017, James sent a letter to Bryson, on MAFF letterhead, in which the labor representative again requested to bargain. That letter also contained several requests for information, including, but not limited to, a copy of the Department's SAFER grant.

James testified that he spoke with Bryson on or around February 2, 2017, during which they discussed negotiations and the Township's SAFER grant. According to James, Bryson asked for assistance with respect to the grant, specifically whether James or the MAFF knew of anyone who had knowledge of how to extend the grant.3

On February 6, 2017, Interim Chief Doan was replaced on a permanent basis by George Rose. Rose had previously served in different roles at various times for the Department starting back in 1978, when he was a founding member of the Department. Prior to installation as Fire Chief, Rose had last worked with the Department in the role of Assistant Fire Chief from approximately 2002 through 2007.

The parties began negotiating on March 21, 2017, over a first contract. Prior to bargaining commencing, Olderman had worked four (4) duty shifts during the first two months of 2017, working on January 13, 2017, and February 3, 8, and 21, 2017. Additionally, he attended one training session on March 11, 2017, and another after bargaining had begun on April 10, 2017.4

From March 21, 2017, through November 21, 2017, the parties met to bargain approximately eight times; Olderman attended each of those sessions as a member of Charging Party's bargaining team. Bryson testified that he had no prior knowledge of Olderman's organizational efforts and first learned of Olderman's activity with Charging Party when bargaining began. As of the hearing in this matter, the parties had still not agreed to a first contract.

3 Sometime in September of 2017, the SAFER grant expired and those full-time positions the grant had made possible, including Olderman's, returned to paid on-call status.

4 According to the record, Olderman attended just two of the twenty-three training sessions conducted by the Department in 2017.

Shift Expectation and Terminations

Chief Rose testified that upon taking command of the Department he came to learn that there was a mixture of written and unwritten policies that had been governing the Department. During the hearing, several exhibits identified as Standard Operating Guidelines (SOGs) were received into the record. During testimony some of the SOGs received were referred to as "original" while others "revised." However, the record is unclear as to which, if any, of the SOGs received into evidence, had been approved and/or officially implemented by Respondent's governing body. The preceding notwithstanding, James did admit that some, if not most or all of the SOGs admitted at the hearing, had been provided to Charging Party during negotiations or at other times since Charging Party assumed its role as the authorized bargaining agent.

In describing the difference between "on-call" and "duty shifts", Rose testified that "on-call" responses are where an on-call volunteer fire fighter would respond to an "all call" tone out for services while a duty shift response is where only those individuals serving on the duty shift would respond. According to Rose, the Department maintains a policy that distinguishes what constitutes an all call as opposed to a duty shift call. For example, structure fires, gas leaks, fuel spills, investigation of smoke inside structures are considered all call situations. Lift assists, both with and without injury and medical emergencies are considered duty shift situations. Rose further explained that it was not Department policy or practice to give on-call fire fighters the discretion to respond to duty shift calls if they were not serving on that particular shift at the time of the call.

Rose explained that the Department's fire fighters are encouraged to make themselves available to serve duty shifts at a station when available. In order to facilitate the staffing of duty shifts, which are set on a bi-weekly basis, Rose testified that he emails all members of the Department and requests their availability to work the upcoming duty shifts. According to Rose, should he not receive sufficient responses to cover the shifts for the two stations, he will then reach out to his members through phone calls or text messages to encourage greater availability. The record does not establish what process former Chiefs DuPage or Doan utilized, if any, to set the schedule or solicit availability for shifts within the Department.

The above uncertainty of the SOGs notwithstanding, SOG #100, entitled "Recruiting and Employment" provides in Section III the following:

> All persons offered employment as firefighters by the Department are expected to attend 75% of all regularly scheduled training and respond to 20% of all calls for service. Failure to attend regularly scheduled training and respond to calls for service without an acceptable reason may result in termination of employment.

SOG #110, entitled "Grievance & Complaint" provides a minimal grievance procedure by which an employee is afforded a three step process beginning at the employee's direct supervisor before moving on to a grievance board and ultimately terminating with an appeal to the Chief and Respondent's Board.

SOG #111, entitled "Discipline" provides in Article II, Section 2, a right of appeal for an employee who has been suspended or discharged by action of the Chief. That allows the employee to challenge their suspension or discharge to the Appeal Board, a panel comprised of

the three most senior officers within the Department.

On February 3, 2017, Belinda Vela-Sablowski, Mike Adamo, James Gatteno, and Dessierai Gaul, were all sent letters signed by Interim Chief Doan, that stated in the relevant part:

> This is a formal letter to advise you that, due to your lack of providing any availability, and from you not being active on the schedule in the previous 60 days you are being removed from the roster as an employee of the Clay Township Fire Department.

Sometime following the appointment of Chief Rose, James received a phone call from Vela-Sablowski informing him of her termination. James then contacted Chief Rose who directed him to contact someone at the Township office because it happened before he had assumed his position as Chief. On February 23, 2017, James sent an email to the Township's Clerk, Cindy Valentine, which stated:

> It has been brought to the attention of the Michigan Association of Firefighters that the above mentioned member has been recently discharged. The reason given was for a failure to provide availability as well as not being active for the previous sixty 60 days. It is the understanding of the Union that Mrs. Sablowski did in fact work a shift on 12/16. As this letter was written on 2/3 it had not yet been sixty (60) days as indicated.
>
> On behalf of Belinda Sablowski, and pursuant to the PERA the Union is requesting the following information.
>
> 1. Any and all policies and procedures relative to response and availability requirements.
>
> 2. Any documentation relative to any firefighters that have been discharged/separated[sic] for the same offenses.
>
> 3. Workplace activity, according to your records, for the sixty (60) day period prior to 2/3/17.
>
> This information is required to assist in enforcing the rights and or privileges of the aforementioned member.

Valentine replied later that same day and stated that Vela-Sablowski was either not available or did not provide availability "within the timeframe of 60 days, or more, prior to the end of the schedule out at the time" which according to her was completed on February 3, 2017, and then posted through February 11, 2017. Valentine went on to state that Vela-Sablowski last worked a shift on December 11 and not December 12 as claimed in the earlier email. Charging Party did not file a grievance on behalf of Vela-Sablowski or any of the other three individuals terminated at that same time.

James testified that in approximately three of four meetings he attended with the bargaining unit, beginning in April of 2017, the above sixty day requirement had been discussed.

From the beginning of 2017 through mid-September of that year, Olderman responded to, and was paid for, seventeen (17) emergency "all calls". On September 18, 2017, Olderman sent Chief Rose a text message asking how the Department's two stations would be staffed following the expiration of the SAFER grant. Chief Rose responded by stating that he would staff the two stations so long as personnel signed up for shifts. Chief Rose went on to express that he was not getting the level of participation on shifts that he would have liked to see and asked Olderman if he would "be able to pull a few shifts?" Olderman responded by stating "I will start taking shifts as soon as the contract is finished…" Olderman and Chief Rose spoke again on September 20, 2017, in person on Harsens Island, where Olderman repeated that he would not work a duty shift until a contract was signed.[5]

During the last three months of 2017, Olderman did not work any duty shifts but did respond to three separate emergency calls, on October 8, November 22, and December 13, 2017. According to Chief Rose, and reports received at hearing, these three calls were not "all calls" but rather were duty shift calls to which only those members of the Department working the duty-shift at the mainland's station were supposed to answer.[6] Olderman claimed that it was his understanding that he could respond to all calls even while not working a duty shift. Olderman claimed that this understanding had been formed under former Chief DuPage but that he never discussed the same with either Chief Doan or Chief Rose.

On December 12, 2017, Chief Rose sent Olderman, and three other members of the Department, letters terminating their employment.[7] The four letters were identical and read in the relevant part:

> Township of Clay recognizes that employees have diverse needs for time off from work, however, according to our records you have not provided availability to work or worked in the last 60 days. At this time, you have been removed from the roster as an employee of the Clay Township Fire Department.

On December 17, 2017, Olderman, prior to receiving the December 12, 2017, letter, was present in Chief Rose's office representing John Cinzinski over allegations of improper activity. At no time during that meeting did Chief Rose inform Olderman that he had been terminated effective December 12, 2018; likewise there is no indication that Olderman was informed of the same while on-scene at the December 13, 2017, emergency call. On December 22, 2017, Chief Rose terminated Georgina Wenckovsky for the same reason as Olderman and the three others.

By letter dated December 26, 2017, Olderman appealed his termination pursuant to the SOG #111 to the Department's Appeal Board, which consisted of Chief Rose, Captain Karl Bayly, and Sergeant Bill Huber, the latter two both being members of the bargaining unit represented by Charging Party. James represented Olderman during that proceeding. Chief Rose testified that he remained silent and did not participate in deliberations with Bayly or

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5 Eventually, upon the urging of James, Olderman apologized to Rose regarding his comments on refusing to work duty-shifts until a contract had been reached.

6 Each of these three calls occurred on Harsens Island, yet the responding station was the mainland station. According to Chief Rose's testimony, the Harsens Island station was not manned for lack of volunteers.

7 Tony Spina, Troy Wykowski and Lou Perkins were the other three individuals terminated by way of the December 12, 2017, notices.

Huber. Those two, along with Rose, voted to uphold Olderman's termination.

Olderman, following the Appeal Board's decision, advanced his appeal, presumably pursuant to SOG #110, to the Respondent's Board. James again represented Olderman; the Board upheld the termination.

Discussion and Conclusions of Law:

As stated above, following the conclusion of the hearing and with Charging Party's later withdrawal of that portion of the charge predicated on an alleged violation of Section 10(1)(e), the only issue that remained before the undersigned was whether Olderman's termination violated Sections 10(1)(a) and/or (c) of PERA.[8]

In order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act, a charging party must show, in addition to an adverse employment action: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Interurban Transit Partnership,* 31 MPER 10 (2017). The aforementioned analysis was first enunciated by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Line, Inc, 251 NLRB 1083 (1980)*, enf'd 662 F2d 899 (CA 1, 1981) and approved by the United States Supreme Court in *NLRB v Transportation Management Corp*, 462 US 393 (1983). Under the *Wright Line* test, later adopted under PERA in *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983), it is only after a prima facie case has been established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id* at 74.

Inferences of animus and discriminatory motive may be drawn from competent circumstantial evidence, including, but not limited to, the timing of the adverse employment action in relation to the protected activity, indications that the respondent gave false or pretextual reasons for its actions, and the commitment of other unfair labor practices by the employer during the same period of time. *Keego Harbor*, 28 MPER 42 (2014). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). Moreover, it is well established that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result of anti-union animus. See *Southfield Pub Sch*, 22 MPER 26 (2009) (A temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation).

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8 The preceding notwithstanding, Charging Party's post hearing brief is devoid of any attempt to articulate an argument as it relates to its Section 10(1)(a) claim. Accordingly, it is the conclusion of the undersigned that any such argument predicated thereupon has been abandoned. As such, I will proceed to analyze the merits of this matter with respect to Section 10(1)(c) only.

At the conclusion of the hearing, I directed the parties to ignore the first two elements in their post-hearing briefs of a prima facie case under 10(1)(c) as it related to Olderman's participation in the bargaining process as I found that the record clearly established that both Chief Rose and Bryson were aware of Olderman's presence at the bargaining table and that such constituted protected activity under the Act. The preceding notwithstanding, I also cautioned that, to the extent either party thought it necessary to establish or address some other protected activity, i.e., Olderman's organizational efforts, such treatment remained their burden.

In the instant matter, Charging Party has provided no direct proof that Chief Rose, Bryson, or any other person associated with the Respondent harbored anti-union animus or hostility.9 Rather, it appears that Charging Party is relying on the lack of any explicit written provision within Respondent's SOGs that requires a fire fighter's termination following sixty (60) days of inactivity, along with the timing of the termination, to establish that Olderman's termination was a result of anti-union animus or otherwise in response to his protected activity. Moreover, Charging Party disputed whether Olderman had actually been inactive during the sixty days preceding his termination, providing three specific instances where Olderman responded to calls.

The Employer could not point to any explicitly stated policy of terminating fire fighters following a period of inactivity. However, it established that no less than nine (9) fire fighters, including Olderman, were terminated in 2017 for inactivity. Moreover, these terminations spanned the command of two different Chiefs, Interim Chief Doan and current Chief Rose. Chief Rose also testified that fire fighters could not choose to respond to any calls they wished and that "duty calls" were reserved for those fire fighters working shifts at the time of the call. While Olderman did claim that he had an understanding with former Chief DuPage in which he, Olderman, was encouraged to respond to any call, duty shift or otherwise, that understanding was never presented to former Chief Doan or current Chief Rose.

When viewing the evidence presented in this matter as a whole, it is my conclusion that Olderman's termination was not based on any unlawful motive violative of Section 10(1)(c) of PERA, but that rather it, and the similarly terminated eight (8) fire fighters by the Respondent in 2017, was a direct result of their inactivity. Moreover, while Olderman did claim that he responded to calls in the sixty-days (60) leading up to his termination, it is clear that Chief Rose and the Department, as evidenced by the decision of the other two members of the Appeal Board, did not consider such responses to be valid as Olderman had responded to "duty shifts" despite not working duty shifts at the time of the call. I have considered all other arguments as put forth by the parties and conclude that such does not change the outcome. Accordingly, I recommend that the Commission issue the Order as set forth below.

RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

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9 Charging Party attempted to introduce what appeared to be a Facebook post made by someone in the Township's governing body which, according to Charging Party, referred to the fire fighters in a deprecatory manner. However, the posting was without context and it was not entirely clear to what group the comments were being directed at. As such the exhibit was not admitted into the record.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 13, 2018