STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

-and- MERC Case No. 19-C-0572-CE

DETROIT FIRE FIGHTERS ASSOCIATION,
IAFF, LOCAL 344,
Labor Organization-Charging Party.
_____/

APPEARANCES:

June Adams, City of Detroit Law Department, for Respondent

Legghio & Israel, PC, by Christopher Leggio and Megan Boelstler, for Charging Party

DECISION AND ORDER

On November 27, 2019, 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

Samuel R. Bagenstos, Commission Chair

Edward D. Callaghan, Commission Member

Robert S. LaBrant, Commission Member

Issued: April 30, 2020

[1] MOAHR Hearing Docket No. 19-008074

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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

Case No. 19-C-0572-CE
-and- Docket No. 19-008074-MERC

DETROIT FIRE FIGHTERS ASSOCIATION,
IAFF, LOCAL 344,
Labor Organization-Charging Party.
----------'/

APPEARANCES:

June Adams of the City of Detroit Law Department for the Respondent

Leggio & Israel, P.C., by Christopher Leggio and Megan B. Boelstler, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On March 6, 2019, the Detroit Fire Fighters Association, IAFF, Local 344 (Charging Party or Union), filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the City of Detroit (Respondent or City) pursuant to Sections IO and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. The charge was assigned to Administrative Law Judge Travis Calderwood for the Michigan Office of Administrative Hearings and Rules and acting on behalf of the Commission. Based upon the entire record, including the transcript of hearings held on April 25, 2019, and May 16, 2019, the exhibits admitted into the record, and the post-hearing briefs filed by the parties, I make the following findings of fact, conclusions of law and recommended order.

The Union's filing alleges that the City violated Sections 10(1)(a), (b), and (e) of PERA, when it unilaterally implemented a new procedure requiring fire fighters to clean up blood and other items from incident scenes.

Findings of Fact:

The parties are signatories to a collective bargaining agreement initially effective from November 6, 2014, through June 30, 2019. The agreement was later extended through June 30, 2020. The agreement covers a unit represented by the Union that includes fire fighters and other civilian and non-civilian employees within the City's Fire Department (Department).

The unit described above does not include paramedics or emergency medical technicians who, while also represented by the Union for collective bargaining purposes, are in there own unit and covered by a separate agreement.

Article 3 of the parties' contract covering the Department's fire fighters is entitled "Management Rights." Subsection B states in the relevant part the following:

> Except as specifically limited by the provisions of this Agreement or applicable law, the Department will have the discretion and authority:
>
> ***
>
> 2. To determine the size of its workforce, including the number of Employees, the type and number of job classifications, departments, and shifts of work, whether increased or decreased;
>
> ***
>
> 6. to determine the content and nature of the work to be performed, and the competencies and qualifications needed to perform the work, including but not limited to the right to require Employees to become qualified as emergency medical technicians (EMT), at no cost to the Employees, and to perform medical first responder work as assigned by the Department;
>
> ***
>
> 9. to establish, regulate, determine, revise, or modify at any time the policies, practices, protocols, process, techniques, methods, means and procedures used in the Department, including, but not limited to machinery, materials, methods, facilities, tools, and equipment;

Section G of Article 3 states in its entirety, "It is understood by the parties that every incidental duty connected with operations enumerated in job descriptions is not always specifically described.

Article 8 of the agreement sets forth the parties' agreed upon multi-step grievance procedure which culminates in final and binding arbitration.

Article 16 covers various topics including under Section (C) various provisions related to the addition of medical first responder (MFR) duties, as will be discussed more fully below. Subsection (C)(4)(b) states, relevant to this proceeding, the following:

> The Department may develop policies and procedures related to M.F.R. and E.M.T assignments. The Department will meet and confer with the Union prior to developing, implementing, or amending any such policies and procedures.

The Department's most current maintained job description for the position of fire fighter lists as the position's "Major Duties" the following:

1. Responds to emergency incidents with an assigned Company.

2. Connects, carries and operates hose lines and nozzles.

3. Positions and climbs ladders to gain access to upper levels of building, or to rescue individuals from burning structures.

4. Turns water on or off.

5. Utilizes a variety of extinguishers and forcible entry tools, including, but not limited to axes, bars, hooks and life lines.

6. Rescues people and salvages property.

7. Operates a variety of fire department apparatus and vehicles.

8. Assists emergency medical personnel in administering CPR and extrications; and handles chemical hazmat, weapons of mass destruction and Homeland Security events.

9. Participates in public education programs and community relations activities to educate public on how to protect life and property.

10. Participates in departmental training and drills regarding the operation of departmental equipment.

11. Lubricates, cleans and polishes fire apparatus and replaces equipment.

12. Maintains Company facility/quarters including, but not limited to, cleaning quarters, washing windows, and scrubbing floors.

13. Monitors Ere alarm instruments.

14. Verifies and records alarms received from Computer-Aided Dispatch System, depaiiment two-way radio and telephone.

15. Maintains Company records and prepares reports.

The position statement also provides, in italics, the following qualifier regarding the position's enumerated duties:

The above statements describe the general nature and level of work performed by employees assigned to the class. Incumbents may be required to pe1form

job-related responsibilities and tasks other than those stated in this specification. Specific job duties may vary from position to position.

Beginning in April of 2015 fire fighters were required as a condition of employment to become licensed as Medical First Responders (MFR). This requirement, however, was not implemented universally at that time but was implemented over several years; as of the April 2019 hearing in this matter approximately 97% of the Department's fire fighters were licensed as MFRs. In connection with the addition of MFR duties, fire fighters licensed as such received a 4% increase in salary. Additionally, the City began to provide certain items identified as Personal Protection equipment (PPE) for fire fighter use as MFRs. Such equipment included Tyvek suits, face shields, gloves, masks, etc. [1]

Chief Distelrath estimated that the Department's fire fighters participate on approximately 50,000 runs per year. There was no testimony provided however on the ratio between MFR runs and traditional fire fighter runs following the addition of MFR duties, or whether the Department kept track of such a breakdown.

Standard Operating Procedure 1.1

On April 4, 2018, the Department issued Standard Operating Procedure (SOP) 1.1, entitled "Bloodborne Infections Disease Exposure Control Plan." SOP 1.1 was the product of a collaborative effort between the Department and the Michigan Occupational Health and Safety Administration stating under the heading "Policy," the following:

> The Detroit Fire Department (DFD) is committed to providing a safe and healthful work environment for its entire staff. In pursuit of this endeavor, the following Exposure Control Plan (ECP) is provided to eliminate or minimize occupational exposure to Bloodborne pathogens in accordance with MIOSHA Part 554 Bloodborne Infections Diseases.

SOP 1.1 requires that Department employees engage in "universal precautions" and further provides "specific guidance on controls and practices that shall be used when performing tasks involving occupational exposure to bloodborne pathogens." SOP 1.1 provides certain task-specific procedures including wound care, CPR, and equipment cleaning and disinfection. SOP 1.1 does not, on its face, expand the duties of fire fighters, but rather implements procedures by which the Department's employees are to conduct themselves in furtherance of their duties and responsibilities. The record does not indicate that the Union was involved with the creation or in any way consulted on SOP 1.1 before its implementation nor did the Union challenge the implementation of SOP 1.1 in any fashion.

October 9, 2018, Murder Scene Incident

On October 9, 2018, Engine 60, a fire truck staffed by fire fighters, was dispatched to the backyard of a private residence to render medical assistance for a shooting victim. The

[1] Fire Chief Robert Distelrath admitted during his testimony that while the Department does provide PPE, not all fire trucks or vehicles have the equipment.

record is not clear on the exact timing of the initial moments relative to the shooting and Engine 60's initial arrival at the scene, i.e., were they able to render medical assistance or whether the victim had already been pronounced dead at the scene. The preceding notwithstanding, Engine 60 left after the City's Medical Examiner cleared the victim's body from the scene. Shortly thereafter, a request was made for Engine 60 to return to the scene and conduct a "washdown" of the blood and materials present there. Engine 60 did return but prior to taking action requested Battalion Chief Stephen Lesniak to come to the scene to provide guidance. Lesniak, in his testimony, described the scene as "horrific." Photographs of the scene admitted into the record portray a scene with significant amounts of blood, other bodily fluids, bloody towels and clothing, and other miscellaneous medical objects presumably also contaminated with blood or other fluids present.

Lesniak, upon viewing the scene concluded that Engine 60 would not clean up the scene and instead ordered them to leave, thereby putting them "back in service."[2] Lesniak testified that his first thought was that cleaning up the scene was "not [a fire fighter's] job." Lesniak remained at the scene and called dispatch which resulted in police officers sent to the scene along with others from the Department, including Assistant Superintendent Joseph Barney. Lesniak also testified that he called Deputy Chief Robert Shinske and Deputy Chief Eugene Biondo to discuss the issue.

The record is clear that there was no consensus between those at the scene and the other individuals consulted by phone regarding who should bear the responsibility of cleaning the scene and/or how to clean the scene. The Department's own official report documenting the incident, in describing the confusion, states:

> Several calls were made to [the] Fire Marshal, Central Office, Deputy Chief and EMS Command to resolve the incident. DPD and a DPD supervisor was also at the scene and had nothing to offer to mitigate the biohazard. All parties agreed it is not proper to wash the blood down the driveway and then down the sewer and all agree it cannot just be left to sit out untouched.

Lesniak testified that eventually Assistant Superintendent Barney and a Detroit Police Lieutenant put water, dirt, and an unidentified substance on the blood. It is not clear what was done with the bloody clothing or other items that were on scene at the time.

Standard Operating Procedure 1.4

Chief Distelrath during his testimony confirmed that the Department began working on what would become SOP 1.4, entitled "Bodily Fluid Aftermath Cleanup", because of the confusion regarding the fire fighter's responsibility at the October 9, 2018, incident. Deputy Chief Shinske was the author of SOP 1.4 and was assisted in its creation by several other individuals within the Department. Shinske testified that, not long after the October incident, during a meeting amongst the various Chiefs, there was discussion regarding how that incident

[2] When an Engine is put back into service, the Engine and its fire fighters can now be dispatched to other scenes or incidents where they might be needed.

should have been handled. The record does not indicate that the Union was involved with the creation or in any way consulted on SOP I.4 during its creation.

SOP 1.4 was implemented by the Department on March 5, 2019, and states as its "Purpose" the following, "To outline when it is appropriate for the DFD to engage with cleanup of injury incident and/or MFR scenes. To identify how this type of cleanup shall be accomplished."

SOP 1.4 does differentiate between scenes located on public property and those that occur on private property, like the October 9, 2018, incident. With respect to public property, the SOP provides:

> The DFD will be responsible for ensuring cleanup of blood and other bodily fluids at any/all accident scenes and MFR incident scenes where fire and/or EMS initially responded.
>
> The DFD will be responsible for ensuring cleanup of blood and other bodily fluids at any incident as requested by the police.

Regarding private property scenes, SOP 1.4 provides that cleanup is at the discretion of the Incident Commander/EMS Supervisor who can determine whether the "circumstances warrant a cleanup by the DFD." SOP 1.4 requires that the Incident Commander/EMS Supervisor is responsible for determining whether the scene at issue is located on public or private property. Moreover, the SOP states that an "Incident Commander/EMS Supervisor may consult with the Fire Marshal when the incident is on private property and the decision is not clear."[3]

With respect to the disposal of blood or other bodily fluids, SOP 1.4 directs fire fighters to dilute and flush the same into the sewer. The SOP does not provide any guidance on how to properly and/or safely accomplish this task. SOP 1.4 goes further with respect to "soiled garments/soiled materials" stating:

> All bloody clothing/materials found on the incident scene shall be collected and placed into a red bio-bag. The red bio-bag shall be returned to the appropriate fire house location and placed into the red bio container for professional pick up.

The Union filed this instant charge on March 6, 2019, claiming that the Respondent made unilateral changes in mandatory terms and conditions of employment and failed to bargain in good faith over said changes. On March 14, 2019, the Union filed suit in Wayne County Circuit Court, seeking injunctive relief pending resolution of the unfair labor practice proceeding. Following a hearing before Circuit Court Judge Daniel A. Hathaway on April 17, 2019, Judge Hathaway denied the Union's request for an injunction regarding implementation of SOP 1.4, noting that the Union had failed to establish that it was likely to suffer "irreparable injury."

---

[3] SOP 1.4 on its face does not provide any guidance and/or elements that a Fire Marshal would or must consider when making the decision as to when it would be appropriate to clean up such a scene located on private property.

Wash-Downs

For much of the hearing both sides elicited quite a bit of witness testimony regarding an action that fire fighters perform called "wash-downs." While each of the witnesses had a slightly different take on what the term meant, the general consensus from all was that a wash-down was the act of using the fire truck's hose to spray down an area for the purpose of clearing away whatever was present so that the public would not encounter the same. Chief Distelrath, the first witness to testify, described a wash-down as the "process of taking the fire hose and removing product from the street, the sidewalk, whatever, or just diluting it, it doesn't necessarily have to go into the sewer." Chief of Training, Alfie Green, described his experience with respect to wash-downs as an action to "get the debris from, most of the time from accidents out of the street." Green claimed that he would have participated in one or two wash-downs a month. Green, in describing what he meant by debris, listed glass, metal, plastic, etc. Deputy Chief Biondo, who claimed to have participated in "hundreds" of wash-downs, defined it as an action to "wash everything towards the side of the road, some of it went down the sewer... basically you were cleaning the street to open the streets so there wasn't glass and metal and debris that would cause another accident. .." Lesniak, who was the commanding officer at the October 9, 2018, scene, described wash-downs by stating, "you get a car accident, you get oil, gas on the road, and you wash it down, you wash it to the side of the road, dilute it, and then that way the road is not slippery and you clean it off, that's a wash down."

Of the four individuals identified above, the record indicates that only Chief Distelrath admitted to giving an order that blood from a crime scene was to be washed-down. In his testimony, Chief Distelrath claimed that at a 2013 crime scene, where a merchant had been murdered, he ordered fire fighters to wash-down blood from a sidewalk. The other individuals that testified regarding their experiences with wash-downs each asserted, in some fashion, that wash-downs could have blood present along with the other debris subject to the wash-down. The overwhelming consensus among those individuals was that wash-downs would occur for the most part in connection with accidents of some sort. None of the individuals who testified, with the possible exception of Chief Distelrath as set forth above, testified that they were ever called to a crime scene specifically for the purpose of performing a wash-down. Additionally, none of the witnesses explicitly testified that they were ever required to dispose of bloody clothing or other blood materials in relation to a wash-down or otherwise.

Admitted into the record at the request of the Respondent were a series of various reports and other internal records which the Department uses to document the runs that its fire fighters, and equipment, are dispatched on. In its brief, the Respondent claims that said records indicate that from 2011 through March of 2019, Department fire fighters performed 159 wash-downs. Moreover, according to Respondent's interpretation of those selected runs, 66 of the wash-downs were runs made in response to requests at crime scenes.

Discussion and Conclusions of Law:

Section 15 of PERA requires a public employer to bargain collectively with the recognized representative of its public employees. Certain issues including "wages, hours and other terms and conditions of employment" are considered to be mandatory subjects of collective bargaining. *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44, 54-55 (1974); *Local 1277, Metropolitan Council No. 23, AFSCME v Center Line,* 414 Mich 642,652 (1982). Issues falling outside of this category are classified as either permissive or illegal subjects of bargaining. *Id* at 652. Unilateral action on the part of a public employer, or its refusal to engage in collective bargaining with respect to a mandatory subject, may constitute an unfair labor practice under Section 10(1)(e) of PERA.

Respondent's post hearing brief, while somewhat disjointed, presents as its defense against the Union's charge two main arguments. Firstly, Respondent argues that the implementation of SOP 1.4 did not impact any mandatory subject of bargaining because it simply "clarified existing job duties" and as such, its unilateral action did not violate PERA. To this first point, Respondent asserts that the duties codified in SOP 1.4, i.e., "wash-downs", have been undertaken by fire fighters for years. Secondly, Respondent claims that the implementation of SOP 1.4 was permitted pursuant to the parties' contract.

Addressing Respondent's first claim, that SOP 1.4 does not implicate any mandatory subject, I note that it is well established that safe work practices are conditions of employment and, as such, are mandatory subjects of bargaining. *NLRB v GulfPower Co,* 384 F2d 822, 824-825 (5th Cir, 1967). To that point, under PERA, a public employer has the duty to bargain even over decisions that are clearly matters of management prerogative, such as staffing, to the extent that they have a direct impact on employee safety. *Detroit Fire Fighters Ass'n v City of Detroit,* 271 Mich App 457,463 (2006).

Respondent, while explicitly acknowledging the danger and safety concern that bloodborne pathogens pose, appears nonetheless resolved to argue that because fire fighters may be exposed to blood or other bodily fluids during the course of their duties as a fire fighter, i.e., fighting a fire, rescuing individuals from fires or accidents, engaging in their MFR responsibilities, there is no reason to presume that the additional duties set forth in SOP 1.4 impacts safety in any greater amount. Such an argument ignores the plain and inarguable reality that the aforementioned duties are those intrinsically intertwined with the act of being a fire fighter; fire fighters acknowledge and accept the risk that in the furtherance of their duties in actively trying to safe lives that they may be exposed to certain dangers, including bloodborne pathogens. However, with the addition of SOP 1.4, additional duties such as cleaning up blood and/or collecting or disposing of contaminated items including clothing and other materials, are not tasks so obviously intertwined with firefighting. Moreover, further compounding this incongruity, SOP 1.4 can require fire fighters to do these extra duties in situations wholly unrelated temporally to their traditional duties, i.e., despite not being present as MFRs, fire fighters can be called to a scene after the fact to clean up the same. As such, it is my finding that SOP 1.4 does implicate a mandatory subject of bargaining because the duties set forth therein clearly and unequivocally impact issues regarding the safety of fire fighters.

When viewing the record as a whole, it is the opinion of the undersigned that the Respondent has not established that there existed a past practice regarding wash-downs, in the

manner contemplated under SOP 1.4, or the other duties set forth therein, that supports the City's argument that SOP 1.4 is simply a codification of what fire fighters have been doing for years. In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. *Amalgamated Transit Union v Southeastern Michigan Transportation Authority,* 437 Mich 441, 454 (1991). As the Court stated in *Amalgamated Transit Union:*

> A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a term or condition of employment.

In the present matter, assuming that the Respondent's interpretation regarding the incident runs it cited in its post-hearing brief is accurate, from 2011 through March of 2019, the Department had engaged in 159 wash-downs, of which 66 were runs made in response to requests at crime scenes.[4] Putting that claim in perspective, wash-downs as a total made up 0.0397% of the approximate runs for that time period; wash-downs in response to crime-scenes made up even less of the total runs at 0.0165% for that time period.[5] Moreover, several high-ranking members of the Department, while testifying that they had participated in wash-downs, as that term was generally agreed to entail, only Distelrath testified that he ever engaged in a wash-down at a crime scene specifically. While I would agree with the premise that fire fighters regularly engage in the act of a wash-down, or that it has become an accepted part of the job, I would constrain the definition or scope of a wash-down, as supported by the record, to the act of moving debris or other items, sometime commingled with blood, from public areas of the street, and was most often related to accident scenes. For this reason, I do not find that the Respondent met its burden to establish that the scope of the duties set forth in SOP 1.4, with the exception of the aforementioned scope of the term wash-down, was a past practice that the policy's implementation simply codified.

The above notwithstanding, an employer may defend against a charge that it has unilaterally altered working conditions by arguing that it has fulfilled its duty to bargain by negotiating a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining. *Port Huron EA v Port Huron Area Sch Dist,* 452 Mich 309, 318, (1996). In *Port Huron,* the Court noted that where the matter is "covered by" the agreement, the union has already exercised its bargaining rights. According to the Court, the Commission's initial charge is to determine whether the agreement "covers" the dispute. If it does, the enforceability of the provision is normally left to the parties' contractual grievance

---

[4] I note that I find the City's identification of only 159 wash-downs as suspect, given testimony from Green that he participated in washdowns once or twice a month and Biondo's testimony that he had participated in "hundreds" of **wash-downs.**

[5] Assuming approximately 50,000 runs per year per ChiefDistelrath's testimony for a total of approximately 400,000 **runs over an eight-year period.**

mechanism, supra, at 321. Moreover, as the Commission stated in *St Clair Co Rd Comm,* 1992 MERC Labor Op 533, 538:

> Where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is presented.

Traditionally, our Commission has refused to find a contractual waiver based on a broad management rights clause. *City of Rochester,* 1982 MERC Lab Op 324; *Oakland County Road Comm'n,* 1983 MERC Lab Op 1; *City of Garden City,* 1986 MERC Lab Op 901, *City of Dearborn,* 1993 MERC Lab Op 444. However, doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute. *Macomb Co v AFSCME Council 25, Locals 411 and 893,494* Mich 65, 82 (2013).

Respondent's post-hearing brief claims that its implementation of SOP 1.4 was permissive under Article 3 of the contract. Here, the parties' agreed upon management rights clause does not contain the sort of boilerplate language typically found in such a provision. See e.g. *Lapeer County,* 1984 MERC Lab Op 467 (broad management rights clause making no specific reference to the subject at issue does not constitute a waiver of bargaining rights). Rather, subsection B(6) and B(7) of Article 3 explicitly grants to the City the right to "to determine the content and nature of the work to be performed..." and "to establish, regulate, determine, revise, or modify at any time the policies, practices, protocols, processes, techniques, methods, means and procedures used in the Department..." Here the City exercised its authority to determine the scope of the work performed by bargaining unit members and added the additional duties covered in SOP 1.4, with the authority to implement the same, also reserved to the City. [6] As such, and for the reasons set forth above, I must conclude that the parties' contract covers the matter at issue here.

I have considered all other arguments as set forth by the parties and conclude that such does not justify a change in my conclusion. Accordingly, for the reasons set forth above I recommend that the Commission issue the following Order:

[6] I note that the addition of the duties required under SOP 1.4 clearly and unequivocally are duties not inherent within the traditional or established purview of what constitutes a fire fighter. However, the contract does not limit the City's authority to "determine the content and nature of the work to be performed" as a fire fighter.

RECOMMENDED ORDER:

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated November 27, 2019