STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

MERC Case No. 19-L-2233-CE

-and-

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

APPEARANCES:

Letitia C. Jones, Senior Assistant Corporation Counsel, for Respondent

Legghio & Israel, P.C., by Christopher P. Legghio, John G. Adam and Meghan B. Boelstler, for Charging Party

DECISION AND ORDER

On August 31, 2021, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

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

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: November 4, 2021

[1] MOAHR Hearing Docket No. 19-023600

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

In the Matter of:

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

Case No. 19-L-2233-CE;
Docket No. 19-023600-MERC

-and-

DETROIT FIRE FIGHTERS ASSOCIATION,
INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 344,
Charging Party-Labor Organization.

_____/

APPEARANCES:

Letitia C. Jones, Senior Assistant Corporation Counsel, for the Respondent

Legghio & Israel, P.C., by Christopher P. Legghio, John G. Adam and Meghan B. Boelstler, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Detroit Fire Fighters Association (DFFA), International Association of Fire Fighters (IAFF), Local 344 against the City of Detroit Fire Department. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the case was heard in Detroit, Michigan by David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the transcript of the hearing, exhibits and post-hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charges:

Charging Party DFFA represents a bargaining unit consisting of fire fighters, EMTs, paramedics and other employees of the Respondent City of Detroit Fire Department (DFD). The unfair labor practice charge, which was filed on December 4, 2019, asserts that Respondent violated Sections 10(1)(a) and (c) of PERA by requiring outgoing Union president Captain Michael Nevin to report to the Training Academy for recertification rather than immediately return to his position in the field. On February 6, 2020, Respondent filed

a motion for summary disposition. The Union filed a timely response to the motion on March 17, 2020. In an order issued on April 13, 2020, I denied the motion on the ground that there were questions of material fact which warranted an evidentiary hearing. The hearing commenced on September 15, 2020, and was completed on October 8, 2020. Post-hearing briefs were filed by the parties on or before February 28, 2021.

Prior Unfair Labor Practice Proceeding:

This is not the first time that the DFFA has brought a charge alleging that Respondent took action against Cpt. Nevin in retaliation for his activities as Union president. At the time the instant charge was filed, a hearing had just been held before the undersigned on two consolidated charges involving these same parties. In Case No. 19-H-1646-CE; Docket No. 19-016519-MERC, the DFFA asserted that Respondent, under the leadership of Fire Chief Robert Distelrath, had unlawfully denied Nevin's requests to "ride a firefighting rig" with his squad despite having allowed other Union officials to do so for more than 30 years. According to the Union, Nevin had submitted his requests to ride with his squad on multiple occasions throughout the summer and early fall of 2019. The charge in Case No. 19-G-1452-CE; Docket No. 19-015459-MERC alleged that Respondent retaliated against Nevin by requiring him to submit to a disciplinary "*Garrity*" interview on June 26, 2019, as part of an administrative investigation into alleged criminal conduct.

In a Decision and Recommended Order issued on January 5, 2021, I concluded that Cpt. Nevin had engaged in protected concerted activity of which Chief Distelrath and other high level DFD officials were aware and that Distelrath harbored animus towards Nevin's actions as Union president. Specifically, I made the following findings:

> Nevin was elected DFFA president in December of 2015 and he remained in that position throughout the events giving rise to this dispute. From 2017 to 2019, the Union filed approximately thirty grievances each year, a marked increase from the number of grievances filed during the previous three-year period, as well as an unspecified number of unfair labor practice charges and MIOSHA claims. The record establishes that Distelrath, who became Fire Chief in 2016, was aware of these filings, as was Deputy Fire Commissioner [David] Fornell. At hearing Distelrath identified Nevin as one of the catalysts driving the grievances, while Nevin testified that Fornell characterized him as the individual responsible for all the Union activity. Under Nevin, the Union also publicly criticized Fire Department response times, including by way of posting dispatch reports on social media.
>
> The record also establishes that Chief Distelrath and others within the Fire Department harbored animus towards Nevin's protected activity. Although Distelrath is himself a longstanding member of the DFFA, the Chief admitted that he and Nevin have a troubled and contentious relationship. In its post-hearing brief, Respondent attempts to characterize the difficulties between Distelrath and Nevin as arising from a personal dispute; however, it is clear from Distelrath's own testimony that it was Nevin's vigorous representation of Charging Party's members which drew

> the Fire Chief's ire. Distelrath testified that he and Nevin have frequently clashed over Union matters and he described the grievances and unfair labor practice charges filed by Charging Party under Nevin's leadership as "troublesome and annoying." Distelrath also conceded that he takes criticism of the Fire Department personally. Distelrath's testimony, along with the pretextual nature of the Chief's explanation for denying Nevin's requests, as set forth in detail below, would be sufficient to support a finding of anti-union hostility on the part of Respondent. This conclusion is further buttressed, however, by Nevin's testimony concerning conversations he had with Fornell and [Labor Relations Representative Hakim] Berry. Nevin testified that Fornell told him that he deserved "grief" for filing unfair labor practice charges against Respondent and that Berry asked him what it would take to curtail his Union activities.

With respect to the allegation that Chief Distelrath unlawfully prevented Cpt. Nevin from riding a rig with his squad, I found that the Chief's actions were motivated by his animus toward Nevin and the DFFA. I determined that the evidence presented by the Union overwhelmingly established that there was a longstanding and widely acknowledged past practice of Respondent allowing Union officers to work in the field from which the Fire Department deviated only after Charging Party, under Nevin's leadership, began filing numerous grievances and unfair labor practice charges. There was also additional testimony linking the denial of Nevin's request to ride a rig to his protected concerted activities, including the fact the deputy fire commissioner explicitly referenced Nevin's actions as Union president when explaining why he was not allowed to ride with his squad. For those reasons, I concluded that Respondent violated Sections 10(1)(a) and (c) of PERA by refusing to allow Nevin to ride a rig in retaliation for his vigorous advocacy on behalf of DFFA members. This conclusion was based, in part, on my determination that Distelrath was not a credible witness and that his testimony, which was "rife with inconsistencies and dubious claims" could not be relied upon to establish a non-discriminatory motive for the Fire Department's actions.

I reached a different conclusion, however, regarding the *Garrity* interview of Cpt. Nevin. I found that there was no evidence showing that Chief Distelrath or any other DFD representative participated in the investigation of Nevin or the scheduling of the *Garrity* interview in any meaningful way. Rather, it was undisputed that the investigation was conducted solely by Sgt. Deanna Wilson of the City of Detroit Police Department's Internal Affairs (IA) division. Moreover, the record established that the IA Division is required to complete an administrative investigation at the conclusion of every criminal case involving a City employee, of which a *Garrity* interview is a necessary component, and that Wilson has conducted such interviews in every case unless the subject of the investigation resigns. For those reasons, I recommended dismissal of allegations relating to the interview of Nevin. On exception, the Commission rejected Respondent's assertion that there was insufficient evidence to support my finding of anti-union animus or to overturn my credibility determinations. While modifying the remedial order attached to my decision, the Commission agreed with my determination that Respondent violated Sections 10(1)(a) and (c) of PERA by prohibiting Nevin from riding a rig. *City of Detroit (Fire Department)*, 34 MPER 49 (2021).

Findings of Fact:

I. Background

The City and the Union are parties to a collective bargaining agreement covering the period November 6, 2014, through June 30, 2019. The contract contains a Management Rights provision, Article 3, Section B, which gives Respondent the authority to manage the operations of the Fire Department, including the authority 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. The agreement also contains a grievance procedure, Articles 8 and 9, culminating in final and binding arbitration.

The DFFA executive board is comprised of a president, vice president, secretary and treasurer, each of whom serve a two-year term. Pursuant to the collective bargaining agreement, executive board members are granted full-time release while working as Union officers. Specifically , Article 5, Section D of the contract provides that the DFFA president, vice-president, secretary and treasurer "shall be permitted time off on a full time basis with compensation to which their rank otherwise entitles them, including without limitation: salary, pension credits and contributions, seniority, etc." Nevertheless, executive board members are expected to maintain compliance with various requirements established by Respondent, including certification, training and other specifications. Cpt. William Harp, who has worked for the Fire Department for more than 30 years and is currently the DFFA Vice President, testified that Union officers are still considered "in service" and may be called upon to return to work in the field at the discretion of the Fire Chief. Likewise, Deputy Fire Chief Robert Shinske, testified that when a fire fighter is serving on the DFFA executive board, he or she is not considered "separated from active duty."

In order to be in compliance with DFD requirements, active-duty employees must have passed a self-contained breathing apparatus (SCBA) fit test, a tuberculous test, and an N95 mask fit test. Other requirements include maintaining Cardiopulmonary Resuscitation (CPR), Michigan Department of Health and Human Services (MDHHS) and Michigan Occupational Safety and Health Administration (MIOSHA) certifications and completing various online training courses offered by Respondent. The department uses a computer database to track the compliance status of individual employees. Active-duty employees who are found not to be in compliance with DFD standards are placed on leave without pay status until the issue is corrected. Employees who are not on active duty, such as those individuals who are on leave of absence due to injury or for other reasons, are not required to be in compliance until they are ready to return to work.

II. Recertification

When an employee has been absent from the field for more than a year, he or she must go through a process referred to by the parties alternatively as recertification or orientation. At hearing, Cpt. Harp testified that the recertification process is intended to avoid legal liability for the DFD and to verify that employees have met all requirements before returning to work.

The recertification process was first codified in writing on November 3, 2004, when Executive Fire Commissioner Tyrone Scott issued Official Bulletin 89-94. The Bulletin provides that DFD employees who have been "off duty for one or more years must complete a 6-week orientation schedule at the Training Academy." According to the Bulletin, the purpose of orientation is to "update and re-acclimate the individual to departmental policies, standard operating procedures, and training." Deputy Chief Shinske was a Union officer at the time Official Bulletin 89-94 was issued. Shinske testified that at a Union meeting around that time, the DFFA president and the rest of the executive board indicated that the policy was applicable to Union officers returning to regular duty, a conclusion which "shocked" Shinske at the time.

On August 1, 2018, the DFD issued Standard Operating Procedure 1.8 which revised the process to be followed for individuals returning to regular duty. Under the SOP, an individual who is returning to active duty from sickness, injury status, military leave, etc. must contact the Senior Chief in order to verify that he or she meets all compliance requirements. If the individual is out of compliance, he or she must report to the training academy until compliance is up-to-date. Pursuant to the SOP, any individual who has been off duty for one year or longer must report to the training academy for recertification. The recertification process is intended to ensure that individuals have met standards established by the National Fire Protection Association (NFPA) and the Michigan Fire Training Counsel (MFTC), as well as internal DFD policies. The process also provides individuals with refresher training in policies, procedures, and equipment, including a hazardous materials (Haz Mat) refresher class, a medical first responder refresher class, an incident command class, a refresher class on standard operating procedures, driver's training and an SCBA challenge.

Alfie Green has worked for Respondent since 2008 and has been involved in training and recertification throughout his tenure with the DFD. Since 2016, Green has been employed as Chief of Training. In that capacity, he serves as the commanding officer of the training academy and is responsible for assigning training modules to ensure that employees meet the minimum requirements necessary in order to return to work as a fire fighter. Green testified that the recertification process begins when the senior chief sends an email to the academy indicating that an individual is returning to regular duty. According to Green, the time that an individual is required to spend at the training academy varies depending on several factors, including how long that individual was off duty and whether they are returning from injury. Green testified that some individuals spend as little as two days at the academy. If an individual is still at the academy after 45 days, a reevaluation occurs to determine what actions should be taken to ensure completion of the recertification process.

Green testified that the training academy is a benefit to the employees who are sent there for recertification. According to Green, approximately 30% of the recertification program is individualized to the needs of each fire fighter. For example, a fire fighter who was returning to work from a motorcycle injury underwent physical rehabilitation while at the academy. However, the record indicates that there are financial implications to being sent to the training academy as opposed to being immediately returned to a position in the field. While at the training academy, employees are ineligible for overtime, out-of-class pay, holiday pay and other benefits. Harp estimated that a captain who is sent to the training academy would lose about $135 per day by not being able to work out of class as a battalion chief.

III. Practical Application of Return to Work Policies

Deputy Chief Shinske testified that every individual who has been away from the field for more than a year must go through the recertification process, regardless of whether they have otherwise met the compliance requirements. In fact, Shinske testified that he was sent to the training academy when he left Union office in 2015 after a six-year stint as DFFA treasurer. At the time, Shinske was accompanied at the academy by outgoing DFFA officers Jeff Pegg and Theresa Singleton. Shinske reported to the training academy five days a week for eight hours a day beginning in December of 2015. He was not sent back into the field until February of 2016. While at the academy, Shinske updated all of his certifications, caught up on assignments and reviewed new developments within the department. Shinske testified that other former Union officers have been assigned to the training academy after leaving office, including Verdine Price and Steve Kushner in 2011. Shinske testified that he was aware of only one instance in which Respondent made an exception to the policy. According to Shinske, former DFFA president Dan McNamara was sick at the time he left Union office and was allowed to work at headquarters until his retirement rather than report to the academy.

Likewise, Green testified that, without exception, the DFD requires that any fire fighter who has not worked in the field for more than one year must report to the training academy for recertification. In support of this contention, Respondent produced a document prepared at Green's direction listing all of the individuals who were assigned to the training academy from January 2014 through May 2020. According to the list, four fire fighters were assigned to the training academy after leaving Union office: Michael Nevin, Jeffrey Pegg, Shinske and Teresa Singleton. With respect to non-DFFA officers, the list identifies 30 fire fighters who completed the academy's return to work program during the period in question, along with 2 individuals who were still in recertification at the time of the hearing, three firefighters who were assigned to the academy but retired or were discharged prior to completing the program and five individuals who were assigned to the academy for compliance purposes only.

Despite Shinske and Green's insistence that attendance at the training academy is mandatory for individuals who have been out of the field for more than a year, the record establishes that several DFD employees have been allowed to return to positions in the field without going through the recertification program. None of the individuals in question were returning to work after having served on the DFFA executive board.

A. James Plieth

James Plieth has worked for Respondent for 25 years and is currently a sergeant assigned to Squad Company 6. In 2015, Plieth was transferred from his position in the field to a desk job at DFD headquarters where he remained for 16 months. Upon his return to fire fighting, Respondent attempted to send him to the training academy for recertification. Plieth protested that decision, arguing that the policy did not apply to him because he had never formally left the firefighting division. Plieth contacted Nevin, his Union president, who sent an email to the City requesting that Plieth be returned directly to the field without recertification. Respondent granted that request. At the time, John King was Fire Chief.

Plieth was once again assigned to a position at headquarters during the period 2017-2018. After six months, Plieth sent a letter to Fire Chief Distelrath indicating that he no longer wanted to work at headquarters and requesting that he be returned to the field on his normal schedule. The letter was returned to him stamped "Approved" and he resumed his firefighting duties without going through the recertification process. Plieth testified that he was aware of several other fire fighters who were allowed to return to the field without being assigned to the training academy, including Verlin Williams, Kevin Kennedy, Ernie Macy, Orlando Watkins and Paul Martin. None of the individual whom Plieth identified were former DFFA officers.

B. Michael Carroll

Michael Carroll has worked in the firefighting division since 2004 and is currently a fire fighter with Engine 29. In 2016, Carroll was assigned to a fire investigator position at DFD headquarters. Carroll described the position as a desk job, although he made some court appearances and conducted investigations of fire scenes. The position did not require Carroll to engage in fire fighting. When Carroll decided he wanted to return to the firefighting division in 2016, he notified his captain, who told him to submit his request in writing. Carroll did so and the request was forwarded up the chain of command and ultimately approved. Chief King instructed Carroll to report to Ladder Company 27. Carroll testified that he was never asked about his credentials or instructed to report to the training academy for recertification.

C. Sean Wilson

Sean Wilson has worked for Respondent for 20 years and is currently a firefighter assigned to Engine 33. In 2013, he was transferred from the firefighting division to a fire inspector position. The position, which was based out of the public safety headquarters, did not involve any fire fighting responsibilities. Rather, Wilson did desk work and performed inspections of buildings and fire suppression systems. After working three years as a fire inspector, Wilson wrote a letter to Chief Distelrath, the fire commissioner and the fire marshall requesting a voluntary demotion back to the firefighting division. He received a copy of the letter stamped "accepted." Two weeks later, he was placed back on active duty as a fire fighter. Nobody from management ever discussed recertification with Wilson, nor was he ever asked about his credentials.

D. Sean Friday

Sean Friday was transferred from his position as a firefighter to work in an IT position in Chief Distelrath's office. He remained there fore several years before being sent back to the field in March or April of 2020 at Distelrath's direction. Friday was not required to go through the recertification program.

IV. Nevin's Return to Work

Cpt. Nevin was elected DFFA president in 2015. As in the prior case between these parties, Chief Distelrath admitted that he had had a contentious relationship with Nevin and that the Union filed multiple grievance and unfair labor practice charges during Nevin's tenure which the Fire Chief believed were frivolous, troublesome or annoying.

Chief Distelrath testified that after the results of the 2019 DFFA election were finalized, he ordered Nevin to report to the training academy for recertification. Distelrath asserted that before making that decision, he checked Nevin's credentials and determined that he was up-to-date. When asked why he sent Nevin to the academy despite the fact that he was in compliance, Distelrath explained that recertification is different than compliance and that because Nevin had been away from fire fighting for several years, he believed that it was "prudent that he go through [the] process before we entrusted him with the safety of members." Distelrath testified that his expectation in sending Nevin for recertification was that it would ensure that he was competent to work out-of-class as a battalion chief and perform all of the duties of that position, from paperwork to responding to emergencies. According to Distelrath, the duties of a battalion chief had "changed immensely" between 2015 and 2019. After the order was issued, the Union reached out to Distelrath and requested that Nevin be released from having to report to the academy. That request was not approved.

Deputy Chief Shinske testified that the decision to send Cpt. Nevin to the training academy for recertification was made based upon discussions between himself, Chief Distelrath and Deputy Chief Biondo, although the order itself came from Senior Chief Jack Huckleby. According to Shinske, there was no conversation at the time as to whether Nevin was up-to-date on his compliance requirements because "when someone goes for recertification, the academy will make that assessment once they get there."

Cpt. Nevin was initially ordered to appear at the training academy to begin recertification on December 5, 2019. However, he was not available to work that day and was allowed to use banked leave time in lieu of being considered off work without pay. Nevin ultimately reported to the training academy on December 13, 2019. According to Green, Nevin had already completed "the physical stuff" by the time he arrived at the academy and only needed to pass the SCBA challenge and "ladders and ropes." He was released from the training academy ten days later on December 23, 2019.

Rather than immediately return to his normal duties in the field, however, Cpt. Nevin was instead ordered to "shadow" a battalion chief. According to Chief Distelrath, this process, which is generally referred to as "orientation," has been going on for more than 30 years and is intended to ensure that captains understand the work of the battalion chief so that they are prepared to perform those duties if called upon to work out-of-class. Nevin

worked two or three days shadowing a battalion chief in late December 2019 through early January 2020. Thereafter, he was off work serving a suspension for reasons not set forth in the record. Nevin returned to work around February 8, 2020, and was once again required to ride along with a battalion chief for a few more days until Senior Chief Todd Fugiel finally signed off on his readiness. At that point, Nevin was released to perform his normal duties.

Cpt. Harp testified that Nevin would have been working out-of-class as acting fire chief had he not been assigned to engage in shadowing and that the treatment of Nevin after he left the training academy was unprecedented. Harp asserted, "There's no other individual in the entirety of the time that I have been on this job, that I am aware of, that was made to ride 24 hours with a battalion chief for a number of days in order to be able to be cleared to do the battalion chief's role." In fact, Harp testified that there is no formal shadowing program within the DFD. Rather, Harp testified that a battalion chief will sometimes invite a captain to come over in the morning for the sole purpose of making sure that they understand how to fill out paperwork. Deputy Chief Shinske testified that when he returned to the training academy, he underwent on-the job training with a battalion chief but was never required to ride along in the field for a 24-hour period.

V. Nevin's Day Off

Chief Distelrath testified that Senior Chief Fugiel was in charge of Nevin's schedule when the shadowing process was ongoing. Fugiel approved Nevin's request to be off work on a specific date in early January 2020. However, Distelrath intervened and ordered Fugiel to require that Nevin immediately return from Ohio and appear at work by 2:00 p.m. on his day off so that he could attend a hearing before the Human Resources (HR) department. Nevin was cautioned that he would be considered on leave without pay if he did not comply with the order. At hearing in this matter, Distelrath admitted that Nevin had obtained the proper approval to take time off and that the HR hearing could have been rescheduled. Similarly, Deputy Chief Shinske testified that if a fire fighter was on vacation or otherwise off work for other reasons on the date that an HR hearing is supposed to occur, the hearing would ordinarily be rescheduled for the next day. Beyond asserting that Nevin "should have been at work," Distelrath offered no explanation for why the hearing date was not changed.

VI. Distelrath Testimony

As in the prior case involving these parties, there were many problems with Chief Distelrath's testimony which raise serious questions as to his veracity or, at the very least, his reliability as a witness. Distelrath was initially called to testify as an adverse witness during Charging Party's case-in-chief. From the outset, his description of the recertification process was confusing and problematic. The Fire Chief began by avowing that since 2004, all "union members" have been required to go to the training academy for recertification after having been off work for a period time. When confronted with the testimony of Carroll and Wilson, Distelrath at first vehemently denied that there was anything contradictory about his claim that the policy had been universally applied:

> A (by Distelrath): Since 2004, all union members have been required to go through the recertification process.

> Q (by counsel for Charging Party): Well, you've heard testimony today that's not true; right?
>
> A: No, I have not heard testimony today that's not true. You have presented members that did not go through the recertification process, but you have not produced a member from the executive board that didn't have to go through the process.

The above exchange is noteworthy in that Distelrath appears to concede the merits of the Union's claim: that Respondent has treated Union officers differently than other members of the bargaining unit with respect to recertification. Apparently realizing the consequences of his testimony, Distelrath then attempted to distinguish Nevin's situation from that of Carroll, Wilson and Plieth. Chief Distelrath testified that the recertification policy did not apply to Carroll and the other firefighters who had been assigned to desk duty because they "always worked in the job continuously in the fire department" whereas members of the DFFA executive board "are excused from duty" and are "not subject to the department command." Such an assertion flies in the face of Captain Harp's testimony that Union officers are still considered "in service" and Shinske's claim that DFFA executive board members are not considered "separated from active duty."

Distelrath then contradicted himself once more by reversing course and acknowledging that there is in fact no distinction between being a Union officer and working a desk job:

> Q: So is your answer, then, that because those individuals are subject to department command, even though they're working desk jobs, that [is the] reason they're able to avoid the recertification that the city attorney has indicated is necessary for the city's compliance?
>
> A: No. I'm not really making any distinction. What I'm telling you is that I can't speak to all of those [exceptions to the recertification policy] because I wasn't responsible for them.

Chief Distelrath conceded that he was Fire Chief when Wilson returned to the field without being sent to the training academy. Distelrath testified that he discussed the situation with Wilson and Shinske. According to Distelrath, Wilson brought up the fact that Carroll had recently been allowed to return to regular duty without going through recertification and "[A]t that time I agreed with him. I sent him back to the field without the recertification." When asked to explain why he ordered Wilson back to the field, Distelrath testified that it was because the firefighter was "in compliance." When Distelrath was later recalled to the stand as a Respondent witness, he was again asked why he had allowed Wilson to skip the training academy. This time, Distelrath responded by indicating that he had only been Fire Chief for a few weeks and that Standard Operating Procedure 1.8 had not yet been issued. Distelrath testified that if he had to make the same decision today, he would require Wilson to go through the recertification process.

With respect to his decision to allow Sean Friday to skip recertification, Distelrath acknowledged that Standard Operating Procedure 1.8 was in place when he ordered Friday

to return to work. Distelrath asserted that his order sending Friday back into the field was simply an "oversight" and a "mistake." When he was recalled to the stand on the second day of hearing, Distelrath offered a slightly different account of what had occurred. Describing the situation as "a little bit complicated," Distelrath testified that Friday was off duty serving a suspension. When the discipline was completed, Friday experienced a health issue and "so ultimately he returned to work through the medical case manager, and he returned to his assignment without going through the recertification process." Distelrath conceded that he still does not know whether Friday was in compliance at the time he resumed his regular duties. Despite that admission, there is no evidence that the DFD ever required Friday to undergo recertification after realizing the "mistake."

Distelrath testified that he initially ordered Sgt. Plieth to report to the training academy for recertification. However, Plieth appealed the order and Distelrath was overruled by the fire commissioner and sent back to the field without reporting to the training academy. However, Distelrath offered no explanation as to the circumstances which led to Plieth being returned to regular duty a second time.

Finally, with respect to the issue of shadowing, Chief Distelrath acknowledged that there is no written policy codifying that practice but testified that shadowing or "orientation" has been going on for at least three decades. However, Distelrath was unable to identify any other instance in which a captain has been required to shadow a battalion chief for as long a period as Nevin.

Discussion and Conclusions of Law:

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to public employees under Section 9 of the Act, including the right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." While anti-union animus is not a required element to sustain a charge based on a Section 10(1)(a) violation, a party must still demonstrate that the complained of actions by an employer have "objectively" interfered with that party's exercise of protected concerted activity. *Huron Valley Sch*, 26 MPER 16 (2012); *Macomb Academy*, 25 MPER 56 (2012).

Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. Analysis of whether an employer's action against employees violates Section 10(1)(c) of the Act is governed by the test 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, as adopted by the Commission in *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983), the charging party has the initial burden of establishing that union activity was a motivating factor in the adverse employment action by proving: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Huron Valley Sch, supra; Univ of*

Michigan, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility,* 1993 MERC Lab Op 686, 696.

A charging party may meet the *Wright Line* burden with evidence short of direct proof of motivation. In other words, the employer's actual state of mind need not be established. See e.g., *Macomb County (Juvenile Justice Center)*, 28 MPER 4 (2014); *City of Royal Oak*, 22 MPER 67 (2009); *Stadium Mgmt Co*, 1977 MERC Lab Op 458; *St. Lawrence Hospital*, 1971 MERC Lab Op 1173. 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); *Inkster Housing & Redevelopment Auth*, 23 MPER 21 (2010) (no exceptions). See also *Volair Contractors, Inc*, 341 NLRB 673 (2004); *Tubular Corp of America*, 337 NLRB 99 (2001); *Shattuck Mining Corp v. NLRB*, 362 Fd 466, 470 (CA 9, 1966). If it is found that the employer's actions are pretextual, the employer fails by definition to show that it would have taken the same action in the absence of the protected conduct and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp*, 255 NLRB 722 (1981), enf'd 705 F.2d 799 (CA 6, 1982); *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *NLRB v IBEW, Local 429*, 514 F3d 646 (2007).

There can be no dispute that Cpt. Nevin was engaged in protected concerted activity of which Respondent was aware. The record establishes that Nevin was Union president from 2015 to 2019 and that during his tenure, the DFFA filed multiple grievances and unfair labor practice charges. Thus, the central question here is whether Respondent harbored a retaliatory motive for requiring Nevin to report to the training academy for recertification based upon his activities as Union president.

Respondent contends that the record is devoid of evidence of any unlawful motivation on the part of Chief Distelrath. I disagree. In the prior case between these parties, of which I take official notice, the record established that Distelrath and others within the DFD harbored animus towards Cpt. Nevin's protected activities. That finding was based upon testimony demonstrating that Distelrath and other high-ranking officials were angry about Nevin's vigorous representation of DFFA members, as well as evidence indicating that the explanations Distelrath provided at hearing for the actions taken against Nevin were pretextual. As noted, the commission of other unfair labor practices by an employer is relevant in determining motivation of underlying subsequent conduct. *Detroit Public Schools*, 30 MPER 2 (2016); *Detroit Public Schools*, 25 MPER 84 (2012). See also *Paramount Cap Mfg Co v NLRB*, 260 F2d 109, 112-113 (CA 8 1958); *NLRB v Hale Container Line*, 943 F2d 394, 398-399 (CA 4, 1991); *Overnite Transportation Co*., 336 NLRB 387, fn. 2 (2001). Thus, Respondent's anti-union hostility and its prior discriminatory treatment of Nevin is probative of whether the acts complained of in the instant case were unlawfully motivated, as is Distelrath's admission here that he found Charging Party's filing of unfair labor practice charges and grievances under Nevin's tenure as president "troublesome" and "annoying." The evidence of a prior violation is particularly probative of motive given the relatively short period of time between the commission of the earlier unfair labor practice and the issuance of the order requiring Nevin to appear at the training academy.

See e.g. *Maphis Chapman Corp v NLRB*, 368 F2d 298 (CA 4, 1966). Also notable is the fact that the actions taken by Respondent against Nevin in both cases are similar in nature and that the decisionmaker in each of these matters was the same individual, Distelrath.

There is no dispute that Respondent has had policies in place regarding recertification for many years. Official Bulletin 89-94, which was issued in 2004, provides that DFD employees who have been "off duty for one or more years must complete a 6-week orientation schedule at the Training Academy." In 2018, Respondent issued Standard Operating Procedure 1.8 which revised the process to be followed for individuals returning to regular duty. Under that SOP, individuals who have been off work for less than one year must verify that they have satisfied the department's compliance requirements, while fire fighters who have been off duty for one year or longer must report to the training academy for recertification. It is also undisputed that Respondent has assigned numerous individuals to the training academy over the years, including four former Union officials and more than thirty individuals who never served on the DFFA executive board. However, the record also establishes that the policy has not been consistently applied. Sgt. Plieth testified that on two separate occasions, he was allowed to transfer directly from a 40-hour a week job at headquarters to his former position in the field without reporting to the training academy. Plieth also identified several other fire fighters who were allowed to skip recertification, including Verlin Williams, Kevin Kennedy, Ernie Macy, Orlando Watkins and Paul Martin. Likewise, fire fighters Mike Carroll, Sean Wilson and Sean Friday returned to regular duty after working at headquarters without going through the recertification process. Notably, Friday was allowed to return to his normal duties just four months after Distelrath compelled Nevin to report to the academy for recertification.

Respondent stresses that its policies relating to compliance and recertification are necessary to ensure the safety of DFD employees and members of the public. To that end, the Employer characterizes the exemption of Carroll, Friday and other firefighters from the recertification policy as mere mistakes which must be rectified. In its post-hearing brief, counsel for the Employer writes, "Should they have been brought back through the academy, most certainly YES!" Yet, there is no evidence in the record indicating that the DFD has ever attempted to remedy these mistakes upon discovering that they had occurred. In fact, Distelrath admitted at hearing that he still does not know whether Friday was in compliance at the time he resumed his regular duties.

As in the prior case, Chief Distelrath's testimony was rife with contradictions. The fire chief began by asserting that all "union members" are required to recertify after extended absences. When asked to explain why Carroll and Wilson did not go through the training academy program, Distelrath initially seemed to acknowledge that Nevin and other Union officers were treated differently. He then attempted to argue that the recertification policy simply did not apply to individuals working non-firefighting jobs at headquarters because those individuals "always worked in the job continuously" whereas members of the Union executive board are "excused from duty." Such a claim is contradicted by testimony from both DFFA vice-president Harp and Chief Shinske, the latter of whom was an Employer witness. Distelrath then seemed to reverse course once again, conceding that the policy applies to all individuals who have been absent from the field for over a year and that there is no distinction between being a Union officer and working a desk job.

Chief Distelrath's testimony regarding what occurred with respect to Carroll and the other firefighters was equally perplexing. Distelrath initially testified that he allowed Wilson to return to the field without first going to the training academy because the fire fighter was "in compliance." When recalled to the stand, the Fire Chief defended his decision on the basis that the Standard Operating Procedure 1.8 had not yet been issued. Such testimony ignores that fact that Official Bulletin 89-94 was still in place when Wilson returned to work and that the policy, by its terms, requires that employees who have been off duty for more than a year must undergo orientation at the academy. Distelrath's testimony also fails to account for the fact that Friday was also allowed to skip the academy, even though the SOP was in effect at the time. Distelrath's explanation for why the policy was not followed with respect to Friday changed from the time the Fire Chief testified as part of the Union's case-in-chief and when he was called to the stand by Respondent. Distelrath initially characterized the treatment of Friday as simply an "oversight" and a "mistake." Testifying later as an Employer witness, Distelrath asserted that the situation was "complicated" and that Friday was released back into the field due to a decision by a medical case manager. Distelrath offered no explanation as to why Plieth was allowed to skip recertification when he returned from headquarters a second time. On that occasion, Plieth sent a letter directly to Distelrath requesting that he be returned to regular duty and he received the letter back stamped "approved." Distelrath's testimony overrides any inference from Respondent's application of the policy to other employees.

In addition to the various inconsistencies in the testimony of Chief Distelrath, I find Respondent's treatment of Nevin after he left the training academy to be probative of a discriminatory motive. After completing the recertification program, Cpt. Nevin was ordered to work alongside or "shadow" a battalion chief. This assignment continued for several days in late December 2019 through early January 2020 and then resumed in February after Nevin returned from serving a suspension. Although Distelrath testified that shadowing has existed in the DFD for many years, he was unable to identify any written policy acknowledging the practice. In fact, Cpt. Harp asserted that there is no formal shadowing program in the DFD and that to the extent such a practice exists, it typically consists of having a captain visit a battalion chief for the purpose of learning how to fill out paperwork. Moreover, Harp testified credibly that he knows of no other employee who was required to ride along with a battalion chief for 24 hours. Although Deputy Chief Shinske testified that he previously underwent on-the-job training with a battalion chief, he acknowledged that he was never required to ride along in the field for as long as Nevin. Respondent compounded its unparalleled treatment of Nevin by ordering him to attend an HR hearing in early January of 2020, despite the fact that he had already received approval from Senior Chief Fugiel to be off that day. Although Distelrath admitted that Fugiel was in charge of Nevin's schedule while he was engaged in shadowing, there is no dispute that the order requiring Nevin to return to work came from Distelrath himself. Notably, Distelrath offered no plausible explanation for why the HR hearing could not have been rescheduled or why Nevin was not permitted to use banked leave time, as he was allowed to do when he was initially supposed to report to the training academy. Such evidence constitutes further proof that Respondent's treatment of Nevin was retaliatory.

Respondent clearly had the right to send Cpt. Nevin to the training academy for recertification. Nevertheless, the Commission has previously held that a decision about which there is no duty to bargain may nevertheless be unlawful if the employer' s actions are

motivated by anti-union animus. *Southfield Pub Schs*, 25 MPER 36 (2011); *Detroit Public Schools*, 25 MPER 84 (2012); *Coldwater Cmty Schs*, 2000 MERC Lab Op 244; *Parchment Sch Dist*, 2000 MERC Lab Op 110 (no exceptions). The record in the instant case establishes that the DFD sent Nevin for discriminatory reasons and that Respondent's reliance on Official Bulletin 89-94, Standard Operating Procedure 1.8 and past practice to justify its actions is mere pretext. This determination is based upon Distelrath's inconsistent testimony concerning application of the recertification policy, the fact that Nevin was required to spend multiple days shadowing a battalion chief before being released to his regular duties and Distelrath's decision to order Nevin to return to work on his day off. For these reasons, and in light of my findings in the prior case involving these same parties, I conclude that the only plausible explanation for the actions taken against Nevin is that Distelrath was determined to harass Nevin because of his activities as Union president. For the same reasons, I find that such actions would objectively tend to restrain, interfere or coerce a reasonable employee in the exercise of his or her rights under the Act, in violation of Section 10(a)(1).

I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. For the reasons set forth above, I find that Respondent violated Sections 10(1)(a) and (c) of PERA with respect to its treatment of Cpt. Nevin after his term as Union president ended and recommend that the Commission issue the following order.

RECOMMENDED ORDER

The City of Detroit (Fire Department), its officers and agents, are hereby ordered to:

1. Cease and desist from:

    a. Interfering with, restraining, or coercing employees, including but not limited to Michael Nevin, in the exercise of rights guaranteed in Section 9 of the Act, including the right to hold or seek union office and to pursue grievances and unfair labor practice charges on behalf of members of the DFFA bargaining unit.

    b. Discriminating or retaliating against employees, including but not limited to Michael Nevin, regarding terms or other conditions of employment in order to discourage the holding of office in a labor organization or the pursuit of grievances and unfair labor practice charges.

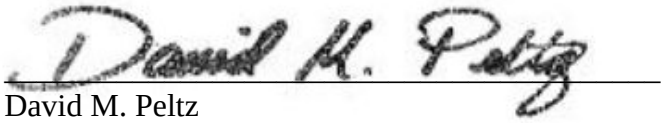
2. Take the following affirmative action to effectuate the purposes of the Act:

    a. Reimburse Michael Nevin for any financial losses he suffered as a result of having been ordered to attend the training academy for recertification.

    b. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices

to employees are customarily posted and post it prominently on any website maintained by the Fire Department for employee access for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings & Rules

Dated: August 31, 2021

NOTICE TO ALL EMPLOYEES

The CITY OF DETROIT (FIRE DEPARTMENT), a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the order of the MICHIGAN EMPLOYMENT RELATIONS COMMISSION, we hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining, or coercing employees, including but not limited to Michael Nevin, in the exercise of rights guaranteed in Section 9 of the Act, including the right to hold or seek union office and to pursue grievances and unfair labor practice charges or take other protected concerted actions on behalf of members of the bargaining unit represented by the Detroit Fire Fighters Association (DFFA), Local 344.

WE WILL cease and desist from discriminating or retaliating against employees, including but not limited to Michael Nevin, regarding terms or other conditions of employment in order to discourage the holding of office in a labor organization or the pursuit of grievances and unfair labor practice charges.

WE WILL reimburse Michael Nevin for any financial losses he suffered as a result of having been ordered to attend the training academy for recertification.

WE ACKNOWLEDGE THAT all of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of PERA.

CITY OF DETROIT (FIRE DEPARTMENT)

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.