STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent

MERC Case Nos. 20-I-1425-CE
& 20-I-1426-CE

-and-

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

APPEARANCES:

Letitia C. Jones, City of Detroit Law Department, for Respondent

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

DECISION AND ORDER

On October 27, 2020, Administrative Law Judge Travis Calderwood 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: January 14, 2022

[1] MOAHR Hearing Docket Nos. 20-017711 & 20-017712

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

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer,

Case Nos. 20-I-1425-CE
20-I-1426-CE

-and-

Docket Nos. 20-017711-MERC
20-017712-MERC

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

Letitia C. Jones, City of Detroit Law Department, for Respondent

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

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On September 4, 2020, the Detroit Fire Fighters Association, Local 344 (Charging Party or Union), filed the above unfair labor practice charges with the Michigan Employment Relations Commission (Commission) against the City of Detroit (Respondent or City). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA),1965 PA 379, the charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules (MOAHR).

The parties appeared before the undersigned on December 2 and December 3, 2020. Based upon the entire record, including the transcript of the hearing, the exhibits admitted into the record and the parties' post hearing briefs filed on February 26, 2021, I make the following findings of fact, conclusions of law and recommended order.

Unfair Labor Practice Charge and Procedural History:

Charging Party's initial filings, while identical in scope and theory, were filed on behalf of two separate bargaining units. Case No. 20-I-1425-CE was filed on behalf of the DFFA I, the bargaining unit comprised of Fire Fighters and other related divisions. Case No. 20-I-1426-CE was filed on behalf of DFFA II, the bargaining unit that is comprised of the Emergency Medical Services (EMS) Division. As stated above, the charges were identical in both scope and theory with the DFFA claiming that the City's unilateral placement of DFFA I bargaining unit members into DFFA II positions and work, along with its actions surrounding the same, violated Sections 10(1)(a), (b), (e) of PERA.

On November 23, 2020, the Charging Party filed amended charges in both cases seeking to add the allegation that the City had failed to respond timely to requests for information relative to the City's actions complained of by the DFFA. At the commencement of the December 2, 2020, hearing, both the Union and the City put forth their respective positions as to whether I should allow the amendments. Ultimately, I allowed the amendments over the City's objection.

Findings of Fact:

1. DFFA I and DFFA II Bargaining Units

The DFFA is the authorized bargaining agent of two separate bargaining units with the City of Detroit's Fire Department (Department). The DFFA I unit is comprised of those employees who work within the Department's Fire Fighting Division while the DFFA II unit covers those employees under the EMS Division. Sitting atop of the divisions that makes up DFFA I at all times relevant to these proceedings was Chief Robert Distelrath. Superintendent Sean Larkin oversaw the EMS divisions that are a part of the DFFA II.

The City has separate collective bargaining agreements with both DFFA I and DFFA II. Both contracts, according to the record, expired on June 30, 2020. The parties had agreed to begin bargaining in March of 2020 in anticipation of the contracts' upcoming expiration. In early 2020 the State was faced with the impending pandemic caused by COVID-19. The March bargaining dates were cancelled because of the pandemic. Eventually the parties did begin bargaining in June of 2020, however no agreement as to either unit has been reached. At the time of the hearing the parties were participating in mediation.

Since 2016, DFFA I members have had to maintain Medical First Responder (MFR) certifications.[1] DFFA I members received a 4% wage increase in connection with the addition of the MFR requirement. MFR certification is the lowest standard DFFA I members are required to obtain – some members are certified at higher levels. DFFA II members who work as Emergency Medical Technicians (EMT) are required to have the BLS certification while paramedics possess the ALS certification.

The DFFA I contract contains several references to the MFR functions and duties of its bargaining unit members. More specifically, and relevant to this proceeding, Section 3(B)(6), entitled Management Rights, states that the Department will have the discretion and authority:

> 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.

[1] Under Michigan law there are three classifications for pre-hospital medical care. MFR is the lowest classification, with Basic Life Support (BLS) being the next highest and Advanced Life Support (ALS) being the highest.

Moreover, Section 16(C)(4) of the same contract states in the relevant portion the following:

> a. The Department may assign [MFR] work to Employees licensed to perform such work, and the Department may assign [EMT] work to Employees licensed to perform such work.
>
> b. The Department may develop policies and procedures related to [MFR] and [EMT] assignments. The Department will meet and confer with the Union prior to developing, implementing, or amending any such policies and procedures.

Since the 2016 requirement that DFFA members have MFR certification, the Department has routinely utilized them on MFR runs whereby fire fighters will arrive at a scene and assist in the preliminary patient assessment and initial delivery of care. Normally , members of the DFFA II would then take over as necessary up to, and including, transporting the patient to the hospital. It is important to note while DFFA I members were trained to provide MFR duties, that training did not include the operating and/or driving of the Department's ambulances.[2]

Both the DFFA I and DFFA II contracts contain provisions governing the assignment of overtime. Under the DFFA I contract, overtime work is required to first be offered on a voluntary basis to members pursuant to their seniority. If required overtime is unfilled, the Department can mandate overtime on a reverse-seniority basis. The DFFA II contract grants the Department the right to "schedule overtime work as required in a manner most advantageous to the Department and consistent with […] the public safety…"

2. DFFA II Ambulance Shifts

According to testimony provided by Superintendent Larkin, the Department runs 20 ambulance shifts during every 24-hour period. The record establishes that periodically, due to various reasons, the EMS Division is unable to fully staff the 20 ambulance shifts in a given day and is forced to "close" individual ambulances for their respective shifts. According to witness testimony, the closing of ambulance shifts extends the time in which the Department is able to respond to the emergency medical needs of the City's residents. Testimony also establishes that the City has aid agreements with private ambulance services whereby those ambulances can be dispatched should a Department ambulance be unable to timely respond.

Superintendent Larkin testified that, despite the fact that the Department might be forced to close ambulance shifts because of staffing issues, the Department makes the conscious decision not to mandate overtime to DFFA II members. Larkin stated in fact that he could not recall mandatory overtime being used at any point during his 25-year history with the EMS Division. When pressed on why the Department made the decision to forgo mandatory overtime for DFFA II members both Chief Distelrath and Superintendent Larkin cited morale reasons as a primary factor. Superintendent Larkin, in further discussing the issue, stated:

Well, mandating of overtime, morale is only one factor of phasing in the mandating

[2] Testimony provided by several witnesses did establish that on occasion DFFA I members would ride along with patients, and assist with patient care, in ambulances operated by DFFA II members when situations required such.

> of overtime conversation. You also have to think about burnout, possible increased risk of injury. You also have to think of, you know, just losing employees due to being overworked. There's a very high turnover in the EMS division.

Superintendent Larkin did state that the actual departmental decision regarding whether to mandate overtime to DFFA II members fell to Executive Fire Commissioner Eric Jones.

3. DFFA I Ambulance Training

On March 26, 2020, 2nd Deputy Commissioner Reginald T. Jenkins, sent an email to DFFA President Thomas Gehart outlining the agenda for a telephone conference scheduled to occur later that day. The agenda included the following items:

- EMS Action Plan with Candidates from EMS Academy
- DFD Divisions Assisting with the COVID-19 Response Team
- Training For All Fire Personnel to Work on Ambulances
- Threshold For Standing Up Fire Personnel to Work on Ambulances
- Details For Fire Operations and Division Personnel to Work on Ambulances

Also included with that email was a training syllabus for DFFA I members. Captain William Harp, DFFA Vice-President and member of DFFA I, participated in that call on behalf of the DFFA. Harp in describing the call testified:

> [We] asked for details -- who would train members; how, for what length of time, and when member[s] would be trained; what standards would be used; the number of units would be used, etc. -- and the City did not have answers.
>
> * * *
>
> We told them […] that we believe that there are significant collective bargaining agreement issues with getting DFFA 1 members into a DFFA 2 bargaining unit work and conversely the other way around. That there is not an open blending of these two very independent collective bargaining agreements just because we have to represent both groups.

On March 30, 2020, Department Chief Robert Distelrath, issued a memorandum entitled "MFR – EMS Ambulance Training." That memo, sent to all "Firefighting Division Personnel" stated in the relevant part the following:

> In order to support EMS and answer the increasing demand for service during the COVID-19 pandemic. DFD will train all members on ambulance driving and operations. The training schedule is attached to the Smartsheet sign up webform which can be found on Forms and Links in the COVID-19 file.
>
> Volunteers can sign up via the web form for the 8 hour class on an overtime basis.

> In order to enroll, you must first complete the corresponding prerequisite video on FireRescue 1. Once training is complete members will be eligible to staff an EMS Ambulance with an EMS Medic on a voluntary overtime basis.
>
> Classes will start on Wednesday April, 1, 2020. Two classes a day will be offered (8 members per class).

Distelrath, when asked during his testimony why he felt the need to implement the above training, stated, "We were making backup plans in case the [COVID19] pandemic escalated to the point where we needed to staff ambulances on an emergency basis."

On April 2, 2020, Gehart sent a letter to the City's Director of Labor Relations, Hakim W. Berry, responding to the March 30, 2020, memo, writing:

> This responds to Chief Distelrath's March 30, 2020 inter-office memo to "All Firefighting Division Personnel" regarding "MFR-EMS Ambulance Training."
>
> As you surely know, the DFFA and its members support the City's efforts to assist EMS in answering the "increasing demand for service during this COVID-19 pandemic."
>
> That said, Chief Distelrath's March 30 Memo disregards our Collective Bargaining Agreement and the City's statutory duty to recognize the DFFA as the exclusive bargaining representative of all firefighting division personnel.
>
> The DFFA, however, is uninterested in a dispute with the City during these emergency pandemic times.
>
> But, to prevent any future City claim that the DFFA waived its challenges to such unilateral City action -- e.g., later, in the context of a City action outside the emergency COVID-19 pandemic -- we send this letter to register our objections to the contractual and statutory violations raised by Chief Distelrath's March 30, 2020 MFR-EMS Ambulance Training Memo.

Initially 12 DFFA I firefighters volunteered for the additional training offered in Distelrath's March 30th memo. That training began on April 1, 2020, and ran through May 8, 2020. On August 29, 2020, the Department staffed DFFA II ambulance shifts with non-DFFA II personnel. During that shift, three (3) DFFA I members worked on DFFA II ambulance(s).

EMS Superintendent Larkin testified that from March 30, 2020, through November 30, 2020, there were approximately 9,800 individual ambulance shifts. Larkin further testified that only 12 of those shifts were staffed by members of DFFA I.

Chief Distelrath testified that while DFFA I training to work DFFA II shifts was initially voluntary, he has since ordered that the training is mandatory for DFFA I members.

4. Contract Negotiations

As stated above, the Department and the DFFA are currently in negotiations over successor contracts for both DFFA I and DFFA II. Testimony provided by several witnesses reveals that the Department strongly desires to merge or blend DFFA I and DFFA II into one unit or division. In his own testimony, Chief Distelrath identified that issue as "one of the [Department's] most important priorities during bargaining. The Chief, in recognizing the magnitude of that action conceded that "it's a big ask." Capt. Harp testified that the Department's Head Negotiator, Commissioner Jenkins, stated at the bargaining table that the merging of the divisions "is his legacy moment of transforming the Detroit Fire Department to what he envisions is a fully cross-trained, dual-role, dual-deployment department." Commissioner Jenkins, when asked directly to describe a primary objective of bargaining, stated:

> Well, one of the primary things we're working on is what we call negotiate merged roles. So that's where we're trying to have -- negotiate that fire fighters will come -- will have an EMT or paramedic designation. So currently we have fire fighters that are on duty that have EMT, paramedic license, but they do not perform that work as a paramedic and an EMT. And likewise, we have EMT and paramedics who have fire fighter 1 and 2 certifications. So we're -- we're negotiating to both, merge roles, and we'll have new classifications, fire fighter EMT, fire fighter paramedic. And then those employees will be able to work in dual roles on fire trucks and/or ambulances, interchangeable.

At the time of hearing, the parties had not yet reached settlement on a successor contract for either the DFFA I or DFFA II bargaining units.

5. Grievances and Requests for Information.

On September 4, 2020, the DFFA filed two grievances on behalf of both DFFA I and DFFA II respectively, the substance of which was identical. Both grievances acknowledged that the Department had recently assigned DFFA I members to work DFFA II ambulance shifts. In addition to the request that the Department immediately cease the assignment of DFFA I members to DFFA II shifts, the grievances also requested that the DFFA be notified each time a DFFA I member was assigned to work a DFFA II shift. The grievances were addressed to Commissioner Jones but were also copied to several individuals, including Berry, the head of the City's Labor Relations Department.

On September 11, 2020, Commissioner Jenkins issued written denials on both grievances. Nowhere within that response did the Department appear to try and provide the information requested above.

As stated above, on November 23, 2020, the DFFA filed amended charges in these consolidated proceedings seeking to add the allegations that the Department had not yet responded to their September 4, 2020, information requests. As of the dates of hearing the Department had still not provided the information requested.

Discussion and Conclusions of Law:

The DFFA's charges against the City allege that the Department's actions in implementing the above plan to train and utilize DFFA I members to work DFFA II shifts violated Sections 10(1)(a)(b) and (e) of the Act. While the implicated statutory sections are similar, the perspective necessary to consider those allegations do vary depending on the differing position of the two bargaining units.

1. DFFA I - Case No. 20-I-1425-CE

   a. Duty to Bargain

Section 15 of the Public Employment Relations Act (PERA) imposes a duty to bargain on public employers and unions with respect to those matters which constitute "mandatory subjects of bargaining." MCL 423.215; *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215 (1989). A mandatory subject of bargaining is one which has a material or significant impact on "wages, hours and other terms and conditions of employment." *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177 (1989); *Port Huron Area School District*, 28 MPER 45 (2014). Our Commission has taken a broad view of the phrase "other terms and conditions of employment" for purposes of determining whether an issue involves a mandatory subject of bargaining. *Central Michigan Univ Faculty Ass'n v Central Michigan Uni.*, 404 Mich 268, 279-290 (1978).

When a collective bargaining agreement covers a mandatory subject of bargaining, the parties are deemed to have fulfilled their statutory duty to bargain regarding the matter. As the Michigan Supreme Court stated in *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996):

> When the unfair labor charge is the failure to bargain, however, it is often necessary for the MERC, like the NLRB, to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain. See *Detroit Fire Fighters Ass'n v Detroit*, 408 Mich 663, 293 N.W.2d 278 (1980) . . . In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.

Even in situations where a bargaining obligation may not exist with respect to a particular decision, an employer does have a duty to bargain over the impact or effect of that decision. *Metropolitan Council No. 23 and Local 1277, AFSCME v City of Center Line*, 414 Mich 642, 661-662 (1982) (decision to layoff employees was not a mandatory subject of bargaining, but impact of the decision was a mandatory subject of bargaining); *Ishpeming Supervisory Employees v City of Ishpeming*, 155 Mich App 501, 508 (1986) (no obligation to bargain over reorganization plan, but duty to bargain over impact of reorganization).

The DFFA, in its post-hearing brief, argues that "[t]his program is a mandatory subject as it indisputably materially impacts "wages, hours and other terms and conditions of employment." Examples of issues identified as mandatory subjects by the Union include, but are not limited to - training, overtime pay and the allocation of overtime, differing of work rules between the Fire Division and the EMS Division, differing chains of command, and employer discipline.

The City, in its defense, claims that its program is covered by the contract, stating that the "negotiated contract allows for the utilization of firefighters as MFRs." In addition to pointing out that DFFA I members received a 4% wage increase in connection with the requirement that they become MFR certified, the City also made reference to several portions of the contract to support its position. More specifically, the City cites to Section 3(B)(6) of the Management Rights clause and certain portions of Section 16(C)(4), as the authority that allows it to direct DFFA I members to work shifts as MFRs on ambulances.

Viewing the Department's program from the vantage point of DFFA I members, it is the opinion of the undersigned that the City, under the contract provision stated above, did have the authority to implement the training program both initially as a voluntary program and also later as a requirement for DFFA I members as well as to actually implement the program. The City possessed the authority Section 3(B)(6) of the contract to "determine the content and nature of the work to be performed…" by DFFA I members. Moreover, Section 16(C)(4), explicitly granted the City the authority to "assign [MFR] work to…" DFFA I members. The City's authority notwithstanding, the City did have an obligation to bargain the effects of the program in so far as those effects touched upon and/or implicated mandatory subjects of bargaining, including but not limited to the issues cited above.

Such duty to bargain on the part of an employer however is conditioned on its receipt of an appropriate request. *Local 586, Service Employees International Union v Union City,* 135 Mich App 553 (1984). While a demand to bargain is not required to take a particular form in order to be effective, the employer must know that a request is being made. *Michigan State University*, 1993 MERC Lab Op 52, 63. Furthermore, a demand to bargain must articulate with some specificity what impact the requestor wishes to bargain. See *City of Grand Rapids,* 22 MPER 70 (2009).

In its brief, the DFFA first appears to claim that although the program itself was presented as *fait accompli,* its "objections" raised during the March informational call as well as the form and substance of its April letter to Berry, nonetheless constitute a sufficient notice to the Department that it demanded to bargain. While true that the actual inception of the program was put into motion by the Department unilaterally – the Respondent does not claim in any fashion that it bargained any aspect of the program – as stated above, it is my finding that the decision to implement the program itself was allowed under the DFFA I contract. Rather, what remains is the question whether the DFFA I made a sufficient demand to bargain over the effects of the Department's decision such as to trigger a duty under the Act to bargain the same. It is the finding of the undersigned that the DFFA I did not provide evidence, either through witness testimony or exhibits, that would allow me to conclude that the DFFA I made an appropriate and sufficient demand under the Act. Nowhere within Harp's testimony regarding the informational call or the DFFA letter to Berry, does the Union articulate with any semblance of specificity that it wished to bargain over the effects or what effects it wished to bargain. See *City of Detroit,* 31 MPER 36

(2017) (no exceptions) (no duty to bargain over the effects of large-scale department reorganization despite general comments made by union that it wanted to bargain but did not identify any aspect of the reorganization as a target of bargaining). Rather, the record establishes that the Union took great care to put the Department on notice that it was "register[ing] our objections to the contractual and statutory violations…" It is clear that the Department was on notice that the DFFA I did not support its decision and objected to the same. However, nowhere within the record as developed has the DFFA I provided the undersigned a reasonable basis for which to conclude that it put the Department on notice that it wanted to bargain over the issue or what aspects of the issue it might wish to bargain.

b. Direct Dealing

Under both PERA and the National Labor Relations Act (NLRA), 29 USC 151 et seq., an employer commits an unfair labor practice when it circumvents the designated representative and attempts to negotiate directly with employees by presenting new information or proposals to employees before or instead of to their bargaining agent. See e.g., *Jackson Co*, 18 MPER 22 (2005); *Medo Photo Supply Corp v NLRB*, 321 US 678 (1944). As the NLRB stated in *General Electric Co*, 150 NLRB 192, 195, enf'd 418 F2d 736 (CA 2 1969), "The employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees." In allegations of direct dealing, the inquiry focuses on whether the employer's conduct is "likely to erode the union's position as exclusive representative." *City of Detroit (Housing Commission)*, 2002 MERC Lab Op 368, 376 (no exceptions), citing *Modern Merchandising*, 284 NLRB 1377, 1379 (1987).

The NLRB has formulated a three-part test for determining whether an employer is guilty of unlawful direct dealing with its employees. The criteria are: (1) that the employer communicated directly with union-represented employees; (2) that the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) that such communication was made to the exclusion of the union. *Permanente Med Group*, 332 NLRB 1143, 1144 (2000). The Commission has adopted the NLRB's test for determining whether an employer has engaged in unlawful direct dealing. *City of Detroit (Housing Commission); Wayne Co*, 31 MPER 17 (2017) (no exceptions).

In addition to the above criteria regarding the "traditional" notion of direct dealing, the Commission has also had the occasion to consider whether an employer's surveying of employees had the same "purpose or effect" as to erode a bargaining agent's position. See *Grand Rapids*

Public Schools,1986 MERC Lab Op 560[3]; See also *Holland Public Schools*, 2 MPER 20071.[4] (1989). The Charging Party also cites to *Obie Pacific, Inc*, 196 NLRB 458 (1972). In that case, also a situation where an employer surveyed its employees regarding their sentiments on an existing contract clause before seeking the union's agreement to eliminate it, the NLRB stated that an employer cannot "seek to determine for himself the degree of support, or lack thereof" for a position, because doing so would "impede effective bargaining." *Id* at 459.

The DFFA argues in its post-hearing brief that the Department's issuance of the March memo and its eventual implementation of the program constituted direct dealing, writing:

> Here, the City directly dealt with unit employees -- issuing the Memo directly to employees and dealing directly with employees for training and overtime assignments -- without Union permission, and outside the CBA-outlined overtime allocation system.
>
> The City here impermissibly tried to solicit support, and to "seek to determine for himself the degree of support," for the merger it would shortly propose at the bargaining table. This timing shows that the City sought to undercut the Union's position.
>
> The City claims that the program is a "win-win" for the parties. But, the City cannot change terms or conditions or add new benefits unilaterally -- and then deal directly with the unit members -- simply because the City has determined that it is beneficial for unit members.[5]

Its clear to the undersigned that the Department's actions do not constitute under the NLRB's three-point test, as adopted by the Commission. The plan was communicated first to the

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[3] In *Grand Rapids Public Schools*, a majority of two Commission members held that an employer engaged in unlawful direct bargaining when it disseminated a survey to teachers which included questions on mandatory subjects of bargaining without first giving the teachers' bargaining representative the opportunity to see the questions. In separate opinions, the two commissioners gave different reasons for their decision. The Court of Appeals, in an unpublished opinion, adopted Member Tanzman's reasoning in his concurring opinion. He concluded that each case involving a survey should be examined on its facts to determine whether either the purpose or the effect of the survey was to engage in direct bargaining or undermine the union's authority as bargaining representative. He found that the fact that the survey was distributed immediately before negotiations, and the fact that Charging Party knew that Respondent possessed information that might be used to undercut its position(s) at the bargaining table, undermined its authority as representative even though the employer did not actually use the results of the survey at the bargaining table.

[4] In *Holland Pub Schs*, the Commission applied member Tanzman's "purpose or effect" test to an employer's distribution of a survey asking its teachers their views on smoking policies. It held, at 357-358, that the survey did not have the effect of undermining the union's authority when the parties were not in the middle of or approaching contract negotiations and the union had never demanded to bargain over smoking policy.

[5] The "win-win" statement is attributed to Respondent's Counsel/s opening statement in which she stated,

> The DFFA 1 members are volunteering to fulfill their duties as an MFR, and it just so happens that they are doing so on an EMS rig rather than on a fire rig. Either they are bringing this erroneously or they really didn't think it through because this is a win-win for all parties. DFFA members are benefitting because of the overtime opportunities. DFFA 2 members are not being bumped out of any positions. The City is benefitting as it does not have to shut down EMS rigs when we seriously -- seriously need them to go out and assist our citizens and benefits the City.

DFFA before being rolled out to DFFA I membership. While it can be said that aspects of the plan did have an effect on wages, hours and terms of conditions, as stated in the preceding section, I have already found that the Department could rely on the contract in support of its actions. Lastly, while I recognize that the timing of memo and subsequent actions do coincide somewhat close in proximity in time to the cancelled March 2020 bargaining dates and the eventual start of bargaining in June of that same year, I don't find support in the record to conclude that the Department utilized the same to gauge and/or drum up support for the blending of roles that it was seeking to achieve through bargaining.

c. Failure to Provide Requested Information

It is a long-held principle that an employer subject to PERA, in order to satisfy its bargaining obligation under Section 10(1)(e) of Act, must supply in a timely manner information requested by the union which will permit the bargaining representative to engage in collective bargaining and police the administration of its collective bargaining agreement. *Wayne Co,* 1997 MERC Lab Op 679; *Ecorse Pub Schs,* 1995 MERC Lab Op 384. Information relating to terms and conditions of employment, such as wages, job descriptions, and other information pertaining to bargaining unit employees, is considered presumptively relevant. *West Bloomfield Sch Dist*, 28 MPER 82 (2015); *Plymouth Canton Cmty Schs,* 1998 MERC Lab Op 545.

In the present matter, the DFFA, through grievances filed on behalf of both the DFFA I and DFFA II on September 4, 2020, sought information regarding the assignment of DFFA I members to DFFA II shifts. There is no question that the DFFA was entitled to the requested information under PERA and that it should have been provided under the Act as the information requested was presumptively relevant. As of the December 2020, hearing in this matter, there is no indication that the City furnished this information.

The City claims that it cannot be presumed that it was in possession of a proper request for information such that its failure to provide a response did not violate the Act. In its post-hearing brief, the City writes, "[p]lacing [an information request] within a grievance is not proper, as the grievance does not get to the Labor Relations Division until the grievance reaches step 4 of the grievance process." The City claims in its brief that there existed a "long standing practice that information request[s] must be made in writing to the employer's Labor Relations Director Hakim Berry or Deputy Director […], and it should state with specificity what is being requested." Additionally, the City writes, "[t]he DFFA has been put on notice on numerous occasions of the proper way to make these requests. Although they know the proper way, they did not so in this specific instance, they placed the request inside of a grievance." In further support, the City points to two emails regarding information requests, in which similar statements are made by City representatives. However, those emails are not to DFFA members but rather are correspondence between a city attorney and a DFFA attorney.

Here, the question is whether the form in which the information requests were presented as well as to whom the requests were made are sufficient to establish that a proper request had been made under the Act. I note that under *City of Detroit,* 25 MPER 13 (2011), the Commission found that a charging party's "continued disregard of the established protocol" relative to information requests caused the complained of delay. In that case it was determined by the ALJ that the charging party, despite repeated instructions that information requests should be sent to the City's labor relations

division, continually transmitted such requests to the City's Law Department. Charging Party's actions had the effect of its requests not being considered under PERA, but instead being treated as requests under the state's Freedom of Information Act. Here, while the City argues that the DFFA had been put on notice several times as to the "proper" method in which to make information requests, it failed to put sufficient evidence into the record to allow the undersigned to make such a finding. Moreover, and which I find significant, the grievances themselves were copied to Hakim Berry, the head of the Labor Relations, the very department and person to whom the City claims such requests should be made. For these reasons I find that the DFFA I made a proper request under the Act and that the City's failure to respond violates PERA.

2. DFFA II – Case No. 20-I-1426-CE

a. Duty to Bargain

Addressing the failure to bargain issue from the perspective of the DFFA II is markedly different then the vantage of the DFFA I. In this situation, the issue facing the DFFA II is the alleged transfer of bargaining unit work from its bargaining unit members to DFFA I members.

As stated above, in general terms, Section 15 of PERA bestows upon public employers the duty to bargain in good faith over wages, hours, and other terms and conditions of employment. Our Supreme Court recognized in *Southfield Police Officers Ass'n v City of Southfield*, supra, that, in certain contexts, an employer's "duty to bargain extends to a public employer's diversion of unit work to non-unit employees." More specifically, an employer's decision to unilaterally transfer duties and responsibilities from one unit to another may constitute a violation of the duty to bargain, but only if it can be established that the work was exclusive to the members of the bargaining unit bringing the unfair labor practice charge. *Id* at 185. Conversely, an employer has no duty to negotiate where job functions have historically been assigned interchangeably to both unit and non-unit employees because such work is not the "bargaining unit work" of the unit from which the work has been removed. In order for a charging party to prevail on a claim of unlawful transfer of bargaining unit work, it must also show that the transfer had a significant impact on unit employees. To that end, the record must establish, for example, in addition to exclusivity, that unit employees were laid off, terminated, demoted, not recalled or lost a significant amount of overtime as a result of the transfer of work. The mere loss of unit positions or speculation regarding the loss of promotional opportunities within the unit does not constitute a significant adverse impact. *City of Detroit (Water & Sewerage Dep't)*, 1990 MERC Lab Op 34.

In the instant situation, there is no question that in general terms, DFFA I members, by nature of their MFR credentials, have been assigned some of the duties normally performed by the members of the DFFA II. The full extent of that overlap however is difficult to ascertain given the record as developed herein. The preceding notwithstanding, the record does establish in no uncertain terms that the act of operating the ambulance and equipment therein was not, prior to the Department's actions, an overlapping duty. As such, it is my finding that to the extent DFFA I members were being assigned duties that required them to operate ambulances and the associated equipment therein, those duties are of the nature that was exclusive to DFFA II members.

Addressing the next element, significant impact, I first note that the actual number of times that DFFA I members performed the exclusive work during the relevant time period between

March 30, 2020, and November 30, 2020, was roughly 12 shifts out of 9800 possible shifts. Additionally, the record established that DFFA I members were only offered those DFFA II shifts after the Department determined that DFFA II members themselves would/could not fill those shifts. Here, there is no indication that DFFA II members were either laid off, terminated, demoted, not recalled or lost a significant amount of overtime as a result of shifts being offered to the DFFA I. For these reasons I do not find that the Department's utilization of DFFA I members in DFFA II roles, on the limited basis as shown herein, had a significant impact on the bargaining unit.

b. Direct Dealing

The DFFA II's charge explicitly includes the allegation that the Respondent "negotiated directly with represented employees over mandatory subjects of bargaining…" However, nowhere within the record or the Charging Party's post-hearing brief is there any actual identification of actions undertaken by the Department that can be attributed as being made towards the members of the DFFA II. For this reason, I consider this allegation abandoned.

c. Failure to Provide Requested Information

The analysis of applicable case law and application to the present facts is identical here as in the above section covering the DFFA I. My findings there are repeated here. For those reasons, I find that the DFFA I made a proper request under the Act and that the City's failure to respond violates PERA.

I have considered all other arguments as put forth by the parties and conclude such does not warrant a change in my findings.[6] As such, I recommend that the Commission issue the following order.

Recommended Order

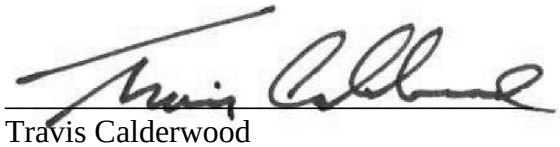
Respondent City of Detroit, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to provide Detroit Fire Fighters Association, Local 344, with information that is relevant and necessary to its role as the bargaining agent for employees of Respondent.

2. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

[6] While both charges cited to Section 10(1)(a) of PERA as part of their allegations, there is no direct and/or indirect argument made in the post-hearing brief addressing the same. As such, I consider that portion of the charge(s) abandoned.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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

Dated: October 27, 2021

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGES WITH THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) BY THE **DETROIT FIRE FIGHTERS ASSOCIATION, LOCAL 344**, ON BEHALF OF THE **DFFA I** AND **DFFA II** THE COMMISSION HAS FOUND THE **CITY OF DETROIT** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL cease and desist from refusing to provide Detroit Fire Fighters Association, Local 344, with information that is relevant and necessary to its role as the bargaining agent for employees of Respondent.

WE WILL provide to the Detroit Fire Fighters Association, Local 344, with information that is relevant and necessary to its role as the bargaining agent for employees of Respondent in a complete and timely manner.

CITY OF DETROIT

By: _____

Title: _____

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

Case Nos. 20-I-1425-CE & 20-I-1426-CE; Docket Nos. 20-017711-MERC & 20-017712-MERC