STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LOWELL,
Public Employer-Respondent,

Case No. C13 C-050

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (IBEW), LOCAL UNION 876,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Abbott Nicholson, P.C., by John R. McGlinchey and Sarah L. Harwood, for Respondent

Kalniz, Iorio & Feldstein Co., L.P.A., by Fil Iorio and Kurt Kline, for Charging Party

DECISION AND ORDER

On October 13, 2013, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent City of Lowell breached its duty to bargain and discriminated against members of Charging Party International Brotherhood of Electrical Workers, Local Union 876 (Union) in retaliation for activity protected under § 9 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.209. The ALJ concluded that Respondent violated § 10(1)(a), (c), and (e) of PERA and recommended that we order Respondent to cease and desist unlawful activity, to bargain in good faith with Charging Party and to take other affirmative action.

The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA. After requesting and receiving an extension of time in which to file its exceptions, Respondent filed exceptions to the ALJ's Decision and Recommended Order on December 4, 2013. Charging Party requested, and was granted, an extension of time in which to file a response to the exceptions, and filed its response on January 16, 2014.

In its exceptions, Respondent contends that the ALJ erred by finding that denial of a wage increase violated PERA because the increases were governed by individual contracts between the city and each employee and the Commission has no authority to order it to increase wages pursuant to individual contracts. Respondent also argues that the ALJ erred by finding sufficient evidence of anti-union animus and by ruling on an issue not specifically alleged in the

charge. Respondent also claims that the ALJ erred in ruling that it threatened and coerced Union members for speaking to City Council and for lobbying the public for support. Respondent claims the ALJ's finding that it bargained in bad faith was in error. Finally, Respondent claims the ALJ erred by finding that it did not timely respond to the request for information.

In its response to Respondent's exceptions, the Union asserts that the ALJ was correct on all findings of fact and conclusions of law and requests that the Commission affirm the ALJ.

Respondent has requested oral argument. We find that oral argument would not materially assist us in deciding this matter. Respondent's request for oral argument is, therefore, denied.

We have carefully considered all of the arguments made in Respondent's exceptions. We affirm in part and reverse in part the Decision and Recommended Order of the ALJ.

Facts:

We do not adopt the findings of fact of the ALJ. The following facts are taken from the record.

The Union was first certified to represent a unit of Respondent employees in late 2011, began bargaining with Respondent in January of 2012, and was still seeking to negotiate its first contract as of the August 2013 hearing date in this matter.

Respondent's water department employees, before joining the Union, regularly received a raise when they obtained a new level of State licensure. A memo prepared by the City Deputy Treasurer Lori Gerard demonstrates that prior to joining the Union, employees Todd Phillips, Ralph Brecken and Brian Van Veelen had received pay increases upon reaching each new level of State licensure. Todd Phillips had, in 2008, received his S-3 and S-4 State certifications and had promptly received pay increases for each new level of certification. After joining the Union, Phillips received his F-4 license but was denied the pay increase. In addition to being denied the license-based pay increases, the employees who joined the Union did not receive a $1,000.00 one-time pay adjustment given to all other full-time city employees with the exception of the City Manager and the Chief of Police.

City Manager Mark Howe met with Phillips and Union steward Ralph Brecken on February 19, 2013, regarding the denial of the pay increase for Phillips. Brecken testified that at the meeting, when he said city policy was to give pay increases upon receipt of higher-level certifications, Howe did not disagree. Rather, Howe insisted that because the employees joined a Union and were engaged in bargaining, Respondent was "prohibited by law" from granting the increase. Brecken asked to speak to the City Council about the issue and Howe responded that Brecken "could not speak to City Council about this matter that it must stop with [Howe]." Howe then told him that other city employees received $1,000 bonuses and he "really wanted to give it to you guys but I couldn't because of the law." Howe said the other employees received the $1,000 "because they had a contract." Howe then said that "the union was misleading us

and leading us astray" and that, due to union "arrogance" and unwillingness to negotiate, there was no contract.

Howe sent an email on the day after the meeting, which states that it is to "confirm our conversation yesterday afternoon regarding a requested pay increase for Todd Phillips. I cannot lawfully grant this pay increase nor can this issue be taken to the council for consideration. The proper forum for settling these issues is at the bargaining table." Howe testified that his refusal to approve a pay raise for Phillips had nothing to do with Phillips joining the union. He stated that pay raises and pay adjustments were mandatory subjects of bargaining that must be resolved at the bargaining table. Howe further testified that at the February 19, 2013 meeting, he told Brecken and Phillips that the union was not negotiating in good faith and was leading them astray.[1] He initially testified that he did not remember whether he mentioned PA 54 during the meeting, but later testified that he did. He testified that "PA 54 would not allow us to grant a certification increase in the middle of contract negotiations."

Howe also testified that the licensure-related pay raises were pursuant to individual contracts between each employee, and the city and the city had no policy mandating such raises. Three documents introduced at the hearing, entitled "Water Department Pay Raise Based on Licenses Acquired" state that "[e]mployees that obtain any of the licenses listed below shall be compensated by an hourly increase in pay for the amount listed below for the appropriate license acquired." Each document is signed by the former city manager, the employee's supervisor and the employee; one is signed by Brecken, one by Phillips and one by Van Veelen. A Performance Review for Todd Phillips, dated February 7, 2013, recommends that Phillips "receive F4 license raise as it is stated in current policy." Brecken testified that, sometime in late 2008, the Director of the Department of Public Works (DPW), Dan Desjarden, held a meeting with all the employees of the DPW. At that meeting, according to Brecken, Desjarden stated that from that point forward, city policy would be that any city employee who achieves state licensure will receive a pay increase based upon the license obtained.

Howe testified that the one-time $1,000.00 pay adjustment given to full-time employees was awarded after the city discovered through an audit that it had a budget surplus from the prior fiscal year. He added that no employee working under 33 hours a week received the adjustment, nor did the Chief of Police or the City Manager. Police officers, he testified, received the adjustment because there was a contract between the police and the city that required police bargaining unit members to receive the same pay increases given to other city employees.

Howe additionally testified that "a public campaign was started, yellow signs were put in yards. There were people attending council meetings and people talking to council members." He testified that at City Council meetings, there were personal attacks, "people making statements under public comments saying the city manager is being unfair" and that he was criticized for his performance and his bargaining stance. Howe said none of the individuals who spoke at council meetings were members of the bargaining unit, but he believed "that the Union organized people to attend the city council meeting to make those comments." He also testified about a newspaper advertisement that was supportive of the Union members. He noted that Todd

[1] Respondent has not filed an unfair labor practice charge alleging that the Union is acting in bad faith in negotiations.

Phillips was listed as a member of the organization which ran the advertisement and he believed Phillips' participation "was going outside the bargaining table to illustrate [the Union's] position on issues." Howe acknowledged that Phillips was not on the bargaining team. His testimony was that this "public campaign" led him to conclude that the Union was not bargaining in good faith.

When cross-examined on Respondent's positions at the bargaining table, Howe testified that he insisted that he be the final arbiter on all grievances; that all employees be at-will as opposed to just cause; that Respondent have the right to lay off full-time employees and replace them with non-Union part-time employees; and that Respondent have the right to subcontract bargaining unit work without limitation. The Union concluded that Howe's demands demonstrated that Respondent was not bargaining in good faith.

The Union requested information from Respondent on April 11, 2013. Specifically, it asked for the names of city employees who received the $1,000.00 pay adjustment, the date the payments were made, any City Council resolution or action authorizing the payments, the minutes from the City Council meeting where the payments were authorized, and any other documents authorizing the payments. When the information was not received by May 17, 2013, the Union filed an amended charge, which included an allegation that Respondent refused to provide necessary and relevant information. On May 21, 2013, the Union received a list of city employees who had received the payments, but did not receive the other requested information. Henry Matulewicz, the Union's business manager, testified that he did not know whether the additional information existed but had been led to understand that there was no additional information because City Council had neither discussed nor authorized the payments at a meeting and had not issued any formal document authorizing the payments. Matulewicz did not make a subsequent request for additional information.

Discussion and Conclusions of Law:

The Union alleges that Respondent interfered with and coerced Union members in their exercise of rights protected by PERA, in violation of §10(1)(a); retaliated against Union members for engaging in protected activity in violation of Section §10(1)(c); refused to bargain in good faith in violation of §10(1)(e); and failed to provide information in violation of §10(1)(e). The ALJ found for the Union on all claims.

The ALJ's Finding on a Matter not Specifically Alleged in the Charge:

Respondent claims that the ALJ erred by making a finding on whether Respondent could legally prohibit Union members from speaking at City Council meetings or through the media because such allegations were not alleged in the charge or the amended charge. We disagree. In *Detroit Downtown Travelodge*, 1967 MERC Lab Op 443, 445-446, this Commission held that "omission of a charge or defense from a pleading in an administrative proceeding is not prejudicial if the agency hears the evidence and decides the issue." See also *City of Detroit*, 26 MPER 15 (2012), where we said that "[a]lthough the charge did not specifically mention subcontracting, it is clear from the charge and the remainder of the record that the dispute was over the transfer of bargaining unit work to persons outside the unit."

In this case, the issue was raised and litigated at the hearing through testimony and the admission of documentary evidence. In his opening statement, Respondent's counsel stated that the City Manager told Union members that he thought the Union was "doing a disservice to employees because it … was conducting a public campaign including taking out newspaper ads rather than coming to the table and engaging in meaningful negotiations." He added that "there's nothing unlawful about the [City Manager's] expressions of opinion. It certainly didn't chill anybody or … interfere with anybody's rights under the law." In addition, City Manager Howe testified that he told Union members not to appear before City Council and that he expressed concern about the Union's encouragement of public support for its cause. Some of Howe's testimony was *sua sponte* and Respondent's counsel did not attempt to stop his testimony or move that it be stricken from the record. Respondent's attorney solicited testimony from Howe by asking "has the Union ever or someone supporting the Union ever taken any newspaper ads out in the local paper?" When Howe said yes, he was asked "[w]ere those ads supportive of the city's position?" to which Howe replied "No."

It is clear from both the testimony and the exhibits that Union members were told that they were prohibited from speaking to City Council. The record also demonstrates that Howe expressed to them his concern about their engaging in conduct intended to solicit public support. Accordingly, the ALJ did not err by considering a claim not specifically alleged in the charge because he made findings consistent with testimony and exhibits offered at the hearing. Similar to *Detroit Downtown Travelodge, supra,* the omission of the claim from the charge did not prejudice Respondent because the ALJ heard evidence on the claim and relied on that evidence in reaching his decision. Respondent had an opportunity to be heard and to voice objection.

Public Statements

We agree with the ALJ that Respondent violated §10(1)(a) when it attempted to prevent Union members from speaking to City Council and expressed concerns about their encouraging public support for their cause. In *City of Menominee*, 1982 MERC Lab Op 585, the Commission found that an employer unlawfully disciplined a union officer because he sent a letter to the mayor and members of city council, contrary to contractual grievance procedures and the employer's personnel manual. Similarly, in *City of Menominee*, 1982 MERC Lab Op 1420, the Commission found unlawful the employer's suspension of a union officer for contacting a city alderman to discuss a pending press release. The city had a policy regarding chain of command which it claimed precluded employees from speaking directly with city officials. The Commission held that the discipline constituted interference with rights protected by PERA. See also *Utility Workers Union of America, Local 482*, 20 MPER 51 (2007) (no exceptions) (Contacting elected officials about matters related to contract negotiations is protected concerted activity.) In *City of Bay City*, 20 MPER 96 (2007), an employee was disciplined for violating a city resolution prohibiting employees from speaking to city commissioners about employment-related matters. The Commission found that "it has long been recognized that employees' right to communicate regarding terms and conditions of employment is inherent in the right of self-organization." It was noted in that case that the right extends not only to other employees, but also to non-employees. The Commission held that the resolution "is unlawful if its effect is to restrain or chill [protected concerted] activity."

City of Greenville, 2001 MERC Lab Op 55, involved public safety officers who attended a City Council meeting and spoke about safety concerns. The city manager met with union officers to inform them that they had violated procedures which required them to bring such issues first to their department head and then to him. He said union officers could be reprimanded and possibly discharged for speaking at City Council meetings. In addition, he warned Officer Brian Blomstrom, that it would not look good if he continued to associate with union officers because City Council would see him as a "troublemaker." The Commission found that the statements "could reasonably be interpreted as a threat to dissuade Blomstrom from engaging in further protected activity" and, therefore, violated § 10(1)(a). See also *Township of Redford*, 1984 MERC Lab Op 1056 (Employer violated PERA when it reprimanded police officer based on statements he made to the press concerning union-management disputes); *City of Detroit (Police Dept)*, 19 MPER 15 (2006), aff'd in an unpublished opinion of the Michigan Court of Appeals, 2007 WL 4248562 (2007) (Employer violated PERA by ordering police officer to shut down a website he operated for the purpose of providing a forum for police officers to express their concerns over issues within the department, and by disciplining officer when he failed to do so.); *Superiorland Lib Co-op*, 1983 MERC Lab Op 975 (Employer discriminated against two employees when it laid them off after following their appearance before the library board to present employee concerns about provisions in a proposed staff policy manual.)

Section 10(1)(a) prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights protected under the Act. The analysis of a claim does not turn on the employer's motive but on whether the employer's actions may reasonably be said to interfere with the free exercise of protected rights. If the effect of a rule or policy is to restrain or chill protected concerted activity, it is unlawful. *City of Greenville, supra*. The test is whether the conduct complained of is inherently destructive of important employee rights. *City of Detroit (Fire Dept)*, 1988 MERC Lab Op 561.

We agree with the ALJ that Respondent's prohibition on Union members speaking to City Council interferes with the free exercise of PERA protected rights. The effect of the policy is to restrain or chill protected concerted activity. The ALJ was, thus, correct in his conclusion that Respondent violated § 10(1)(a) of PERA by its actions.

Pay Increases

We do not agree with the ALJ that Respondent's refusal to approve a licensure-related pay increase for Phillips after he obtained a higher level of licensure violated PERA.

Respondent argues that pay raises contingent on state licensure, and the one-time pay adjustment, were withheld from Union members because once the parties began negotiations, wages became a mandatory subject of bargaining. Respondent relies upon 2011 PA 54, which states in relevant part:

> Sec. 15b. (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public

> employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement.

The ALJ held that the language of PA 54 expressly states that it applies only "after the expiration of a collective bargaining agreement" and not where the parties are negotiating their first contract. Respondent concedes in its exceptions that "the language of the Act is silent on the period before a first collective bargaining agreement is reached." While Respondent relies upon *Waverly Comm Sch*, 26 MPER 34 (2012), that case involved wage increases after the expiration of an existing collective bargaining agreement and while the parties were negotiating a successor agreement, placing it squarely within the confines of PA 54. The Commission in *Waverly* expressly noted that there was a prior collective bargaining agreement. Respondent also relies upon *Bedford Pub Sch*, 26 MPER 35 (2012) but, like *Waverly*, that case also involved parties who were negotiating a successor contract, not a first contract. And, as in *Waverly*, we noted in *Bedford* that there was a prior agreement between the parties. We hold that PA 54 does not apply where, as here, the parties are negotiating their first contract.

Respondent claims that even if PA 54 does not apply here, it had no legal duty to pay the raises or adjustments and the Commission, therefore, lacks the authority to order it to pay them. City Manager Howe testified that the licensure-based raises were governed by contracts between the City and each individual employee. As noted above, three documents were admitted into evidence which contain all of the elements of a contract. Further, those contracts clearly promise the employees certification-based pay raises. There was also evidence that it was city policy to pay the increases, though no such written policy appears in the record. The evidence on policy was testimony that the former DPW Director verbally informed employees it was city policy, together with an exhibit – a performance evaluation – which stated that the employee would get the certification-based wage increase "as it is stated in current policy." Notwithstanding the testimony that a policy existed, the lack of a written policy leads us to conclude that the certification based pay raises were given pursuant to individual contracts between the city and each employee.

Having contracted with each individual employee, Respondent may well have a legal duty to grant the pay raises. The contracts state that upon each new level of certification the employees "shall be compensated by an hourly increase in pay for the amount listed below for the appropriate license acquired." Respondent freely and voluntarily entered into those contracts. However, Respondent is correct that we lack the authority to order it to pay union members the raises. We do not police private contracts nor do we remedy breaches thereof. *Kent County*, 25 MPER 29 (2011) (no exceptions). We, therefore, hold that the ALJ erred when he found that Respondent violated PERA and should be ordered to provide certification based pay increases to Union members.

As for the $1,000 one-time pay adjustment, we agree with the ALJ that Respondent violated PERA when it provided the $1,000 to all full-time employees except those who had joined the Union. Unlike the certification-based raises, the one-time adjustments were not based on contract, policy or past practice. Awarding them to all employees except those who had just joined the Union was, as the ALJ found, a violation of §10(1)(a) and (c) of PERA. City Manager

Howe denied the adjustment in retaliation for protected concerted activity and in an attempt to coerce the employees in the exercise of their §9 rights. Howe expressly told union members that they would not get the one-time adjustment because they "did not have a contract," because he believed the Union was misleading them, and because PA 54 would not permit it. Because we have held that PA 54 does not apply to this case, we agree with the ALJ that Respondent violated PERA by denying a pay adjustment to only those full-time employees who had joined the Union.[2] See *Detroit Pub Lib*, 1997 MERC Lab Op 689 (no exceptions), where the employer, prior to the union election and certification, announced pay raises. However, after union certification, the employer refused to pay the raises, contending that because the employees had unionized, wages must be determined through the bargaining process. The Commission held that the promised wage raises were a condition of employment which continued after certification of the union.

Respondent claims that it had no independent obligation to provide the Union members with the $1,000.00 bonus. We agree; Respondent had no obligation to give any employee the $1,000.00 bonus. However, once Respondent chose to award the bonuses, it could not lawfully deny them only to Union employees, and then blame the Union for that denial. The record reveals that the decision to give the bonuses to all but Union employees was motivated by Howe's desire to retaliate against members for joining the Union and engaging in other protected activity, and to deter future protected activity. An employer may not blame the Union for the non-receipt of pay increases without violating the law. See, *Interstate Smelting and Refining*, 148 NLRB 219 (1964), where the employer told employees that "if it were not for the Union" the employees would have received raises; *LRM Packaging*, 308 NLRB 829 (1992); *Parchment Sch*, 2000 MERC Lab Op 110. The ALJ was, thus, correct that the withholding of the $1,000 bonuses violated § 10(1)(a) & (c) of PERA.[3]

Failure to Bargain in Good Faith

We agree with the ALJ's finding that Respondent failed to bargain in good faith. The ALJ looked at the totality of the circumstances in making his determination, which we agree is the correct test. *Capac Comm Sch*, 23 MPER 46 (2010). He ruled that Respondent's conduct both at the bargaining table and away from the table demonstrated a failure to bargain in good faith. The ALJ relied in part upon City Manager Howe's testimony that, at the bargaining table, Howe made the following proposals: 1) that he be the final arbiter on all grievances; 2) that the union employees be at will and not just cause employees; 3) that Respondent reserve the right to replace union employees with part-time non-union employees; and that Respondent be able to subcontract all bargaining unit work without restrictions. The ALJ also relied on statements made by Howe to union members, which were discussed above.

The ALJ also noted that the parties had been in bargaining for a "protracted period, with essentially no progress." He also cited the duty of both sides to "actively engage in the bargaining process with an open mind and a sincere desire to reach an agreement." The ALJ

[2] The Chief of Police and the City Manager did not receive the one-time pay adjustment.

[3] Federal precedent under the National Labor Relations Act (NLRA) is given weight in interpreting PERA, especially where PERA's language is identical to that of the NLRA. However, we are not bound to follow "every turn and twist" of NLRB case law. *Kent County*, 21 MPER 61 (2008).

found Howe's bargaining posture to be "particularly antagonistic" especially given Howe's insistence that the Union be "asked to give up all of the rights which might be found in an ordinary contract." He found Respondent's proposals far outside the norm in public sector labor law and believed them to be intended to avoid reaching a contract, "as a contract based on such terms would be tantamount to no contract at all." We agree. Howe's demand that he be the final decision maker on all grievances, rather than a neutral arbitrator, is evidence of an unwillingness to bargain in good faith. His general bargaining stance, in essence, was that he have unfettered discretion to make all final decisions regarding any labor disputes. We agree with the ALJ that the totality of the circumstances demonstrates Respondent's failure to bargain in good faith, in violation of §10(1)(e) of PERA. See *Oakland Comm Coll*, 2001 MERC Lab Op 273.

The Production of Information

We agree with the ALJ that Respondent violated §10(1)(e) when it failed to timely provide relevant and necessary information. Where a union seeks information related to wages, hours, working conditions or discipline, it is presumptively relevant and must be disclosed. *City of Detroit*, 1998 MERC Lab Op 205. "The Commission has consistently found that to fulfill its bargaining obligation under Section 10(1)(e), an employer must supply in a timely manner relevant information requested by a collective bargaining representative. By its failure to provide the information requested with completeness and reasonable promptness, the Respondent has failed to bargain in good faith in violation of Section 10(l)(e) of PERA." *Detroit Bd Educ*, 1992 MERC Lab Op 572, citing *Detroit Pub Sch,* 1990 MERC Lab Op 624.

In *Kent Co Deputy Sheriff*, 1991 MERC Lab Op 374, the Commission stated that "[i]t is a thoroughly entrenched principle of labor law that a union is entitled to receive from the employer information and documents the union needs to carry out its duties to represent its members." In *Detroit Pub Sch, supra*, the delay in providing the information was two to three months and the employer provided only two of the requested documents - on the day before the hearing. The Commission found that "[w]aiting two and three months for information that should be readily available to the Respondent is unreasonable." In *Keego Harbor* 28 MPER 24 (2014), charging party requested information on July 2, 2010 and Respondent provided some of the information on August 25, 2010, the first day of the hearing. We found that the information was not provided "with completeness and reasonable promptness." Here, the information was requested on April 11, 2013 and was not received until May 21, 2013, several days after Respondent was served with an amended charge which alleged a failure to timely provide the information. We agree with the ALJ that Respondent's failure to provide the information violated § 10(1)(e).

We have carefully considered all other arguments made by Respondent in its exceptions and find that they would not change the result. Accordingly, we affirm in part and reverse in part the findings of the ALJ and issue the following Order.

ORDER

The City of Lowell, its officers, agents, and representatives shall cease and desist from:

1. Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 9 of PERA, including the right to speak to individual City Council members, to the City Council or to the media and the right to encourage public support for the Union's position concerning contract negotiations;

2. Discriminating against employees regarding terms and conditions of employment in order to encourage or discourage union membership or activity;

3. Threatening employees with retaliation for having engaged in conduct protected under PERA;

4. Failing to bargain in good faith; and

5. Refusing to promptly and completely respond to information requests made by Charging Party related to wages, hours, working conditions, or disciplinary matters.

The City of Lowell shall:

1. Pay a $1,000.00 one-time pay adjustment to all water department employees who were denied the adjustment when it was awarded to non-union City employees.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: January 28, 2015

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the **CITY OF LOWELL**, a public employer under the PUBLIC EMPLOYMENT RELATONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 9 of the PERA;
b. Discriminate or retaliate against employees regarding terms and conditions of employment in order to encourage or discourage Union membership or activity;
c. Threaten employees with retaliation for having engaged in conduct protected under PERA;
d. Refuse to promptly and fully respond to information requests made by the union related to wages, hours, working conditions, or disciplinary matters.

WE WILL

a. Bargain in good faith with the Union;
b. Pay a $1,000.00 one-time pay adjustment to members of the bargaining unit.

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 the Public Employment Relations Act.

CITY OF LOWELL

By: _____

Title: _____

Date: _____

This notice must be posted for thirty (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, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF LOWELL,

Public Employer-Respondent,

Case No. C13 C-050
Docket No. 13-000390-MERC

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (IBEW), LOCAL UNION 876,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Fil Iorio and Kurt Kline, for the Charging Party

John R. McGlinchey and Sarah L. Harwood, for the Respondent

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC).

The Unfair Labor Practice Charge:

On March 30, 2013, a Charge was filed in this matter, with an Amended Charge filed on May 17, 2013, against the City of Lowell (the Employer) by the International Brotherhood of Electrical Workers (IBEW) Local 876 (the Union or IBEW). The Charge alleged that the Employer unlawfully withheld certain employment benefits from IBEW unit members, in particular, it was alleged that water department employee Todd Phillips was denied a scheduled pay increase of $1.00 per hour, in retaliation for Union activity, and that the entire IBEW unit was discriminatorily denied a $1,000.00 bonus given to all City employees. The Union alleged that the Employer had interfered in employee exercise of rights under PERA, in violation of Section 10(1)(a); had retaliated against employees for engaging in protected activity, in violation of Section

10(1)(c); and has refused to bargain in good faith, in violation of Section 10(1)(e).

The matter proceeded to trial on August 7, 2013. The parties had a full opportunity to present evidence through testimony and documents. At the conclusion of the hearing, the parties reserved the possibility of presenting a rebuttal witness. That testimony was to be on the narrow question of whether employee Brian J. VanVeelen had received the $1.00 per hour promised pay increase upon receiving his F-2 water filtration license in 2011. Despite the Employer's denial at trial, the parties submitted a stipulation post-trial that VanVeelen had earlier received the pay increase that was later denied to Todd Phillips.

Findings of Fact:

The IBEW was first certified to represent a unit of City of Lowell employees in late 2011, began bargaining with the Employer in January of 2012, and was still seeking to negotiate its first contract with the City as of the August 2013 trial date in this matter. The IBEW unit consisted of seven or eight employees, out of a total City workforce of about 25 individuals.

The original charge alleged that in the immediate aftermath of the Union securing bargaining rights, the Employer withheld what was otherwise a scheduled pay increase of $1.00 per hour from bargaining unit member Todd Phillips upon his securing a new level of licensing, because of, in retaliation for, and to discourage Union activity. Despite orders directed at determining the degree of factual dispute facing the tribunal, the Employer, in its several Answers, in essence refused to address factually whether the disputed pay increase was in the nature of an otherwise regularly scheduled pay increase, which, but for a decision to the contrary, would have been received by Phillips in the ordinary course of events. The Employer did acknowledge a failure to provide the disputed pay increase and asserted that it failed to do so because the Union was recently certified. The Employer also claimed that the pay increase was withheld based on its analysis of obligations arising under 2011 PA 54.

The Amended Charge added the allegation that the Employer refused to provide requested and relevant information regarding the distribution of the unscheduled $1,000 increase to all full-time City employees other than the IBEW members (and according to Howe, to Howe himself). The Employer's answer asserted that the information was neither relevant nor necessary; however, belatedly and after the Charge was filed the City through counsel, in May 2013, provided a single page report by the deputy treasurer dated December 2012.

The Amended Charge also asserted that the Employer provided an unscheduled pay increase of $1,000.00 to all City employees, other than those in the newly organized IBEW unit. The Amended Charge asserted that the City Manager expressly asserted that the IBEW members would not receive the pay increase received by all other City employees because they were engaged in negotiations for their first contract.

Again, despite my efforts to attempt to ascertain the degree of legitimate disputes of fact, the Employer in its several answers, refused to factually address the allegation by the Union that all City employees other than the IBEW members were given the $1,000 increase. The Employer ultimately asserted that it withheld the $1,000 increase on the theory that a unilateral implementation would have been unlawful, even though the Union expressly and in writing waived any objection to the implementation of the bonus.

In a pre-trial letter of June 18, 2013, I brought to the attention of the Employer that the withholding of a promised pay increase, if done in response to employees choosing union representation, would likely violate the Act. See, *Detroit Public Library*, 1997 MERC Lab Op 689.

A review of the record reveals no legitimate dispute of material fact. The newly organized IBEW unit included employees in the water distribution system, the streets and parks, fleet maintenance, and the cemetery. Among those, the employees relevant to this dispute are the water treatment and distribution staff consisting of Brian VanVeelen, Ralph Brecken, and Todd Phillips. Prior to unionization, each employee had been requested to sign what amounted to individual contracts, co-signed by the city manager and the supervisor of the treatment plant. That agreement unequivocally provided that upon attaining ever increasing levels of State certification in their particular fields, each employee would receive specific pay increases set out on a grid. The State certifications required passing State licensing exams, in water treatment, with license gradations F-4 through F-1, or in water distribution, with license gradations of S-4 though S-1.

In February 2013, water department employee Phillips received his F-4 license from the State and was therefore recommended for a $1.00 per hour raise by Brian VanVeelen, who was the crew-boss of the water department. City Manager Mark Howe refused to pay the increase, asserting that he could not lawfully grant such an increase while in bargaining with the Union, and later claiming that there had never been a policy of paying such an increase upon receipt of the new licensing level. Despite maintaining that assertion throughout his testimony, Howe's claim was untenable and was contradicted by the documentary evidence and by the City Treasurer's office.

The proofs established that in each prior instance when an employee advanced in licensing status, they received the pay increase as set forth in the

identical individual agreements that each employee signed and which were signed by the prior city manager. The Union in its case in chief introduced the agreements signed by employees Brecken and VanVeelen, each of whom had been promised, and had received, the same increases. A memo prepared by the City deputy treasurer, in response to a Union request for information, established that each of the employees had received the promised pay increases upon reaching every new level of licensing. The Union did not introduce, and apparently did not have, a copy of an agreement signed by Phillips.

The Employer, and in particular City manager Howe, insisted that the Brecken and VanVeelen agreements were special and had not been offered to all employees. Notwithstanding that testimony by Howe, before the end of the hearing, the Employer's counsel disclosed the existence of and introduced a copy of a signed agreement between the City and Phillips. That agreement, which pre-dated unionization and which was counter signed by the City manager and the water department supervisor, expressly provided that Phillips would receive the $1.00 per hour increase upon receiving his F-4 license, just as had his coworkers. Phillips had in 2008 received his S-3 and S-4 State certifications and had promptly received the pay increases promised in the same agreement that promised the $1.00 pay increase upon receiving F-4 certification.

Howe also testified insistently, and untruthfully, that VanVeelen, who was not present for the hearing, had never received one of the pay increases, despite the contrary assertion in the May 8, 2013, memo from the City treasurer that had been introduced as a joint exhibit. Howe implausibly insisted that he had independently, out of curiosity, reviewed the City records back in 2011, paying special attention to VanVeelen's pay rates, and that the deputy treasurer, who was in charge of the payroll records, was wrong. The record was held open to allow the Union to call VanVeelen as a rebuttal witness. That proved unnecessary as counsel for the parties instead filed a post-trial stipulation acknowledging that VanVeelen had received the promised increase, as asserted by the Union, and despite the vehement denials by Howe.

Howe met with Phillips and Union steward Ralph Brecken on February 19, 2013, regarding the withheld $1.00 per hour pay increase. At that meeting, Howe did not dispute that City policy required paying the increase to Phillip; rather he insisted that because the employees had joined a Union and were now in bargaining, the City was "*prohibited by law*" from giving the increase to Phillips. Brecken also asked to speak to the City Council about the issue and was told that "*the law prohibited"* Brecken from addressing the Council. Howe's own email of February 20, 2013 confirms Brecken's version of the meeting. In his testimony, Howe admitted refusing to pay Phillips the $1.00 per hour scheduled increase because the parties were in bargaining.

After the grievance meeting concluded, Howe remarked to Brecken that "*I'm sure you have heard through the grapevine that the other city employees received $1,000 bonus*" and that Howe claimed *"I really wanted to give it to you guys, but I couldn't because of the law*". Brecken had not heard about the bonus and disagreed with Howe about withholding it from the IBEW crew. Howe as City manager determined who received the bonus checks.

As Brecken went to leave the meeting, Howe opined that he felt that "*the Union was misleading them and leading them astray and that due to the Union's arrogance and unwillingness to negotiate, they did not have a contract*" and, consequently, the IBEW members were not getting the $1,000 bonus Howe had given all other employees. Howe admitted making comments of the sort attributed to him by Brecken, although characterizing them differently. To the extent of differences in their description of the meeting and comments made there, I credit Brecken, as Howe was generally not credible. Based in part on his own demeanor, and frankly his smugness, in testifying about that exchange, I find that Howe raised the $1,000 bonus given to all other employees with Brecken as a deliberate provocation. Howe sought, by raising the issue, to affirm his own authority by underscoring his personal ability to dole out an unscheduled bonus to those he favored, without City Council approval, and to withhold bonuses from those disfavored employees. Further, Howe sought to signal to the Union membership that they would gain nothing by joining a Union, and that in fact, they would lose out on benefits given to all other City employees.

Howe's antipathy to the unionization of the IBEW unit was transparent, both in his actions and in his demeanor while testifying. At the table, Howe insisted that any contract would have to include the IBEW members being employed at will; that the City reserved the right to replace the full-time IBEW members with non-bargaining unit part-timers; and that the City reserved the right to sub-contract all of the IBEW work.

In his testimony, Howe refused to be constrained by the efforts of the City's counsel to limit his extemporaneous comments. Howe went off on his belief that it was the Union which was bargaining in bad faith. He made clear that he was outraged by the fact that yard signs appeared in the City supportive of the City employees. He complained that Union supporters were showing up at City Council meetings and making "personal attacks" against him, which for him included any criticism of his performance or bargaining stance.

Howe *sua sponte* offered that he was particularly incensed that a newspaper ad ran which was supportive of the City employees. With no relevant question before him, Howe asserted that Todd Phillips, to whom Howe

denied the scheduled pay increase, had been one of those listed as a member of an organization which ran the newspaper ad. Howe testified that he believed it improper of Phillips because running the newspaper ad "*was going outside the bargaining table to illustrate [the Union's] position on issues*", while acknowledging that Phillips was not on the bargaining team regardless. Howe described the advertisement as listing and explaining several issues of concern to the Union. Howe believed it to be within his power to prohibit the Union from addressing the City Council; from encouraging the placement of yard signs by supportive citizens; from encouraging members and supporters to speak at City Council meetings; and from presenting their views in the media. It was apparent that Howe also felt it within his authority to take action against Phillips in response to Phillips apparent involvement in the advertisement.

By the conclusion of the hearing, I cautioned the Employer's counsel that there appeared to be no material dispute over the promise and withholding of the $1.00 per hour increase withheld from Phillips. I similarly cautioned the parties that there appeared to be no legal impediment which would have precluded the City of Lowell, given the Union's express concurrence, from providing the $1,000.00 bonus which was withheld from the IBEW unit members, but had otherwise been given out uniformly. The parties were encouraged to seek voluntary resolution of their disputes.

Discussion and Conclusions of Law:

Section 10(1)(a) of PERA prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights protected under the Act, as does the identical provision in the NLRA, Section 8(a)(1). The test under both statutes of whether that prohibition has been violated does not turn on the employer's motive for the proscribed conduct or the employees' subjective reactions to it, but rather whether the employer actions may reasonably be said to interfere with the free exercise of protected employee rights. See e.g. *City of Greenville*, 2001 MERC Lab Op 55, 58; *Carry Companies of Illinois v NLRB*, 30 F3d 922, 934 (CA 7 1994); *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *Cooper-Jarrett*, 260 NLRB 1123 (1982); *American Freightways Co*, 124 NLRB 146, 147 (1959).

Animus or motivation is not a necessary element of a 10(1)(a) violation. Proof of an employer's intent is a necessary element only of a violation of Section 10(1)(c). *City of Detroit Water & Sewerage Dept.*, 1993 MERC Lab Op 157, 167. The test for 10(1)(a) is whether the conduct complained of is inherently destructive of important employee rights. *St. Clair County Intermediate School District,* 2001 MERC Lab Op 218; *City of Detroit (Fire Dept),* 1988 MERC Lab Op 561; *City of Detroit (Fire Dept),* 1982 MERC Lab Op 150. See also *NLRB* v. *Erie Resistor Corp*, 373 US 22 (1963).

To establish a 10(1)(c) retaliation violation, the Charging Party must meet the following standard:

> Where materially adverse employment action has occurred, the elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employees' protected activities; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Warren Con Schs, 18 MPER 63 (2005); City of St Clair Shores, 17 MPER (2004); Grandvue Medical Care Facility, 1993 MERC Lab Op 686.*

The duty to bargain in good faith under Section 10(1)(e) includes the obligation of both parties to "*actively engage in the bargaining process with an open mind and a sincere desire to reach an agreement*". See, *Union-Sebewaing Area Schools*, 1988 MERC Lab Op 86, relying in turn on *DPOA v Detroit*, 391 Mich 44 (1975). An analysis of an alleged bargaining violation requires a review of the totality of the circumstances. *Capac Comm Schls*, 23 MPER 46 (2010); *Flint Twp*, 1974 MERC Lab Op 152, 157; *Warren Education Association*, 1977 MERC Lab Op 818; *Mecosta Co Park Comm.*, 2001 MERC Lab Op 28, 32 (no exceptions).

The Denial of the $1.00 Increase and the $1,000.00 Bonus Violated Sections 10(1)(a) & (c)

There is no factual dispute regarding the $1.00 per hour pay increase or the $1,000 bonus. Todd Phillips was scheduled to receive a $1.00 per hour pay increase immediately upon receiving his State F-4 licensing. He received the licensing, yet he was denied the pay increase. It is undisputed, and in fact admitted, that if Phillips and his coworkers had not joined the IBEW, Phillips would have received the $1.00 increase. It was transparent that not only was there animus directed at the employees for having joined a Union, City manager Howe could scarcely contain himself on the witness stand in his diatribes against the workforce for their temerity in opposing his authority by joining a Union.

The City asserts that it would have violated PERA to give Phillips his admittedly scheduled increase, as doing so would have supposedly denigrated the role of the Union as the employees' exclusive bargaining agent. Here of course the Union not only expressly agreed to the payment of the scheduled wage increase, but objected to it being withheld. The City was well aware that MERC precedent, and common sense, did not support the withholding of the scheduled pay increase under these circumstances. The Commission rejected just such a defense in *Detroit Public Library*, 1997 MERC Lab Op 689, where,

on the same theory, an employer denied to its workforce pay increases which had been promised prior to the employees exercising their statutory right to join a Union.

The purpose of the prohibition on an Employer granting pay or benefit increases unilaterally during bargaining is to prevent interference with employee free exercise of their right to select an exclusive bargaining agent. That goal is obviously not served by withholding from employees benefits already promised, which does more to interfere in employee rights than any granting of an unbargained-for benefit.

I likewise reject the Employer's *post hoc* assertion that Phillips' pay increase was not owed because it was "contingent" and not certain. The only contingency which existed and needed to be met was that Phillips pass the licensing exam and present proof of same. That contingency was met and, but for Phillips having joined the Union, he would have received his pay increase.

Moreover, it was apparent that Howe expressly intended to interfere in the exercise of rights and retaliate against employees for having joined a Union, by withholding the pay increase, as he made clear at the February 19th meeting. Howe had Phillips and Brecken in his office and, without denying that Phillips was entitled to the pay raise, Howe told them that he was personally withholding it because Phillips had joined the Union. Not content with that singular proof of his managerial authority, Howe then informed the two men that Howe, on his own authority, was giving every other full-time hourly City employee a $1,000.00 bonus, which the men had not known, except for the IBEW bargaining unit members.[4] Still not content, Howe then veritably taunted the men with the assertion that it was their Union which was being unreasonable, and but for that supposed unreasonableness, they would have had a contract and been given the $1,000.00 bonus.

The Employer defends, correctly, with the assertion that it had no independent obligation to provide the IBEW unit members with a $1,000.00 bonus. It is equally true that the City had no obligation to give any employees a $1,000.00 bonus. However, Howe acting on his own authority decided to give out such largesse. He then taunted the IBEW unit first by telling them of the bonus which they did not even know about. Next, he assured them that they too would have been blessed by his beneficence if they hadn't joined the IBEW.

Howe's obvious goal in withholding the pay increase and the bonuses was to re-affirm for the employees that Howe, and only Howe, controlled their conditions of employment. The purpose was to punish the employees for joining the Union and engaging in other protected activity, and to deter future protected activity. The goal, in sum, was to destroy support for the Union.

[4] Howe asserts that he did not give himself the bonus.

Such conduct in blaming the Union for the non-receipt of pay increases or benefit improvements has long been held to be unlawful. See, *Interstate Smelting and Refining*, 148 NLRB 219 (1964), where the employer similarly told employees that "if it were not for the Union" the employees would have received raises. See also, *LRM Packaging*, 308 NLRB 829 (1992)[5]; *Parchment Schls*, 2000 MERC Lab Op 110.

The Employer has introduced a *post hoc* defense that the granting of the pay increases would have somehow violated 2011 PA 54, which amended PERA at MCL 423.215b. That Act was passed to restrict the payment of automatic step increases during bargaining, with such automatic pay increases perceived by the Legislature as a deterrent to timely bargaining, as the availability of such increases might deter the Union from making the tough compromises necessary in bargaining.

The Act provides that ". . . *after the expiration of a collective bargaining agreement* and until a successor agreement is in place" such pay increases shall be withheld. That statutory language must be applied according to its terms, and by its terms it is inapplicable to the present circumstances. The Employer argument ignores the unavoidable fact that the parties were not in a period "*after the expiration of a collective bargaining agreement".* There was no prior "collective bargaining agreement". The wage increase, and the bonus, was not compelled by any collective bargaining agreement, rather it was one determined solely by the Employer. PA 54 did not authorize or compel the Employer to grant pay increases to some employees and to withhold them from others for discriminatory and retaliatory reasons.

The withholding of the Phillips scheduled $1.00 per hour pay increase, by Howe, and the withholding of the $1,000 bonus, by Howe, violated Sections 10(1)(a) & (c) of PERA.

The Prohibition of Contacting City Council and Retaliation for Public and Media Comments Violated Sections 10(1)(a) & (c)

In the February 19, 2013, meeting, Howe expressly prohibited the Union generally and Union steward Brecken specifically from approaching the City Council with their concerns. Aside from the obvious First Amendment implications that any American sixth grader should be able to spot, the Howe order was a per se unlawful restriction on protected activity. See, *Wayne County,* 22 MPER 48 (2009); *Utility Workers,* 20 MPER 51 (2007). While public employee unions are obliged to bargain with the employer's chosen

[5] Federal precedent under the NLRA is given great weight in interpreting PERA, at least where PERA's language is identical to that of the NLRA, although MERC is not bound to follow "every turn and twist" of NLRB case law. *Kent County*, 21 MPER 61, 221 (2008); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co. Health Dep't*, 1993 MERC Lab Op 901, 906.

representatives, petitioning the government, lobbying, and engaging in appropriate speech during public comment portions of public meetings is a right of all Americans, even including public employees who belong to Unions. Labor relations in the public sector, frequently and appropriately, includes the publicizing of views by the parties on both sides of the dispute. After all, what is ultimately at stake is the question of what services will be provided and how public tax monies will be spent.

Not content with imposing prior restraints on First Amendment and PERA protected activity, Howe sought to punish the employees for engaging in other forms of communication which he had not thought to ban initially. Howe complained bitterly from the stand about the fact that the supporters of the Union had placed objectively inoffensive yard signs in the City. He singled out for criticism the fact that the Union had expressed its views in a newspaper advertisement, which Howe deemed to be bargaining in bad faith. He openly targeted Phillips for having apparently signed on to the newspaper ad, with Howe's venom towards Phillips being apparent from his *sua sponte* raising the issue from the witness stand.

While asserting that everyone else was violating Howe's own novel interpretations of the law, Howe violated Sections 10(1)(a) & (c) by interfering with employee exercise of rights under PERA and by responding with punitive and retaliatory actions when the employees did engage in protected activity.

The City Bargained in Bad Faith in Violation Sections 10(1)(e)

As noted above, when reviewing a claimed failure to bargain in good faith, the totality of the circumstances must be examined. Here, the parties have been in bargaining for a protracted period with, essentially, no progress. While neither side need yield on any particular issue, as noted above, each party must "*actively engage in the bargaining process with an open mind and a sincere desire to reach an agreement*". Additionally, adjudicated findings of other contemporaneous unfair labor practices by an employer, such as the interference, discrimination and retaliation violation findings made above are relevant circumstantial evidence of unlawful motive by that employer in the context of a discrimination or bad faith bargaining charge. See, *Oaktree Capitol Mgt*, 353 NLRB No. 27 (2009); *Shattuck Mining Corp v NLRB*, 362 F2d 466, 470 (CA 9, 1966). Each separate finding of an unfair labor practice must stand on its own merits; however, unlawful conduct occurring between the same parties during the same round of negotiations is certainly relevant. Indeed, such contemporaneous acts are unavoidably part and parcel of analyzing a party's conduct and the "totality of the circumstances".

Howe's bargaining posture, if one can call it that, was particularly antagonistic. At the table, Howe insisted that any contract would have to

include the IBEW members being employed at will; that the City reserved the right to replace the full-time IBEW members with non-bargaining unit part-timers; and that the City reserved the right to sub-contract all of the IBEW work. The Union was asked to give up all of the rights which might be found in an ordinary contract. Such proposals are far from the norm in the public sector and can only be viewed rationally as an effort to avoid reaching a contract with the Union, as a contract based on such terms would be tantamount to no contract at all. Howe's posture in bargaining was that he was to have the final word on every issue.

Howe backed up his intransigence in bargaining away from the bargaining table by demonstrating his muscle by the granting of bonuses to everyone but the IBEW unit and by withholding the raise promised to Phillips, precisely because the IBEW had not caved at the table. Howe actively sought to demonstrate to the unit that seeking to have the IBEW bargain on their behalf was futile. Howe doled out $1,000 bonuses to everyone but the IBEW unit, and withheld Phillips' scheduled increase, precisely so that he could show them his power and his contempt for the bargaining process.

Additionally, the City failed to timely respond to requests for information from the Union regarding the distribution of the $1,000.00 bonuses. The information was provided by the Employer only after the filing of the Charge and the involvement of counsel, and even then, the information consisted of a single page memo issued months earlier which was in the Employer's ready possession. If providing the information only after a Charge was filed was a viable defense, the number of filings would multiple as initiating litigation became a necessary part of the ordinary process of requesting of information. See *City of Detroit (SEIU),* 20 MPER 57 (2007).

By the totality of its conduct at the table and away from the table, the Employer failed to bargain in good faith, in violation of Section 10(1)(e) of PERA.

Conclusion

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. I find that the Employer, acting through City manager Howe, violated Sections 10(1)(a), (e) & (c) of PERA. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The City of Lowell, its officers, agents, and representatives shall:

1. Cease and desist from:

a. Failing to bargain in good faith with the representative of its employees;
b. Withholding scheduled pay increases to deter protected activity or retaliate against employees engaging in protected activity;
c. Withholding otherwise generally applicable bonuses to deter protected activity or retaliate against employees engaging in protected activity;
d. Interfering with or retaliating against employees for engaging in protected activity;
e. Denigrating IBEW Local 876 for the purpose of interfering in its representation of employees or for the purpose of deterring employees from engaging in protected activity.

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

a. Bargain in good faith with IBEW Local 876 with an open mind and a sincere desire to reach an agreement;
b. Immediately commence paying Todd Phillips the improperly withheld $1.00 per hour pay increase, effective January 28, 2013, for all hours worked or otherwise paid, together with statutory interest on the entire amount of backpay ;
c. Immediately pay all IBEW bargaining unit members, employed since December 2012 and regardless if still employed, the improperly withheld $1,000 bonus, together with statutory interest on the entire amount of backpay commencing December 8, 2012;
d. Maintain all existing conditions of employment throughout the bargaining and fact-finding process, including by complying with previously scheduled or promised increases in pay or benefits
e. Refrain from retaliating or discriminating against employees for engaging in protected activity;
f. Refrain from threatening or taking any actions against employees which could interfere with, restrain, or coerce employees in the exercise of their rights under PERA.

3. Post an appropriate notice, as may be directed by the Commission, to employees in a conspicuous place at each City worksite and post it prominently on any website maintained by the City for employee access for a period of thirty (30) consecutive days, and additionally deliver a copy of the notice by mail or email to each employee in the IBEW bargaining unit.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 11, 2013