

**STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF CADILLAC,  
Public Employer-Respondent,

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,  
Labor Organization-Charging Party.

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Case No. C14 B-015  
Docket No. 14-002387-MERC

APPEARANCES:

Foster, Swift, Collins & Smith, P.C., by Michael R. Blum and Laura J. Genovich, for Respondent

Martha M. Champine, Assistant General Counsel, Police Officers Association of Michigan, for Charging Party

**DECISION AND ORDER**

On March 19, 2015, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent had 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 Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

**ORDER**

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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/s/  
Edward D. Callaghan, Commission Chair

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/s/  
Robert S. LaBrant, Commission Member

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/s/  
Natalie P. Yaw, Commission Member

Dated: April 27, 2015

**STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

CITY OF CADILLAC,  
Respondent-Public Employer,

Case No. C14 B-015  
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-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,  
Charging Party-Labor Organization.

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**APPEARANCES:**

Foster, Swift, Collins & Smith, P.C., by Michael R. Blum and Laura J. Genovich, for the Public Employer

Martha M. Champine, Assistant General Counsel, Command Officers Association of Michigan, for the Labor Organization

**DECISION AND RECOMMENDED ORDER  
OF ADMINISTRATIVE LAW JUDGE**

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Travis Calderwood, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). An evidentiary hearing was held on June 10, 2014, in Lansing, Michigan. Based upon the entire record, including the transcript of the hearing, exhibits and post-hearing briefs filed by the parties, I make the following findings of fact, conclusions of law and recommended order.

**The Unfair Labor Practice Charge:**

On February 2, 2014, the Command Officers Association of Michigan (“Union” or “Charging Party”) filed an unfair labor practice charge with the Commission against the City of Cadillac (“City” or “Respondent”) alleging that City violated Sections 9 and 10 of PERA when it disciplined Lt. Todd Golnick, the local union president, for his actions related to the endorsement of a mayoral candidate in October of 2013. Charging Party claims that the Respondent investigated and ultimately disciplined Lt. Golnick in retaliation for his exercise of Section 9 rights under PERA. Respondent claims it investigated and disciplined Lt. Golnick not because of the exercise of his Section 9 rights, but instead because he violated the City’s ethics ordinance, certain personnel policies and rules and Michigan law.

During opening statements at the June 10, 2014, hearing, Charging Party suggested that, in addition to the alleged violations concerning the City's actions against Lt. Golnick, the City further violated PERA by questioning Captain Matthew Wohlfeill about the facts surrounding the endorsement letter. As Charging Party did not follow through with that suggestion during the hearing and did not address that allegation in its post-hearing brief, it will not be discussed herein.

#### Findings of Fact:

Charging Party, the Command Officers Association of Michigan, is the authorized and certified bargaining representative of the supervisory police officers employed by Respondent. At all times relevant to these proceedings, the parties were operating under a collective bargaining agreement that took effect on July 1, 2010, and which was set to expire on June 30, 2014.

Lt. Golnick began his employment with the Cadillac Police Department ("Department") in 1992 and held many different positions, including sergeant, shift supervisor and various other special assignments before attaining the rank of Detective-Lieutenant in 2007. In January of 2013, Lt. Golnick was elected president of the Cadillac Police Command Officer's Association (CaPCOA), the local union for the Charging Party.

Sometime in October of 2013, Lt. Golnick was approached by Carla Filkins who requested the CaPCOA's assistance in her campaign for mayor.<sup>1</sup> Lt. Golnick indicated to Filkins that the local association was unable to provide any financial assistance but that it could provide an endorsement. Lt. Golnick then began approaching individual members of the CaPCOA to determine whether the local would provide the endorsement. Lt. Golnick testified that because the CaPCOA only had six members, he decided to provide the endorsement after he got agreement from four members.

While off-duty on a Sunday afternoon in late October, presumably October 27, 2013, Lt. Golnick used his City issued laptop computer, which he had taken home, to draft the CaPCOA's letter of endorsement for Filkins.<sup>2</sup> Lt. Golnick claims that the next day he returned to work and while on break he may have made some edits to the letter as well as printed it using the Department's printer and printer paper. Some evening later in the week Lt. Golnick provided Filkins with the letter. That letter was written under the heading, "Cadillac Police Command Officers Association" and contained both the City's logo as well as the logo for Charging Party at opposite corners on the bottom. Text between those two logos read, "Working together for a better community." The letter was addressed to Ms. Carla Filkins, signed by "Todd M. Golnick, President CaPCOA" and stated:

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<sup>1</sup> Lt. Golnick testified that the discussion in October was the second the two had regarding assistance by CaPCOA. The first conversation took place sometime before October.

<sup>2</sup> Lt. Golnick provided undisputed testimony that since as early as 2001 or 2002, he has been issued a laptop computer which he takes home.

As President of the Cadillac Police Officers Association (CaPCOA), I am pleased to announce our groups [sic] endorsement for your 2013 city of Cadillac Mayoral bid. As the senior leaders of the Cadillac Police Department, we feel you possess the qualities and attributes to best represent this fine city.

The Cadillac Police Department has met with unprecedented challenges in the past several years. With an increase in violent crimes, a dramatic influx of dangerous drug use, and a spike in general order crimes that effect [sic] our citizens quality of life; we desperately seek a mayor who will work with us to grapple these and other difficult issues.

Due to a decrease in our staff, we have been unable to maintain our Commission on Accreditation for Law Enforcement Agencies (CALEA) recognition. This standard is only achieved by the top 1% of law enforcement agencies in the country and it was a proud day for all when we achieved it in 2007. The benefits of accreditation are many. Mostly, it allows our citizens and visitors to know our police department implements and follows law enforcements best practices standards. The results are better service to its citizens, increased professional standards and decreased civil liability to the city.

The challenges presented to law enforcement are dynamic and frequently changing. If we are ever going to meet them to their highest standards, it will require a collaborative effort of all the stakeholders. We feel that you, Carla Filkins, will be the leader to get us there.

Evidence and testimony provided by Respondent indicates that a document entitled "Filkins endorse" was modified on Lt. Golnick's city-issued laptop on October 27, 2013, at 11:32 a.m. The record also establishes that two documents entitled "Filkins endorse f" and "Filkins endorse final" were modified on Lt. Golnick's city-issued laptop on October 28, 2014, at 11:52 a.m., and 3:38 p.m., respectively. Payroll records indicate that Lt. Golnick was on duty on October 28, 2014, for a total of ten (10) hours, two (2) hours of which were overtime. Respondent did not provide any testimony to challenge Lt. Golnick's claims that he edited the letter while on break.

Unbeknownst to Lt. Golnick, Filkins, or someone acting on her behalf, had arranged to print a visual copy of the letter in the local newspaper, the Cadillac News. Sometime between when Lt. Golnick provided the endorsement letter and the first Monday in November, November 4, 2013, the Cadillac News published the letter both in print and electronic format.<sup>3</sup> The published letter clearly showed both the City logo and Charging Party's logo. Superimposed on the bottom of the letter was text that read, "Paid for by Friends of Carla Filkins, P.O. Box 61, Cadillac, MI 49601 / Michael Bengelink, Treasurer."

On at least four separate letters, three dated July 10, 2013, and one dated July 26, 2013, Lt. Golick had prepared official union correspondence on letterhead identical to the endorsement

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<sup>3</sup> The copy of the letter from the Cadillac News website provided by the parties and admitted into evidence indicates that the letter was available on the website as early as November 2, 2013, at 6:44 p.m.

letter, including the use of the City's logo. Three of those letters were addressed to Marcus Peccia, the Cadillac City Manager, while the fourth was addressed to the Cadillac Civil Service Commission, by way of the Cadillac City Clerk.

Peccia testified that on the Saturday immediately preceding the City Council meeting on the first Monday in November, he received a phone call from a council member advising him that a political endorsement letter which contained the City's logo had appeared in the Cadillac News. Peccia did not indicate which council member contacted him. Peccia's testimony indicated that upon discovering the endorsement letter his "only concern was the use of the (City's) logo." Peccia testified that his next action was contacting the newspaper and advising them that the letter was not an endorsement by the City and that the City's logo had been used without permission.

During the City Council's meeting on November 4, 2013, Peccia, after being questioned by members of the City Council, informed them that the City's logo was available on the internet. Peccia testified that he recalled at least one Council Member "inquiring, perhaps even rhetorically, but just inquiring whether or not this was done by a union vote."

The next day, Tuesday, November 5, 2013, at a staff meeting attended by Peccia, Department Captain, Matthew Wohlfeill, the highest ranking officer within the Department at that time and since retired, as well others, Peccia discussed the Union's endorsement letter with Cpt. Wohlfeill. Cpt. Wohlfeill testified that Peccia revealed to him that there were concerns voiced at the previous night's Council meeting that the letter was written by Lt. Golnick on his own behalf and without support by the CaPCOA. Cpt. Wohlfeill's testimony was supported in part by later testimony given by Peccia and was never refuted or disputed by Respondent. Both Cpt. Wohlfeill and Peccia agreed that Peccia asked Cpt. Wohlfeill whether a vote had taken place within the CaPCOA on whether to issue the endorsement. Both persons provided testimony that in some fashion or another Cpt. Wohlfeill had indicated to Peccia that four members were in favor of the endorsement.<sup>4</sup>

Following the publishing of the endorsement letter, Douglas Mellema, a Cadillac City Council Member, filed a written complaint against Lt. Golnick on November 15, 2013, with the City's Ethic Board. That Board was comprised of Peccia, Michael Homier, the City Attorney, and Linda Kent, the City's Human Resources Director. Mellema's complaint alleged that Lt. Golnick had violated both the City's Ethics Ordinance and certain personnel policies. That letter stated:

With this letter, I am notifying the City of Cadillac that I am filing this written Complaint, pursuant to the City's Ethics Ordinance against Lt. Det. Todd Golnick, who, without authorization, deliberately utilized the City of Cadillac's logo to become a key part of a political campaign whereby the appearance of his actions represented the City of Cadillac as an endorser of the mayoral candidate race. A second logo on the same letter also misrepresented the POAM's

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<sup>4</sup> Peccia testified that Cpt. Wohlfeill informed him that the decision on whether to issue the endorsement was four-to-two in favor of the endorsement while Cpt. Wohlfeill claims he merely told Peccia that four members were in favor of the endorsement. The discrepancy between the two is immaterial to the present dispute.

involvement in the endorsement. Misuse of our city logo was deceptive, dishonest and fraudulent and may have affected the course of the mayor's election. I do not believe there was a vote in the union and that the information Mr. Peccia received from Captain Matt Wohlfiell is untrue and being contested by a union grievance procedure at this time. I have reasonable belief that an ethics violation as well as personnel policy violations that should be investigated and followed through with at your earliest convenience. This ethics violation complaint is separate from the personnel issues that were also violated and I would request that both areas be fully investigated and that proper discipline be handed down following the investigation or actions taken consistent with the Ethics Ordinance and personnel policies.

Please receive this letter as a formal complaint and do not limit your investigation to my specific concerns with regard to the city logo as I am sure you will find that the scope of your investigation will widen.<sup>5</sup>

On December 12, 2013, the City's Ethics Board, conducted a public hearing regarding the complaint filed against Lt. Golnick. Despite receiving notice of the hearing, Lt. Golnick did not attend. Following the presentment of testimony and evidence at the hearing the Ethics Board issued a written Opinion and Recommendation on or about January 17, 2014, in which it made the following findings of fact:

1. A Complaint was received alleging violations of the Code of Ethics by Lt. Det. Todd Golnick.
2. Lt. Det. Golnick created the Endorsement Letter using City property and resources, namely the City's computers, e-mail and internet system, and copier. The purpose of the Endorsement Letter was to endorse a candidate in the City's mayoral election.
3. Lt. Det. Golnick modified and finalized the Endorsement letter while on duty as a police officer and while being paid by the City.
4. The Endorsement Letter included the City's logo, which is property owned and controlled by the City.
5. Neither Lt. Det. Golnick nor any other official from CaCPOA requested or received permission from the City to use its logo on the Endorsement Letter.
6. Drafting the Endorsement Letter was a private action by Lt. Det. Golnick and/or the CaCPOA. Drafting the Endorsement Letter was not part of Lt. Det. Golnick's responsibilities as a police officer or employee of the City.

The Ethics Board ultimately concluded that Lt. Golnick violated Sections 2-367 and 2-368 of the City's Code of Ethics. Section 2-367, entitled "Use of city property and resources", provides as follows:

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<sup>5</sup> Unfortunately, Mellema was not present at the June 10, 2014, hearing to provide testimony regarding his numerous and presumably serious allegations nor to expand on why he was so confident that further investigation would discover other misconduct.

An officer or employee shall not use, or permit others to use, any property owned by the city for profit or personal convenience or benefit, except (a) when available to the public generally, or to a class of residents, on the same terms and conditions; (b) when permitted by policies approved by the city council; or (c) when, in the conduct of official business, used in a minor way for personal convenience.

Section 2-368, entitled “Political activities”, states:

Any violation of the Political Activities by Public Employees Act, MCL 15.401 et seq., or the Michigan Campaign Finances Act, MCL 169.201 et seq., shall constitute a violation of this article and shall be subject to the sanctions set forth herein.

Because the authority granted to the Ethics Board pursuant to the City’s Code of Ethics allows it to determine “any appropriate sanction that should be imposed” but not the authority to actually impose any sanction, as such authority rests with the City, the Board made the following recommendation:

Considering all of the uncontested facts of this matter and the severity of the violation, the Ethics Board has determined and recommends that Lt. Det. Todd Golnick should be suspended without pay for a period of five (5) days and that a copy of this Opinion and Recommendation be placed in Lt. Det. Todd Golnick’s personnel record.

On January 28, 2014, Peccia, who was a member of the Ethics Board, issued a memorandum, acting in his capacity as City Manager, wherein he suspended Lt. Golnick for five days and issued a written reprimand. First, in issuing the discipline recommended by the Ethic’s Board, Peccia wrote:

In an Opinion and Recommendation dated January 17, 2014, attached for reference, the City of Cadillac Ethics Board determined that you violated Section 2-367 and 2-368 of the Cadillac Ethics Code when you used municipal property and resources to create a political endorsement letter, and engaged in such non-work activities while being paid to be on duty as a police officer. Consequently, pursuant to Section 2-391 of the Code of Ethics, the Ethics Board recommended that the City suspend you for a period of five days, and place the Opinion and Recommendation in your personnel file, and hereby I am instituting the five day suspension recommendation, based upon the findings, beginning January 29, 2014 and ending February 4, 2014, with your first regular day back on active duty being February 5, 2014.

Next, in determining that Lt. Golnick had also violated also numerous sections of the Cadillac Police Department General Orders and Work Rules, Police Department Operations Manual and the City of Cadillac Personnel Policies Manual, Peccia wrote:

Through additional review, it has also been determined that you breached the following municipal and department directives, regulations and policies. Section 5.66(A) of the Cadillac Police Department General Orders and Work Rules states in relevant part: "Personnel shall not commit any act which constitutes a violation of the written directives of the department." Section 1.4A of the Police Department Operations Manual which states in relevant part: "I will be exemplary in obeying the law and the regulations of my department." Section 1.11A of the Police Department Operations Manual which states in relevant part: "That I will abide by the Law Enforcement Code of Ethics, Cadillac Police Department Code of Conduct, and all Cadillac Police Department and City of Cadillac policies and directives." Section 1.4 of the Operations Manual states: "Each member of the department shall abide by the Law Enforcement Code of Ethics outlined in [Section 1.4A] of this order." Your actions as described in the Ethics Board's Opinion and Recommendation constitutes separate and independent violations of several municipal directives, regulations, and policies.

Section 4.4 of the City of Cadillac Personnel Policies Manual states in relevant part: "Employees have a right to participate in all other political activity, but must be careful of personal statements so that they are not construed by the public as official City statements and/or City policy." The letter which you prepared and sent to the Cadillac News endorsing a mayoral candidate included the municipal logo, and the Cadillac News published the letter with the municipal logo on the letter. These actions demonstrate that you were not careful of your personal statements being construed by the public as official City statements and/or City policy, since by including the municipal logo on the endorsement letter, it can be construed that your personal statements were official City statements and/or City policy, and those actions violated Section 4.4 of the City of Cadillac Personnel Policies Manual.

Section 5:37 of the Cadillac Police Department General Orders and Rules states: "Personnel are prohibited from using their official capacity as an employee with the Department to influence, interfere with or affect the results of an election." The letter which you prepared and sent to the Cadillac News bore the municipal logo, identified you as a senior leader of the Cadillac Police Department. When considered in combination with one another, these actions demonstrate that you used your official capacity as an employee of the Police Department to influence or affect the result of an election in violation of Section 5:37.

Section 5:61 of the Cadillac Police Department General Orders and Rules states: "Personnel shall operate Department Communication Devices, computers, networks subscribed to by the Department, and other electronic devices in conformance with all laws and departmental procedures. Unauthorized, inappropriate, or unnecessary use is prohibited." As discussed in the preceding paragraph, you violated Section 5:37 by using your official capacity as an employee of the Police Department to affect the result of an election through the

use of department communications devices, computers and other electronic devices to commit this violation which use is prohibited by Section 5:61.

In addition to the five day suspension, this also serves as a written reprimand for violations of the Cadillac Police Department General Orders and Rules, the City of Cadillac Personnel Policies Manual, and the Police Department Operations Manual that were not addressed as part of the Ethics Board Recommendation, and advised that these policies must be adhered to otherwise future disciplinary action may be taken by the City.

Peccia testified at the hearing that he imposed the five day suspension based upon the recommendation of the Ethics Board for the Ethics Ordinance violations and that the violations or various work rules and policies that began with the second paragraph of the above memorandum were dealt with by way of written reprimand.

#### Discussion and Conclusions of Law:

It is important to note that the while City, at no time during the hearing or in its post-hearing brief, disputes whether Lt. Golnick was engaged in protected and concerted activity when he drafted the endorsement letter on behalf of the CaPCOA, it did not explicitly concede that point either. Nonetheless, the record clearly supports a finding that Lt. Golnick's "political activity" of composing the letter endorsing a mayoral candidate is protected and concerted activity under PERA and that the employer was aware of that activity. See *Charter Township of Flushing*, 27 MPER 29 (2013) (no exceptions), (in which the ALJ concluded that concerted efforts by members of the bargaining unit to raise funds in support of a recall of some members of the employer's governing board, constituted protected activity for "purposes of mutual aid and protection" within the meaning of Section 9 of PERA the same way that public statements made by the unit would have been), and *City of Westland*, 26 MPER 26 (2012) (no exceptions), (in which the ALJ concluded that, although not present in that case, facts could be such to support a finding that public employees were engaged in activity for "mutual aid and protection" under Section 9 of PERA when acting in concert to influence the election for a member of their employer's governing body).

Furthermore, it is clear from the record that Lt. Golnick was the recipient of two separate and distinct disciplinary actions issued by the City; the first being the five day suspension issued as a result of the findings and recommendation of the Ethics Board and the second being the written reprimand issued as a result of Peccia's investigation into alleged violations of various work rules.

Charging Party asserts that the City discriminated against Lt. Golnick in retaliation for CaPCOA's endorsement of a mayoral candidate. Arguing in its post-hearing brief, Charging Party states:

It is clear from the evidence presented at the hearing that at least some members of the Cadillac City Council were upset that the CaPCOA endorsed a candidate. At first Council Members called for an investigation because they believed that

the CaPCOA endorsed a candidate without an actual union vote. Then the Council added to the mix the allegation that the Union had somehow broken the law by using the City's logo on its letterhead. Then the Council Member that was the most upset filed a formal complaint alleging that Lt. Detective Todd Golnick had violated the City's Ethics Ordinance.

Charging Party then sets forth the elements of a prima facie case of unlawful discrimination under PERA, i.e., (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. *Wayne County Sheriff*, 21 MPER 58 (2008); *Warren Con Schs*, 18 MPER 63 (2005); *City of St Clair Shores*, 17 MPER (2004); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. Additionally, the Union argues that the City's objection to the Union's use of the City's logo on its letterhead violates not only Section 10(1)(a) and (c) of PERA, but Section 10(1)(b) as well.

The City denies that its actions were undertaken in retaliation for the CaPCOA's endorsement and claims that the sole basis for issuing the discipline to Lt. Golnick was predicated on his violations of the City's Ethics Ordinance and various work and department rules and policies. Respondent, in its post-hearing brief, argues:

This case is not about an employer interfering with protected union activity. This case is about a public employee who violated his employer's ethics ordinance, personnel policies, and Michigan law, and now wants to use union membership as a shield against the consequences of his own wrongful conduct.

In support of its position, Respondent points to *Ingham County v FOP*, 275 Mich App 133 (2007), for the proposition that "misconduct in the course of protected activity... is not beyond an employer's right to discipline."

Although Charging Party makes the claim that Lt. Golnick was disciplined in retaliation for the campaign endorsement, it does not allege sufficient facts in support thereof. Charging Party wants this ALJ to focus on the statements made by Mellema in his November 15, 2013, letter regarding the absence of a Union vote prior to endorsement, as well as testimony by Cpt. Wohlfeill and Peccia that some Council Members also expressed concern regarding the same. Ignoring the fact that neither Mellema nor any other Council Member provided testimony at the hearing, the record clearly establishes that the paramount concern of Peccia and the City Council upon learning of the endorsement letter was the possibility that the presence of the City's logo could cause confusion over the City's involvement in an active election campaign. Peccia, after learning of the letter, immediately contacted the newspaper in order to address that concern. Furthermore, while initially Mellema and presumably other members of the City Council questioned the validity of the internal union process in providing the endorsement, such concerns were not mentioned by either the Ethics Board or Peccia in their respective decisions. It is therefore the opinion of the undersigned that the question is not whether the City's actions constituted retaliatory and discriminatory behavior but rather whether the City lawfully disciplined Lt. Golnick for misconduct that occurred in the course of protected activity.

In *City of Detroit (Fire Dep't)*, 1982 MERC Lab Op 1220, the Commission adopted the Administrative Law Judge's decision in its entirety, holding that an employer violated Sections 10(1)(a) and (c) of PERA when it disciplined employees for violating an otherwise legitimate work rule while they were engaged in activity protected by Section 9 of PERA. The question before the Commission was whether the employer's enforcement of a longstanding department rule prohibiting the wearing of department uniforms off-duty or for private reasons without permission interfered with the employees' right to participate in protected activity. There, the employer disciplined several firefighters who wore their uniforms in television and newspaper ads and at polling places in an effort to express their views on a proposed amendment to the City's charter which would have affected department promotions. The ALJ, in her Decision and Recommended Order, adopted by the Commission in its entirety, utilized the three-part test set out in *Jeannette Corp v Nat'l Labor Relations Bd*, 532 F2d 916, (CA 3, 1976).<sup>6</sup> The test adopted by the ALJ and Commission sought to: (1) determine whether the rule adversely affected the employees' protected rights, (2) determine whether the employer has demonstrated legitimate and substantial business justification for instituting the rule and applying it, and (3) balance the diminution of the employees' protected rights as a result of the rule against the employer's interest being protected by the rule. The Commission first determined that the discipline the firefighters received for wearing their uniforms did in deed have an adverse effect on their protected rights. The Commission next considered whether the employer demonstrated a legitimate and substantial business justification for instituting and enforcing the rule. While the Commission did find legitimate reasons for placing reasonable restrictions on the employees' use of the uniform, it also concluded that the employer had not demonstrated a sufficient justification in applying the rule in that situation. Finally, the Commission determined that the diminution of the employees' rights as a result of the application of the rule outweighed the employer's interest being protected by the rule. Based on this analysis, the Commission concluded that the employer violated Sections 10(1)(a) and (c) of PERA when it disciplined the firefighters.

In *Township of Redford*, 1984 MERC Lab Op 1056, the Commission, while not expressly applying the three part *Jeannette Corp* test, did nonetheless consider whether the employer demonstrated a legitimate and substantial business justification for the application of a rule that had resulted in the restriction of protected rights under PERA. There the employer had a rule that prohibited all public communication concerning police business without prior approval and had issued discipline to the union president for making comments to the press regarding a pending dispute between the union and police department. The Commission recognized that not all the conduct prohibited by the application of the Township's rule would constitute protected concerted activity but that in the instant case the rule was applied to such activity. The Commission held that the employer's desire to keep the labor dispute out of the press was not a legitimate and substantial business justification.

The Court of Appeals in *Ingham County*, supra, got its first chance to address the relationship and interplay between the need for workplace discipline and the statutory

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<sup>6</sup> In addition to adopting the test from *Jeannette Corp*, the Commission also expressed its intention to follow the Supreme Court's holding in *Eastex, Inc, v NLRB*, 437 US 556 (1978), which established that there could be no complete dichotomy between "political" activity and protected activity for purposes of mutual aid and protection.

entitlement of employees to engage in concerted activity allowed by PERA. There a deputy sheriff was disciplined after he released an internal police document despite the existence of a department rule against providing such documents to anyone outside the department. The deputy gave the document to the union's attorney in order to get the attorney's opinion of the propriety of the document itself. The Commission, in *Ingham County*, 18 MPER 44 (2005), had adopted the ALJ's recommended order and decision finding that the employer had violated both Section 10(1)(a) and Section 10(1)(c) of PERA. The Court, while recognizing that contacting a union lawyer to seek advice on a work place matter is generally a protected activity, held that the employee could be properly disciplined for violating the work rule. In order to reach its conclusion, the Court at 141-142, in accord with *Jeannette Corp* supra, articulated the following three-part test to use when analyzing whether an employer may lawfully enforce an employment rule and discipline an employee for engaging in activity that otherwise would be protected activity under Section 9 of PERA:

Under the first prong of the test, we look at whether the employer's action adversely affected the employee's protected right to engage in lawful concerted activities under PERA. Under the second prong, we look at whether the employer has met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule. Finally, under the third prong, we balance the diminution of the employee's rights because of application of the rule against the employer's interests that are protected by the rule. In addressing this final prong, we must remain cognizant that “ ‘[it] is the primary responsibility of the [National Labor Relations] Board and not of the courts ‘to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.’ ” [Footnotes omitted.]

The Court then went on to hold that: (1) although the deputy in question was engaged in protected activity when she provided internal documents to a union attorney, she was disciplined for violating a legitimate work rule against providing internal documents to parties outside of the department, (2) that the employer had demonstrated a legitimate and substantial business justification for instituting the rule and applying it in these circumstances, and (3) the employer's interest in keeping all internal documents out of the public forum absent authorization outweighed the deputy's right to engage in protected activity under PERA. Although not ultimately dispositive to the Court's analysis, the Court did take notice that there were other avenues and means available to the deputy in order to provide the documents to the union's attorney; methods that presumably would not have run afoul of the employer's rules.

#### Five Day Suspension

As supported by Peccia's testimony and the memorandum issued on January 28, 2014, Lt. Golnick's five day suspension was the direct result of the findings and recommendations of the Ethics Board. It has already been established that Lt. Golnick was indeed engaged in protected activity in satisfaction of the first prong of the test long followed by the Commission and recently affirmed by the Court of Appeals relevant to this matter.

Both common sense and the record establish the City's legitimate and substantial

business justification for instituting Ethics Ordinance Section 2-367, “Use of city property and resources” as an attempt to protect public resources from being used for personal gain. Similarly, the City possesses a legitimate and substantial business justification for instituting Ethics Ordinance Section 2-368, “Political Activities”, in an attempt to ensure its employee’s compliance with the state’s Political Activities by Public Employees Act, MCL 15.401 et seq., and Campaign Finances Act, MCL 169.201 et seq. The Political Activities by Public Employment Act while expressly affirming the right of a public employee to engage in political activity prohibits the engaging of that activity while the employee is being compensated for the performance of their duties. MCL 15.403(1)(d) and 15.404. Michigan’s Campaign Finance Act prohibits the use of public resources for political purposes. MCL 169.257. With regard to application of Ethics Ordinance Section 2-367 to Lt. Golnick and his actions, the Union argues that the extent of the alleged violation was minimal, i.e., the use of a few sheets of paper and the personal use of a City laptop where personal use has been acquiesced to in the past. However, the use of public resources by Lt. Golnick did not occur within a vacuum and instead occurred as part of conduct that violated the aforementioned state campaign laws and by extension Ethics Ordinance Section 2-368. Accordingly, I find that the City possessed a legitimate and substantial business justification in both instituting Ethics Ordinance Section 2-367 and 2-368 and in applying them to the present circumstances.

Moving on to the third prong of *Ingham County*, I find that the City’s interest in preventing the misuse of public resources as well as its interest in complying with state law regarding campaigning and political activities of public employees outweighed Lt. Golnick’s right to engage in the protected activity in the manner that he did. Similar to the deputy in *Ingham County*, who could have employed other methods to engage in protected activity, the same is true of Lt. Golnick; Lt. Golnick could have drafted the letter without using City resources and could have done so while not on duty.

#### Written Reprimand

As stated above numerous times, Lt. Golnick was engaged in protected and concerted activity and no further discussion is necessary here. Furthermore, Section 5.66(A) of the Work Rules, which Lt. Golnick, is alleged to have violated, simply prohibits any employee from violating any “written directive of the department” and as such does not require any profound or in-depth analysis. The same applies to Sections 1.4A, 1.11A and 1.4 of the Operations Manual as well, as each is essentially a restatement that an employee will not violate the rules of the department or the Ethics Ordinance of the City.

It is not until Section 4.4 of the City’s Policies Manual does the first real test under *Ingham County* occur. While Section 4.4 first affirms the rights of individual city employees to participate in political activities, it also prohibits conduct by employees that could be construed by the “public as official City statements and/or City policy.” Testimony provided at the hearing by Peccia as well as common sense dictates a finding that the City did indeed possess legitimate and substantial business justification for instituting and enforcing Section 4.4 of the Policies Manual; that justification in the present scenario being the danger that the City could be seen as trying to influence its own local elections. The same aforementioned rationale applies to the use of the City’s logo on the endorsement letter as it is clear that any unauthorized use that

could be construed as to indicate City support for a political candidate is a violation of 4.4 of the Policies Manual. Balancing the City's need to enforce Section 4.4 against Lt. Golnick's right to engage in the protected activity at issue here results in the same finding in favor of the City as earlier with regard to the Ethics Ordinance Section 2-367 and 2-368.

Moving on to Section 5:37 of the Work Rules, which prohibits employees from utilizing "their official capacity as an employee with the Department to influence, interfere with or affect the results of an election", the analysis under *Ingham County* does not produce the same results as above. As discussed previously, the Commission's holding in *City of Detroit (Fire Dep't)*, provides that firefighters appearing in the uniforms in advertisements meant to influence an election on a city charter amendment were engaged in protected activity. There the Commission noted that the employer had failed to establish that the enforcement of the rule was based on a legitimate and substantial business justification. Here, while the City is justified in its attempts to enforce section 4.4 of its Policies Manual and prevent conduct by employees that could be construed by the "public as official City statements and/or City policy", I find that the City has failed to justify its enforcement of Section 5:37 as it applies to Lt. Golnick, or to any other City employee for that matter.

Lastly, considering Section 5:61 of the Work Rules, which states: "Personnel shall operate Department Communication Devices, computers, networks subscribed to by the Department, and other electronic devices in conformance with all laws and departmental procedures. Unauthorized, inappropriate, or unnecessary use is prohibited," I find that, when considering the justification already established with regard to Ethics Ordinance Section 2-367 and 2-368 above, the City has satisfied the second prong of *Ingham County*. Furthermore, balancing the City's need to enforce Section 5.61 against Lt. Golnick's right to engage in the protected activity at issue here results in the same finding in favor of the City as earlier with regard to both the Ethics Ordinances and Section 4.4 of the City's Policies Manual.

#### Use of the City's Logo

Much focus has been spent by the parties on the use of the City's logo by Lt. Golnick on letterhead used by the Union. It is undisputed that Lt. Golnick had used that letterhead on at least four separate letters prior to the endorsement letter at issue here and that the City had not objected to its use. Charging Party states in its post-hearing brief that, "[i]t is clearly disingenuous for the City to object now, or at the very least act as if they had never seen the letterhead before and disciplined [sic] the president for using the City's logo on their letterhead." Charging Party is ignoring the difference between the prior four letters and the one at issue here; those four letters were sent internally and were not done in furtherance of political activity. Charging Party continues on to assert that the City does not possess a trademark on the logo and that it is available for anyone to use and/or copy.

Charging Party, in addition to challenging the City's actions in disciplining Lt. Golnick also requested that the Commission conclude that City's attempt to prohibit future use of the logo on the Union's letterhead is an unlawful restraint on the administration of the Union's internal activities. However, under the analysis provided above regarding Section 4.4 of the City's Policies Manual, Charging Party's request must be denied.

It is not the desire or intention of the undersigned to even begin to address the myriad of possible trademark, ownership or free use issues regarding the City's logo. Furthermore, while it is clear that the City considered the logo its property and under its control as evidenced by the Ethics Board's Decision and Recommendation, and while the City's opinion may or may not be based in fact, such error, if in fact it does exist, does not warrant any change to the above conclusions regarding the discipline meted out to Lt. Golnick.

In summation, Respondent did not violate PERA when it issued a five-day suspension to Lt. Golnick upon the recommendation of the City's Ethics Board because it acted within its right to discipline Lt. Golnick for his misconduct, despite the fact that said misconduct occurred while Lt. Golnick was engaged in otherwise protected and concerted activity. Respondent did not violate PERA when it issued a written reprimand to Lt. Golnick following its determination that Lt. Golnick had violated Sections 5:61 and 5:66(A) of the Cadillac Police Department General Orders and Work Rules, Sections 1.4, 1.4A, and 1.11A of the Police Department Operations Manual, and Section 4.4 of the City of Cadillac Personnel Policies Manual, because it acted within its right to discipline Lt. Golnick for his misconduct, despite the fact that said misconduct occurred while Lt. Golnick was engaged in otherwise protected and concerted activity. Furthermore, Respondent does not violate PERA by prohibiting the use of its logo under Section 4.4 of the City of Cadillac Personnel Policies Manual. Respondent's creation and application of Section 5:37 of the Cadillac Police Department General Orders and Rules to Lt. Golnick does however violate PERA as the City has failed to articulate any legitimate and substantial business justification thereof and therefore any discipline predicated on this specific section is unlawful and must be rescinded.

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. For the reasons set forth above, I recommend that the Commission issue the following order:

#### RECOMMENDED ORDER

The City of Cadillac, its officers, agents, are hereby ordered to:

1. Cease and desist from applying Section 5:37 of the Cadillac Police Department General Orders and Rules in a manner which interferes, restrains or coerces employees, including but not limited to Lt. Todd Golnick, in the exercise of rights guaranteed in Section 9 of PERA.
2. Remove from Lt. Todd Golnick's personnel file the portion of the January 28, 2014, written reprimand regarding Section 5:37 of that Cadillac Police Department General Orders and Rules.
3. Post the attached Notice to Employees in conspicuous places, including all places where notices to employees in Charging Party's bargaining unit are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood  
Administrative Law Judge  
Michigan Administrative Hearing System

Dated: March 19, 2015

**NOTICE TO ALL EMPLOYEES**

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

**WE WILL NOT**

Apply Section 5:37 of the Cadillac Police Department General Orders and Rules in a manner which interferes, restrains or coerces employees, including but not limited to Lt. Todd Golnick, in the exercise of rights guaranteed in Section 9 of PERA.

**WE WILL**

Remove from Lt. Todd Golnick's personnel file that portion of the January 28, 2014, written reprimand regarding Section 5:37 of the Cadillac Police Department General Orders and Rules.

**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 CADILLAC**

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 Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.