STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT TRANSPORTATION COMPANY,
Public Employer-Respondent,

MERC Case No. C18 F-061

-and-

KALANDOUS PRIMER,
An Individual Charging Party.
_____/

APPEARANCES:

Pepper Hamilton, LLP, by Robert C. Ludolph, for Respondent

Kalandous Primer, on his own behalf

DECISION AND ORDER

On May 17, 2018, the Detroit Transportation Company fired Kalandous Primer from his position as a Detroit Transit Police officer. Primer argues that this action violated our labor laws because the employer fired him in retaliation for his union activity. After an evidentiary hearing, Administrative Law Judge Travis Calderwood (ALJ) found that "the record is devoid of facts" to support the claim that Primer's "termination was based on antiunion animus or hostility to his protected rights."[1] Having reviewed the record, we agree with that conclusion and accordingly rule that the firing did not violate § 10(1)(c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210.

Primer also argues that the employer interfered with the exercise of his rights under PERA by posting a notice that stated that officers would not be permitted "union representation" when their supervisors requested to meet with them. The ALJ concluded that the employer's notice did not impermissibly interfere with the exercise of the officers' rights. In evaluating that conclusion, we find the factual context especially important. The employer posted the notice during a 40-day period in the spring of 2018 in which its officers were not represented by any union. The Michigan Fraternal Order of Police Labor Council had disclaimed representation on March 13, and the Detroit Transit Police Officers Association was not certified as the new representative of the unit until April 23. The employer posted the notice on March 15. The officers were not entitled to union representation during that period. Our law still entitled them to seek the assistance of fellow employees—in their capacity as fellow employees, not as union representatives—at any investigatory interview that they reasonably feared might lead to discipline. But our review of the record convinces us that the notice posted by the employer here would not have led a reasonable

[1] MOAHR Hearing Docket No. 18-014023

officer to believe that they were forbidden from being accompanied by fellow employees in a non-union capacity in such disciplinary interviews. Accordingly, we agree with the ALJ's conclusion and rule that the notice posting did not violate § 10(1)(a) of PERA.

We thus reject Primer's exceptions and enter an order dismissing the unfair labor practice charges.

Factual Summary:

A. Background

The Detroit Transportation Company (DTC) operates the People Mover. Through its police department (the Transit Police), DTC provides protection for Detroit Department of Transportation (DDOT) buses and various facilities maintained and operated by the DDOT. Primer was employed by DTC as a Transit Police Officer (TPO) prior to his termination. The Transit Police patrols the Rosa Parks Transit Center, among other facilities. The Rosa Parks Center includes the Maintenance and Control Facility building (MCF), as well as a separate structure containing offices (a structure commonly known as the Times Square Building). At the relevant time, Transit Police Chief Ricky Brown supervised the Transit Police Department. Reporting to Chief Brown were two lieutenants, Lt. William Hart, who oversaw the Department's Patrol Operations, and Lt. Kristy L. Cross, who oversaw the Department's Administrative Operations.

Before March 13, 2018, TPOs were part of a bargaining unit that was represented by the Michigan Fraternal Order of Police Labor Council (FOPLC). The collective bargaining agreement between the employer and the FOPLC had expired on June 30, 2017. On March 13, the FOPLC sent a letter notifying the Commission, DTC, and members of the bargaining unit that the union "disclaims all interest regarding collective bargaining representation" for the TPO bargaining unit as of that date.

Two days later, Chief Brown posted a written notice regarding "Union Representation/Rights" in the TPOs roll call room. The notice began by saying:

> It has come to my attention that there have been instances where supervisors have requested to conduct counseling with officers and are told that "certain" officers are insisting to be present as a union representative.

After noting that the FOPLC disclaimed all interest in the TPO bargaining unit and that employees were no longer represented by any union, the notice went on:

> Therefore, if any officer is hereby requested to meet with their supervisors for any reason and any officer insisting they are attending as union representation, said officer will be dismissed from the counseling session. Failure to comply with this directive will result in disciplinary actions(s) following the DTC Disciplinary Procedures.

On March 16, the Detroit Transit Police Officers Association (DTPOA) filed a petition for a representation election, Case No. R18 C-030. A consent election occurred on April 11. On April 23, the DTPOA was certified as the bargaining representative for the TPO bargaining unit. Primer had served as the local Vice President for the FOPLC before it had disclaimed representation. After the DTPOA was certified as the new representative, Primer engaged in union activity on its behalf.

B. Primer's Termination

On January 30, 2018, Primer worked a shift that began at 10:45 PM and ended at 7:00 AM the following morning. At the beginning of this shift, Primer and TPO Derrick Scott were assigned to, among other things, conduct a perimeter patrol of the MCF. Primer's activity log reported that he was at MCF from 4:00 am to 5:00 AM on January 31; Scott's log for the same time period reported specifically that he was engaged "with P.O. Primer on a perimeter check of North [and] South lots and MCF building."

But Sgt. Anthony Goddard informed Lt. Hart two days later that, instead of patrolling the perimeter of the MCF, Primer and Scott went into the MCF building for a period of time before returning to the lobby. The sergeant thus believed that the log had offered an incorrect account of Primer's activities from 4:00 am to 5:00 am. Hart decided to investigate. While he waited for the relevant video footage to become available for him to review, Hart notified the FOPLC's local President that he intended to investigate Primer and Scott—and that discipline might result. After he had an opportunity to view the footage, Hart concluded that a further investigation was warranted. On March 8, he directed Sgt. Goddard to conduct it.

Goddard and Hart interviewed both Primer and Scott on March 22. Each officer testified that he was unaware of the purpose of the interview before it occurred. There is no evidence that Primer requested union or co-worker representation at any point in the interview.

On April 10, Sgt. Goddard issued a report on the results of his investigation. He found that both Primer and Scott willingly and deliberately falsified entries on their activity logs to cover their neglect of their duties. He recommended that both officers be terminated. Both Lt. Hart and Administrative Operations Lt. Kristy Cross endorsed the report's findings and recommendations.

A review board met a month later to determine the appropriate levels of discipline. Members of the review board included Human Resources Manager Brenda Walker, Transit Police Chief Ricky Brown, Risk Management Manager Mark Pittsford, DDOT Representative Boris Tamarack and Ms. Alice Shelton. The team reviewed the investigative report, as well as audio and video recordings for the time period in question. It prepared a recommendation for DTC's General Manager, Barbara Hansen. After receiving direction from Hansen, Walker drafted a letter, dated May 17, 2018, terminating Primer. At a meeting held that same day, Walker presented Primer with the termination letter.

C. The Unfair Labor Practice Charge

On June 25, 2018, Primer filed an unfair labor practice charge. He claimed that the employer terminated him in violation of Sections 10(1)(a) and (c) of PERA. The ALJ held a hearing on August 20, 2018. At the end of Primer's case-in-chief, the ALJ granted the employer's motion to dismiss the Section 10(1)(a) claim. At the close of all evidence, the employer moved to dismiss the Section 10(1)(c) claim. The ALJ granted that motion and dismissed the entire action.

The ALJ issued a written Decision and Recommended Order on April 9, 2019. Primer has filed exceptions.

Discussion and Conclusions of Law:

I. The Alleged Violation of Section 10(1)(c)

Section 10(1)(c) of PERA makes it unlawful for a public employer to "discriminate with regard to hire, terms, or other conditions of employment to encourage or discourage union membership." In considering claims of anti-union discrimination under that provision, we apply the analysis set forth in the National Labor Relations Board's *Wright Line* decision, *Wright Line, A Division of Wright Line, Inc*, 251 NLRB 1083 (1980). See *MESPA v Evart Pub Sch*, 125 Mich App 71, 73-74 (1983).

Under the *Wright Line* analysis, "the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the decision of the employer to discharge the employee." *MESPA v Evart Pub Sch,* 125 Mich App at 74. If the employee satisfies that requirement, "the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Id.*

Primer's claim fails at the first step. To be sure, there is no dispute that Primer engaged in activity protected by PERA. He was a local Vice President for the FOPLC before that union disclaimed representation, and he participated in activities on behalf of the DPTOA after that union was certified as the new representative. Nor is there any dispute that the employer knew of his protected activity. On this record, however, Primer cannot carry the burden of showing that his termination was motivated by his protected activity.

To draw an inference of improper motivation, Primer principally relies on what he believes to be suspicious timing—notably that he was fired less than one month after the DTPOA was certified as the officers' new representative. He asserts that the employer took this action to prevent him from bargaining on behalf of the DTPOA. But the timing does not seem suspicious to us. The employer began its investigation of Primer more than a month before the FOPLC disclaimed representation—and more than two months before the DTPOA was certified as the new bargaining representative. That investigation involved serious misconduct, and the evidence against Primer appears to have been very strong. The circumstantial evidence thus tilts strongly against a finding of anti-union animus. And Primer has not pointed to any direct evidence of animosity toward his protected activities. For these reasons, we agree with the ALJ that there is insufficient evidence to find a violation of Section 10(1)(c) of PERA.

II. The Alleged Violation of Section 10(1)(a)

Section 10(l)(a) of PERA prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights protected by Section 9 of the Act. Because the issuance of the notice and Primer's investigatory interview took place during the period after the FOPLC disclaimed representation and before the DTPOA was certified as the new bargaining representative, Primer did not have union representation during the relevant period. But that does not mean that he did not have rights under Section 9. Under that provision, non-represented employees have the right to seek the assistance of another employee at an investigatory interview that they reasonably fear might lead to discipline. See *Univ of Michigan*, 1977 MERC Lab Op 496; *Detroit Bd of Ed*, 1982 MERC Lab Op 593, 604; *Univ of Michigan*, 1990 MERC Lab Op 272, 294. See also *Detroit Pub Sch*, 17 MPER 51 (2004) (no exceptions); *Grandvue Medical Care Facility*, 27 MPER 37 (2013); *City of Saline*, 29 MPER 53 (2016).

There is an immediate problem with Primer's Section 10(1)(a) claim, though: He did not request assistance in his interview. We have held that the right to assistance at an investigatory interview arises only on the request of the employee. *Grand Haven Bd of Light and Power*, 18 MPER 80 (2005).

Nevertheless, Primer argues that the March 15 notice chilled the exercise of Section 9 rights by employees in his position. That argument has the right form: We have held that PERA bars actions that impermissibly chill protected conduct, even if the employers did not intend them to achieve that effect. See *University of Michigan,* 1990 MERC Lab Op 272, 295 (supervisor's threat to discipline employee if she continued to file any more repetitious, frivolous, unmeritorious grievances could reasonably be taken to apply to protected as well as unprotected activities). "The test is whether a reasonable employee would interpret the statement as an express or implied threat." *Grandvue Medical Care Facility*, 27 MPER 37, 173 (2013).

Primer argues that Chief Brown's March 15 notice threatened officers with discipline for assisting fellow officers in investigatory interviews. Reviewing the record in its entirety, and given the whole context at Primer's workplace, we do not believe that a reasonable employee would have interpreted the notice to bar individual officers (in their own capacity, rather than in a union capacity) from assisting other officers in disciplinary investigations. The notice specifically barred assistance by anyone acting as "union representation." It did so at a time during which the officers were not represented by any union and thus had no right to any union representation. Chief Brown issued the notice in the immediate wake of the FOPLC's disclaimer. We believe that any reasonable officer would have interpreted it as explaining the effect of the disclaimer on whether any former union officials continued to have union authority. Nothing in the notice said anything about precluding employees from assisting their fellow employees in a non-union capacity. And in fact Primer did not appear to have interpreted the notice so strictly, as he himself testified (Tr. 68) that management continued to meet with him regarding disciplinary actions after the disclaimer. We thus conclude that the notice did not violate Section 10(1)(a) of the Act.[2]

[2] Primer also argues, in his exceptions, that the employer violated its duty to bargain under PERA when it refused to recognize that the FOPLC's collective bargaining agreement continued in effect after the FOPLC's disclaimer. But

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Samuel R. Bagenstos, Commission Chair

Edward D. Callaghan, Commission Member

Robert S. LaBrant, Commission Member

Dated: FEB 12 2020

Primer does not appear to have raised this in his charge or at any point before he filed exceptions to the ALJ's decision. We do not consider new issues that have not been raised before the Administrative Law Judge. *Pontiac Sch Dist*, 27 MPER 52 (2014); *City of Detroit*, 1993 MERC Lab Op 131, 132; *Teamsters Local 580,* 1991 MERC Labor Op 575, 576; *City of Detroit (Fire Department),* 1987 MERC Labor Op 417, 420; *SEMTA,* 1985 MERC Labor Op 316.

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT TRANSPORTATION COMPANY,
Respondent-Public Employer,

Case No. C18 F-061
Docket No. 18-014023-MERC

-and-

KALANDOUS PRIMER,
Individual Charging Party.
_____/

APPEARANCES:

Pepper Hamilton, LLP, by Robert C. Ludolph, for the Respondent-Public Employer

Kalandous Primer on his own behalf

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

On June 25, 2018, Kalandous Primer (Charging Party) filed the present unfair labor practice charge against his former employer, the Detroit Transportation Company (Employer or Respondent). 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) of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

The Unfair Labor Practice Charge and Procedural History:

Charging Party claims that on May 17, 2018, the Employer terminated him in violation of Sections 10(1)(a) and (c) of PERA. As part of his charge, Charging Party included a narrative of events that listed events that occurred more than six months prior to the filing of this charge or his termination. Charging Party also identified several other employees who the Employer had allegedly disciplined to various degrees for various reasons. On July 19, 2018, the matter was noticed for an evidentiary hearing on August 20, 2018.

On July 30, 2018, the Respondent filed an answer responding to the charge in which it claimed that Charging Party "was properly dismissed as a result of his falsification of documents and neglect of duty."

On August 16, 2018, four days before hearing, Respondent filed a Motion in Limine

and/or Motion to Dismiss. Respondent's motion sought to limit and/or exclude evidence relating to other individuals because such was "time barred and beyond... involves facts and circumstances totally dissimilar to those that led to [Charging Party's] termination ..." In the alternative, Respondent requested that the charges against it be dismissed given the "absence of any evidence suggesting that [Charging Party] was terminated for reasons other than his misconduct."

A telephone pre-hearing conference was held on August 17, 2018. During that conference I indicated that while I was neither denying nor granting Respondent's motion(s), given the pleadings before me, it was my opinion that Charging Party had plead a prima facie case sufficient to proceed to hearing. Moreover, I indicated that while I was allowing Charging Party to go forward with his proofs, I would revisit Respondent's motion at the conclusion of Charging Party's presentation of proofs.

At the onset of the August 20, 2018, hearing, I repeated the above statements regarding Respondent's motion(s). At the conclusion of Charging Party's case-in-chief, Respondent again moved for dismissal of the charges. Upon careful consideration during the hearing, I granted Respondent's motion with respect to the 10(1)(a) allegations.

At the conclusion of the hearing, Respondent again moved for dismissal of the remaining Section 10(1)(c) allegations. After allowing Charging Party to argue why the remaining portions of his charge should not be dismissed, I rendered a bench decision, finding that Charging Party had failed to establish that Respondent's actions violated Section 10(1)(c) of the Act. I informed the parties that following the receipt of the transcript, I would issue a written decision and recommended order.

Findings of Fact:

The Employer operates the People Mover and also through an internal police department (hereinafter the Transit Police) provides police-like protection on Detroit's Department of Transportation (DDOT) buses and various facilities maintained and operated by DDOT. Charging Party was employed with the Respondent as a Transit Police Officer (TPO) prior to his termination. One of the facilities patrolled and overseen by the Transit Police was the Rosa Parks Transit Center property, on which sat the Maintenance and Control Facility building (MCF) and a separate structure containing offices and such, and referred to by the parties as the Times Square building or just Times Square. Additionally, TPOs would patrol other properties maintained and/or utilized by the Respondent and DDOT including terminals and other buildings or sites.

At the time of the events relevant to this proceeding, the Department was headed by Transit Police Chief Ricky Brown. Directly beneath Chief Brown were two lieutenants, Lt. William Hart, who oversaw the Department's Patrol Operations and Lt. Kristy L. Cross, who oversaw the Department's Administrative Operations. Sometime later, presumably after Charging Party was terminated, Lt. Hart was promoted to Deputy Chief.

Union Representation

TPOs are part of a bargaining unit that until March 13, 2018, had been represented by the Michigan Fraternal Order of Police Labor Council (FOPLC). The Employer and the FOPLC had been signatories to a collective bargaining agreement that expired on June 31, 2017. Article 28 of that contract stated in the relevant part:

> In the event that the DTC and the Fraternal Order of Police Labor Council fail to arrive at an agreement on wages, fringe benefits, other monetary matters, and noneconomic items by June 30, 2017, the agreement will remain in effect on a day-to-day basis. Either party may terminate the agreement by giving the other party a ten-day written notice on or after June 20, 2017.

The record indicates that the Employer and FOPLC had not reached a successor agreement to replace the contract that expired on June 31, 2017, but that they were engaged in bargaining in attempt to reach such an agreement; no agreement was ever reached.[1]

By letter dated March 13, 2018, Mark A. Porter, General Counsel for the FOPLC notified the Commission that, effective that date, the FOPLC "disclaims all interest regarding collective bargaining representation" for the TPO bargaining unit. Sometime that same day, the Employer allegedly provided to all employees formerly represented by the FOPLC written notice explaining the effects of the FOPLC's disclaimer. That notice reportedly provided the following in the relevant part:

> 1. You are no longer represented by **any** union. The "Detroit Transit Police Officers Association" is ***not*** a recognized union, and at this time, it has no standing in any bargaining at the DTC or at the MERC to represent you. [Emphasis in original.]
>
> 2. Your contract expired on June 30, 2017, and those protections no longer apply. It is strictly at the discretion of the DTC to accept grievances. DTC rules and policies will control all aspects of your work.

Immediately prior to the FOPLC's disclaimer of interest, Charging Party was the Union's local Vice President. TPO DuJuan Brown was the local President. TPO Derrick Scott was the Union's local Sergeant-at-Arms.[2]

On March 15, 2018, TPO's were provided with another written notice from Chief Brown, which began by stating:

> It has come to my attention that there have been instances where supervisors have requested to conduct counseling with officers and are told that "certain" officers

[1] The record does not indicate that the Employer ever provided notice to the FOPLC that it was terminating the agreement following its expiration on June 20, 2017.

[2] An unfair labor practice charge challenging TPO Scott's termination is currently pending before ALJ David M. Peltz, Case No. C18 K-110; Docket No. 18-021837-MERC.

are insisting to be present as a union representative.

The notice then went on to repeat the statements, as partially identified above, that had been included in the earlier March 13, 2018, notice before concluding with:

> Therefore, if any officer is hereby requested to meet with their supervisors for any reason and any officer insisting they are attending as union representation, said officer will be dismissed from the counseling session. Failure to comply with this directive will result in disciplinary actions(s) following the DTC Disciplinary Procedures.

According to Commission maintained records, the DTPOA filed a petition for representation election on March 16, 2018, Case No. R18 C-030. A consent election occurred on April 11, 2018, and on April 23, 2018, the Detroit Police Officers Association (DTPOA) was certified as the bargaining representative for the TPO bargaining unit.

The record indicates that Charging Party was a member of the DPTOA bargaining team and that at least one contract negotiation session occurred between the time of DTPOA's certification and the hearing in this matter. Moreover, there exists a service agreement between the DTPOA and the Police Officers Association of Michigan (POAM); the exact scope or nature of that agreement was not made part of the record.

Investigation and Discipline of Charging Party

For the time period relevant to these proceeding, Charging Party, whose radio call sign was Fox 58, worked a shift that began at 10:45 pm, and continued through 7:00 am the following morning. At the beginning of the shift, during roll-call, TPOs would learn of their shift assignments for that particular shift. At the conclusion of each shift, TPOs were required to create activity logs detailing an individual officer's actions and movements throughout a particular shift.

During the shift that began on the night of January 30, 2018, Primer was at the Rosa Parks Transit Center participating in a training for dealing with impounded vehicles conducted by a Transit Police Sergeant. Primer's activity log for that shift indicates the following activity for the above referenced time period:

> At the Rosa Park Center doing training on (Impounding Vehicles) with SGT. Garrison [sic]

The activity shift for TPO Derrick Scott, whose radio call sign was Fox 54, and who also worked that same shift with Primer, provided for the time period of 3:00 am to 4:00 am the following:

> Just standing by at Time [sic] Square while my partners P.O. Barrett, [and] P.O. Primer attend vehicle inpound [sic] inservice training by Sgt. Garrison. NPF[3]

[3] The acronym NPF, as explained by the witnesses, stands for "no problem found.

Primer's activity log for the next hour of time, 4:00 am to 5:00 am, provides "AT-MCF PUT IN FARE GATE NUMBERS. NPF". Scott's activity log for the same time period provides, "Busy with P.O. Primer on a perimeter check of North [and] South lots and MCF Building. NPF".

Then Lt. Hart testified that in the beginning of February he was notified by Sergeant Anthony Goddard of a discrepancy between what Charging Party announced that he and Scott were doing between 4:00 am and 5:00 am, what the two TPOs put on their activity logs, and what he, Sgt. Goddard, observed on the cameras that were monitoring the MCF building.[4] Lt. Hart claimed at the hearing that he had previously worked with the Detroit Police Department in several different roles, including some time with the Department's Internal Affairs (IA) department. Lt. Hart further testified that because of his past experience with IA he had been attempting to train the Employer's sergeants in investigating instances of officer misconduct. According to Lt. Hart, before he would direct Sgt. Goddard to commence an investigation into Primer and Scott, he first wanted to view the taped video footage but was unable to do immediately.[5]

Lt. Hart testified that while he was waiting for access to the video system, he notified DuJuan Brown, the local President at the time, that there would be an investigation of TPOs Prime and Scott and that discipline might occur. Hart testified that he made Brown aware because the parties' contract contained a provision that required written notice be provided to the employee and Union of possible discipline within fifteen (15) days of the date that management becomes aware of the action prompting discipline. According to the Lieutenant, there was an agreement between the department and the Union that Brown would be notified of investigations and would then notify the applicable unit members. Brown did not dispute such an agreement and did admit to being notified by Hart that both Prime and Scott would be investigated. Lt. Hart did not indicate, nor did Brown remember, whether the notification given included written notification. The record clearly indicates that neither Primer nor Scott were notified by Brown, or anyone else, that they were being investigated until much later.

After Lt. Hart regained access to the video system, he claims he viewed the video footage of the shift in question. According to Hart, the Lieutenant believed that an investigation was warranted after watching the footage. Accordingly, on March 8, 2018, he directed Sgt. Goddard to conduct the investigation. However, because of further technical difficulties, Hart was not able to provide Goddard with a copy of the footage at that time.

As stated above, the FOPLC disclaimed interest in the unit on March 13, 2018. That same day and again on March 15, 2018, the Employer provided the above referenced notices to members of bargaining unit regarding their unrepresented status. On March 16, 2018, the DTPOA filed its petition for representation election with the Commission, Case No. R18 C-030.

Goddard did eventually view the footage and on March 22, 2018, he and Lt. Hart interviewed both Primer and Scott. Both TPOs testified that they were unaware of the purpose of the interview prior to it occurring. While Primer did make several statements during the

[4] Sgt. Goddard did not testify.

[5] Deputy Chief Hart testified that the department had switched video systems sometime the prior year while he was off work recovering from back surgery and that he had not been initially granted access to the system.

hearing, both while testifying and as part of the presentation of his case that he was not permitted union representation during his interview, there is no indication that he requested the same at any point. Lt. Hart testified that as part of the investigative hearing on March 22, 2018, Primer was provided his *Garrity* rights.[6]

On April 10, 2018, Sergeant Goddard issued his Investigation and Report detailing the results of his investigation into the actions of Charging Party and TPO Scott on the morning of January 31, 2018, as directed by Deputy Chief Hart.[7] Sergeant Goddard's report recommended that the allegations made against both Charging Party and TPO Scott warranted termination. The record indicates that both Lt. Hart and Lt. Cross endorsed the report's findings and recommendations.

As stated above, in late April of 2018, the DTPOA was certified by the Commission as the bargaining representative for the TPO bargaining unit. Sometime during the first week of May, Lt. Hart contacted Charging Party and informed him that another TPO was being investigated for insubordination. According to witness testimony, Hart was inquiring whether Charging Party wanted to participate in the aforementioned TPO's investigatory interview. Charging Party did not participate in the interview.

Following the issuance of the above report involving Charging Party and TPO Scott, a review board, which has the purpose of determining appropriate levels of discipline following misconduct investigations, was convened on May 11, 2018, to address the allegations against both men. Members of that review board included Human Resources Manager Brenda Walker, DTC Transit Police Chief Ricky Brown, DTC Risk Management Manager Mark Pittsford, DDOT Representative Boris Tamarack and Alice Shelton, whose role or position was not indicated on the record. Walker testified that the review team was aware of Charging Party's former status as a union officer in the prior union and his current status as a bargaining team member for the DTPOA. Walker further testified that the review team reviewed the investigative report, as well as audio and video recordings of the time period in question. According to Walker, once the review board reaches a recommendation, she then prepares said recommendation for consideration by Respondent's General Manager, Barbara Hansen.

Walker testified that after the review board made its recommendation supporting termination of Charging Party, she prepared a document indicating the same that was provided to Hansen. Walker then claimed that, after she received direction from Hansen, she drafted a letter, dated May 17, 2018, terminating Charging Party. At a meeting on May 17, 2018, Walker presented Charging Party with the termination letter.

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[6] *Garrity* provides that when an employee is compelled to answer questions during an investigatory interview, any statements obtained from the employee may not be used against them in a subsequent criminal action. *Garrity v State of New Jersey*, 385 US 493 (1967) (individual threatened with discharge from employment for exercising his Fifth Amendment privilege had not waived it by responding to questions rather than invoking his right to remain silent).

[7] The Investigation and Report as prepared by Sergeant Goddard, was marked for admission during the hearing by Respondent's counsel; however neither party moved for its admission. Despite this oversight, it is clear to the undersigned that neither party challenged the role that it played in the Respondent's decision to terminate Charging Party.

Discussion and Conclusions of Law:

Section 10(1)(a)

Section 10(l)(a) of PERA prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights protected under the Act. In determining whether a public employer's statement constitutes a violation of Section 10(l)(a), both the content of the employer's statement and the surrounding circumstances must be examined. *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *New Haven Cmty Sch*, 1990 MERC Lab Op 167, 179. Moreover, it is well established that a determination of whether an employer's conduct violates Section 10(l)(a) is not based on either the employer's motive for the proscribed conduct or the employee's subjective reactions thereto. *City of Greenville*, 2001 MERC Lab Op 55, 58. Rather the test is whether a reasonable employee would be coerced. *Id* at 56.

In the instant case, Charging Party's sole justification for his Section 10(1)(a) allegations appears to be the notices put up by the Employer on March 13, 2018, and March 15, 2018, following the disclaimer of interest by the FOPLC.

Our Commission has consistently held that, in situations where an incumbent union had been replaced as part of a representation proceeding by a successor union during the term of an existing contract, that contract continues in effect until its expiration. See *Ionia Co Road Comm*, 1969 MERC Lab Op 82; *Garden City Pub Schs*, 1974 MERC Lab Op 364; *Jonesville Bd of Ed*, 1980 MERC Lab Op 891; *Hartland Consolidated Schools*, 19 MPER 81 (2006). Moreover, an employer has no obligation to bargain under Section 10(1)(e) of PERA if the former bargaining agent has undergone a substantial change in identity, unless and until a representation petition is filed and the Commission certifies the new entity as the bargaining representative. *Mt Clemens Comm Sch*, 1981 MERC Lab Op 424, *L'Anse Creuse Pub Sch*, 1980 MERC Lab Op 607. Additionally, when considering grievance rights for successor unions, the Commission, in *Gibraltar School District*, 1989 MERC Lab Op 365, 2 MPER 20069, held that a successor union has no standing to grieve/arbitrate under an expired predecessor collective bargaining agreement.

Here, following the disclaimer of interest by the FOPLC, the TPO bargaining unit no longer enjoyed the status as a represented unit as there was no longer any bargaining representative as that term is defined by the Act. Accordingly, the vast majority of statements attributed above to the first posting by the Respondent, on March 13, 2018, appear to be factual statements, i.e., a recognized bargaining representative no longer represents the unit, and that the Respondent no longer is required to accept and process grievances. I note that while Respondent does state that the prior contract between the FOPLC and the Employer expired on June 30, 2017, that contract did, by its express terms, continue on a day-to-day basis absent notice by either party of a desire to terminate it. The preceding notwithstanding, there is no rational basis on which to conclude that the FOPLC's disclaimer of interest would not also serve as notice that the day-to-day extension of its contract with the Respondent would also be terminated. Accordingly, there was no contract on which a successor union, of which there was not one at the time, could assert the right to file a grievance. Accordingly, this first posting, in the opinion of the undersigned, did not violate Section 10(1)(a) of the Act because it was a factual statement referring to the unrepresented status of the TPO bargaining unit.

The Employer's second posting on March 15, 2018, communicated its position that it would no longer allow TPOs to be accompanied by "union representation" at meetings with supervisors. Accordingly, the appropriate analysis is whether TPOs at that time had the right to demand representation, union or otherwise, during interviews in which discipline might occur. As will be discussed below, the history as it relates to that issue is complex and inconsistent.

Under *Weingarten Inc v NLRB,* 420 US 251 (1975), the National Labor Relations Board (NLRB or Board) recognized that under the National Labor Relations Act (NLRA) an employee has the right to the presence of a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to discipline. The Commission adopted this premise in *Univ of Michigan,* 1977 MERC Lab Op 496.

In 1978, with *Glomac Plastics,* 234 NLRB No 199, the Board addressed a situation wherein an employer refused to allow a fellow-employee and union negotiating committee member to attend an investigatory interview. There, while an election had occurred and the union had been certified as the bargaining representative, the parties had failed to reach a first contract and the union had in fact brought charges alleging that the employer was refusing to bargain in good faith and further was failing to recognize its status as the certified bargaining representative. The Board, in considering whether the employer's refusal to permit representation at the meeting, had committed an unfair labor practice, stated:

> We do not draw a distinction between union-represented employees and employees who have chosen union representation but have been deprived of the benefits of that representation as a result of the employer's refusal to bargain in good faith with their designated representative.

The Board went on to discuss the parties' failure to reach a contract and the employer's alleged failure to bargain in good faith, and stated:

> The national labor policy of encouraging good-faith collective bargaining would be undermined if an employer were to be allowed to defeat its employees' right to have a representative present by engaging in unlawful bad-faith bargaining which the employer could then rely on to assert that no recognized union representative exists. To permit the Respondent's own misconduct thus to reduce or eliminate the employee's right to have a union representative present is to allow the Respondent's unlawful action to determine the reach and applicability of Section 7 rights.

Accordingly, the Board found that the employer had committed an unfair labor practice and stated, "We conclude that Section 7 rights are enjoyed by all employees and are in no way dependent on union representation for their implementation."

Later that same year, the Board again, in *Anchortank, Inc,* 239 NLRB No 42 (1978), addressed a similar situation. In this case the refusal to allow a union representative at a meeting

where discipline might result occurred after a union election, but prior to certification. The Board again found a violation and stated:

> In these circumstances, the status of the requested representative, whether it be that of Union not yet certified or simply that of a fellow employee, does not operate to deprive the employees of the rights which they enjoy by virtue of the plain mandate in Section 7.

Our Commission, in *Detroit Bd of Educ*, 1982 MERC Lab Op 593, addressed the applicability of *Weingarten*, during an intervening period similar to that in *Anchortank*. Here, security supervisors, on May 22, 1979, filed a petition with the Commission seeking a representation election. A hearing occurred with the Commission on the petition on July 25, 1979. Two security supervisors, who had been involved in the organizing efforts leading up to the petition, both testified at the hearing. Later, both were singled out by the employer and began to have issues with management representatives. During a disciplinary conference attended by both, the employer denied their request to represented by non-employee union representatives affiliated with the labor origination not yet certified by the Commission. At another meeting, one of the supervisors again requested "union representation", but unlike the preceding request, this request was not limited to non-employee representation; that request was denied. The Commission, citing both *Globac* and *Anchortank*, held at 64:

> As with other protected rights, the right to representation at a disciplinary interview does not depend on the existence of a certified or recognized Union representative.

Accordingly, the Commission held that the first denial of representation did not violate the Act because PERA does not grant the right to representation by a non-employee union representative at such an interview. However, the Commission did find a violation as it related to the second interview, noting that the request was not limited to a non-employee, and that the Act guaranteed his right to representation by a fellow employee.

In *Univ of Mich,* 1990 MERC Lab Op 272, the Commission had the opportunity to revisit the issue of union representation during possible disciplinary interviews where there is no certified bargaining representative. There, relying on its earlier decision in *Detroit Bd of Educ*, 1982 MERC Lab Op 593, the Commission declined to find a violation when the employer refused a request for a non-employee union representative affiliated with a labor organization that had lost two representation elections to be present at a possible disciplinary meeting. Moreover, following a separate request that a co-employee be allowed to attend another meeting as a witness, the Commission held that the employer did not violate the Act because it opted instead to cancel said meeting. The Commission summarized its position on the subject by stating:

> In *School District of the City of Detroit, Board of Education*, 1982 MERC Lab Op 593, we held that an unrepresented employee had the right to seek the assistance of another employee at an investigatory interview which the employee reasonably feared would lead to discipline, but that an unrepresented employee did not have

the right to representation by a non-employee union representative at such an interview.

In *Grandvue Medical Care Facility,* 27 MPER 37 (2013), the Commission addressed whether an employer given directive to two, unrepresented at-will employees, that they were not to talk to anyone including each other, with regards to a pending investigation into assault allegations made by a resident against a non-resident. The Commission, as part of its analysis, repeated its position as first set forth in *Detroit Bd of Educ*, 1982 MERC Lab Op 593, and again in *Univ of Mich*, 1990 MERC Lab Op 272.[8] The Commission noted that a "broad no-discussion order could have an unlawful chilling effect on the exercise by employees of their right to seek and to have assistance from a cohort in responding to the investigation." Nonetheless, the Commission, citing special circumstances regarding the two individuals, i.e., their status as management level employees, their responsibilities as it relates to residents, and that the two were also "appropriate targets of the investigation" who needed to excluded from the investigation to prevent them from somehow interfering with the investigation, found that the no-discussion directive was "crafted narrowly both in scope and in time" and did not violate the act.

Commission precedent clearly establishes that an employee without a certified bargaining representative and who reasonably fears possible discipline is not entitled to be represented by a non-employee but is entitled to representation by a fellow employee. Here, the Respondent's second posting is clearly notice to the TPOs that by nature of their unrepresented status the Employer would not permit "union representation" at meetings with management. However, I find it significant that this second notice was specific in so far as it stated that employees would not be permitted to attend as "union representatives" but did not forestall a fellow employee from attending in some other non-unionized affiliation. Moreover, unlike the situations in *Detroit Bd of Educ*, 1982 MERC Lab Op 593, and the Board cases cited therein and relied upon by the Commission, *Glomac Plastics* and *Anchortank, Inc,* where a union was actively in the process of securing its representation status in a way known to the respective employers, here there was no similar action at the time of the Employer's posting – at the earliest, notice of such an action did not occur until the following day with the DTPOA's filing for a representation election. Accordingly, I find that because the Employer's notice was narrowly tailored to exclude from meetings those individuals acting as "union representation" and because it occurred prior the filing of the petition by the DTPOA, the Employer did not violate Section 10(1)(a) of the Act.

Section 10(1)(c)

In order to establish a prima facie case of unlawful discrimination under PERA resulting in an adverse employment action, a charging party must allege: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employees' protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist,* 19 MPER 60 (2006). If the charging party has alleged that the employer's unlawful discrimination is motivated by anti-union animus, that party bears the burden of demonstrating that protected conduct was a motivating or substantial factor in the employer' s decision. *MESPA v Evart Pub*

[8] The Commission also referred to *Detroit Pub School,* 17 MPER 51 (2004), a case adopted in which no exceptions were filed.

Sch, 125 Mich App 71, 74 (1983); *Southfield Pub Schs*, 25 MPER 36 (2011). Only after a charging party establishes a prima facie case of unlawful discrimination does the burden shift to the respondent to demonstrate with credible evidence that the same action would have taken place even in the absence of the protected conduct. *Michigan Educational Support Personnel Ass'n v Evart Public Schools*, 125 Mich App 71, 74 (1983).

Here while Charging Party's protected union activity, both with the FOPLC prior to the disclaimer of interest and again with the DTPOA following the new Union's certification was known to Lt. Hart and at least one member of the review board, Walker, the record is devoid of facts by which the undersigned could find that Charging Party's termination was based on anti-union animus or hostility to his protected rights. Charging Party's position as ascertained from his case-in-chief and testimony he both elicited from witnesses and provided by himself at the hearing, was to attack the Employer's adherence to the disciplinary process. To that point Charging Party focused on his belief that the Employer waited until the FOPLC disclaimed interest before launching the investigation that would lead to his ultimate termination. However, the facts as established during the hearing clearly show that the investigation was commenced more than a month prior to the FOPLC's disclaimer and that while Charging Party was never notified per the prior collective bargaining agreement, Brown, the Union's president, had been but had neglected to inform Charging Party of the same.[9]

Accordingly, for the reasons set forth above, it is the conclusion of the undersigned that Respondent's March 13 and March 15, 2018 notices to the TPOs regarding the FOPLC's disclaimer did not violate Section 10(1)(a) of the Act. Additionally, I find that Charging Party failed to establish a prima facie case that his termination was in violation of Section 10(1)(c). As such, I recommend that the Commission issue the order as set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by Kalandous Primer against the Detroit Transportation Company is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 9, 2019

[9] Charging Party also attempted to attack the validity of the information relied upon by the Employer's representatives in making the decision to terminate him, i.e., the recorded video. Charging Party, without any supporting evidence whatsoever, appeared to suggest that the video had been doctored. Absent something more than a wild unsubstantiated allegation, the undersigned refuses to consider such possibilities.