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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF GRAYLING,
Public Employer-Respondent,

MERC Case No. C17 F-059

-and-

ALAN H. SOMERO,
An Individual Charging Party.

_____/

APPEARANCES:

Cohl, Stoker & Toskey, P.C., by David G. Stoker, for Respondent

Manda L. Danieleski, PLLC, by Manda L. Danieleski, for Charging Party

DECISION AND ORDER

On February 8, 2019, Administrative Law Judge Travis Calderwood (ALJ) issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Charging Party failed to establish a prima facie case necessary to establish a violation of Section 10(1)(c) of PERA. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

After receiving an extension of time, Charging Party filed exceptions and brief in support of its exceptions to the ALJ's Decision and Recommended Order on April 2, 2019. After being granted an extension of time, Respondent filed its brief in support of the ALJ's Decision and Recommended Order on May 13, 2019.

In its exceptions, Charging Party contends that the ALJ erred when he found that Charging Party failed to establish anti-union animus on the part of Respondent. Charging Party further argues that he submitted evidence of suspicious timing that was indicative of the City's unlawful motivation and that the ALJ erred when he failed to find that the reasons given for Charging Party's termination were pretextual.

In its brief in support, Charging Party argues that the record supports the ALJ's finding that it did not violate Section 10(1)(c) of PERA and urges the Commission to adopt the ALJ's Decision and Recommended Order in its entirety.

[1] MOAHR Hearing Docket No. 17-012815

We have reviewed the exceptions filed by Charging Party and, except as noted in Footnote 5, find them to be without merit.

Factual Summary:

Charging Party Alan H. Somero was first employed by the City of Grayling (City or Employer) in February 1999 as a patrolman in its Police Department and was covered by a collective bargaining agreement between the City and the Fraternal Order of Police (FOP or Union).

In 2013, the City combined its Police Department and its Fire Department into a single Public Safety Department (Department), and Charging Party became a public safety officer in the new Department.

On December 21, 2015, Charging Party was dismissed for alleged inaccurate overtime reporting. The FOP filed a grievance challenging the dismissal, and the grievance was heard by Arbitrator Elaine Frost on April 29, 2016.

On September 2, 2016, the arbitrator issued her Opinion and Award, in which she determined that the Department did not have just cause to terminate Charging Party. The arbitrator found that, while just cause did not exist to terminate Charging Party, he was nonetheless "guilty of serious misconduct" and that a four-month suspension was the appropriate discipline. Consequently, the arbitrator ordered that Charging Party be reinstated and that his termination be converted to a four-month suspension.

By letter dated September 6, 2016, Charging Party was instructed to report back to work on September 12, 2016 and further instructed to "make contact with Sargent [sic] [Amanda] Clough for direction."

Upon Charging Party's return work, Sergeant Clough, the Local Union Steward/President at the time, was required to reorient Charging Party to the Department's operations and to ensure that he was informed about any changes that may have occurred during his absence. As part of this task, Sergeant Clough rode with Charging Party for approximately two weeks, at the conclusion of which she communicated to Public Safety Director (Director) Douglas Baum that Charging Party was "was performing" and that he "was able to go solo."

Charging Party's first solo shift occurred on October 5, 2016. During that shift, Charging Party was dispatched to an incident at a local motel development, the Hospitality House, to deal with an individual who was allegedly highly intoxicated and would not leave another individual's premises. Several days later, Director Baum was notified that a complaint had been made by a Crawford County Sherriff's Deputy regarding the manner in which Charging Party handled the situation at the Hospitality House. Director Baum then directed Sergeant Clough to investigate the matter by obtaining and reviewing the tapes from the audio and video recording equipment in Charging Party's patrol car.[2]

[2] The Department's patrol cars are equipped with an audio and video recording system known as "Watchguard."

Although Sergeant Clough attempted to obtain copies of the vehicle's tapes, she discovered that the audio aspect of the recording was missing. She then checked the audio equipment for several days before and after the incident and determined that, on numerous occasions, Charging Party Somero had not been recording the audio aspect of incidents that arose during his shifts.

In a memo dated October 16, 2016, Sergeant Clough reported the results of her investigation and identified several specific incidents from October 5, 2016, through October 7, 2016, in which Charging Party did not properly utilize the audio equipment assigned to him. The memo also indicated that Charging Party's failure to properly record incidents violated a June 15, 2015 directive from Director Baum that required law enforcement officers to ensure that their body-mics are operational when the officer is "out on a traffic stop, crash, complaint or having interactions with the public."[3]

Director Baum, Fire Chief Russell Strohpaul, and Sergeant Clough then met with Charging Party on October 25, 2016, to discuss the latter's handling of the Hospitality House incident. During that interview, Charging Party indicated that he decided to handle the situation in the manner he did based on his experience and training. Moreover, after Director Baum pointed out that the intoxicated individual could have died and/or aspirated, Charging Party responded that he had placed the man on his side for that reason. The issues regarding Charging Party's audio recordings were also discussed during the meeting.

By letter dated October 29, 2016, Director Baum suspended Charging Party for five days and stated the following conclusions with respect to the Hospitality House incident:

> During this entire complaint you indicated that this suspect was highly intoxicated, you never checked or attempted to check his alcohol level with a PBT. By not checking this, you failed to be able to determine if his condition described above was actually due to his level of alcohol intoxication or not. His alcohol level could have been so great that he should have been hospitalized. By not checking his alcohol level you could not verify if his intoxication was worsening or not. You violated the Law Enforcement Code of Ethics by not safeguarding this man's life and well-being. By not seeking definitive medical attention for this man, arresting him and taking him to jail where he could be monitored or at the very least assuring you left him with someone who could watch him, you put his well-being and safety in jeopardy. You even said that you placed him on his side in case he vomited. That tells me that his safety was in question.
>
> During this complaint, you failed to assure your in-car camera video/audio system was turned on and working properly which is a direct violation of a directive dated June 15, 2015. There are no notations on your daily indicating that you were

[3] The record indicates that the City's policies were updated due to a fatal shooting incident that resulted in a wrongful death lawsuit that involved Somero as well as a Crawford County Sherriff's Deputy. According to the testimony of Director Baum, the Court "found that Officer Somero mishandled, misplaced or intentionally deleted audio recordings regarding the incident…"

> having any equipment issues. During our meeting on October 25, 2016, I talked about the audio from your wireless microphone not being turned on and showed you a copy of the directive and asked if you were familiar with it. You indicated you were, and I left that copy with you.

The October 29 letter went on to identify several more incidents in which Charging Party's use of the audio equipment was not in compliance with the Department's policy.[4]

Subsequent to the Hospitality House incident and Charging Party's suspension, Sergeant Clough discovered a Department policy that dealt with fitness for duty evaluations. Sergeant Clough testified that, after reviewing the policy and "looking at the big picture with what was going on with Officer Somero" she approached Director Baum and asked whether Charging Party's fitness for duty should be evaluated. Director Baum then discussed the issue with other individuals, including the City's Mayor and City Attorney. Both the Mayor and City Attorney agreed with Director Baum that Charging Party should be sent for a fitness for duty exam.

As a result, Director Baum and Sergeant Clough called Dr. John A. Haskin, a licensed forensic psychologist utilized by the Department for psychological evaluations. Haskin, during that initial conversation, agreed that Charging Party should be evaluated and urged Director Baum to place him on administrative leave pending the results of the evaluation. By letter dated November 17, 2016, Director Baum placed Charging Party on paid administrative leave and directed him to submit to a fitness for duty exam with Haskin. The evaluation was scheduled for November 29, 2016, at Haskin's Traverse City office.

During the phone call with Psychologist Haskin, he requested that the Department provide him with a written report describing the incidents that caused the Department to have concerns, and Sergeant Clough was directed to write and provide the report.

On November 29, 2016, Charging Party appeared for his evaluation. The evaluation, as conducted by Haskin, consisted of a full day of various tests and evaluations. According to Haskin's testimony, the evaluation he conducted with Charging Party was more extensive than what would be used to evaluate new hires.

After the evaluation, Haskin provided a draft report to Respondent. Haskin and Director Baum discussed the draft report during which Haskin also expressed concern regarding Charging Party's physical health and suggested that he be sent for a physical exam.

Respondent then facilitated a physical examination at a local hospital on January 20, 2017. According to Director Baum, the report regarding Charging Party's physical health, while finding some potential health concerns, nonetheless found the officer physically fit for duty. The results of Charging Party's physical exam were provided to Haskin.

Haskin issued his final report on February 8, 2017, after receiving the results of Charging Party's physical examination. The report diagnosed Charging Party with "Passive Aggressive

[4] On November 8, 2016, the FOP filed a grievance over the 5-day suspension but later withdrew the grievance.

Personality Disorder with Antisocial Personality features and Narcissistic Personality traits." Haskin's report concluded with his determination that:

> Officer Somero is not fit for duty as a law enforcement officer and has no reasonable chance of being rehabilitated to the point where he would be fit for duty as a law enforcement officer.

Following receipt of the report by Haskin, Director Baum again sought the advice of other individuals, including the City's Mayor and City Attorney. The Director also spoke with Haskin directly regarding the report and his recommendation. At the hearing, Director Baum testified that, given the diagnosis, he did not think that he could employ Charging Party any longer, citing concerns regarding the safety of both the community and Charging Party himself, as well as potential liability on the part of the City if Charging Party were to somehow harm a member of the public or even himself.

By letter from Director Baum dated February 28, 2017, Charging Party was notified that a meeting would be held on March 21, 2017, to discuss his "employment status." That letter went on to state that Charging Party would, effective immediately, be placed on "Unpaid Medical/FMLA leave" but that his banked vacation hours would be used to continue both his pay and health insurance.

On March 21, 2017, Charging Party met with Director Baum, Respondent's Counsel David Stoker, and FOP Representative Dave Willis, to discuss Haskin's report and Charging Party's employment status. Director Baum testified that the parties discussed whether the City could move Charging Party to a different position and whether Charging Party would take a medical retirement because of the findings made by Haskin. During the meeting, FOP Representative Willis asked for additional time to allow Charging Party to consider his options.

On March 27, 2017, Willis, by email, communicated to Respondent's Counsel that Charging Party would not seek a medical retirement.

By letter dated May 5, 2017, Director Baum informed Charging Party that he was released from employment with the City effective May 5, 2017. Director Baum's letter indicated that the reason for this release was the finding by Dr. Haskin that Charging Party was not fit for duty. Director Baum also pointed out that Dr. Haskin's diagnosis may render Charging Party eligible for a Non-Duty Disability Retirement Benefit.

The FOP did not file a grievance contesting Charging Party's release from employment and, on May 10, 2017, FOP Attorney Mark Porter informed Charging Party that he did not see any violations of the current labor contract that would provide the basis for a grievance.

On June 15, 2017, Somero filed the present unfair labor practice charge alleging that the City discriminated against him in violation of PERA "for exercising his right to be fairly represented by the Union (Michigan FOP)." Respondent filed an answer to the charge on July 17, 2017, and denied any violation of PERA. The matter was set for hearing on July 25, 2017 and then adjourned and rescheduled several times in accordance with the parties' requests.

On October 13, 2017, Respondent filed a motion for summary disposition seeking dismissal of the charge. During an October 18, 2017, pre-hearing conference, Charging Party agreed to file his response to Respondent's motion by December 11, 2017. Charging Party's response was received on November 29, 2017.

By Interim Order dated January 9, 2018, the ALJ denied Respondent's motion for summary disposition and a hearing was held on February 16, 2018, April 5, 2018, April 23, 2018, and April 24, 2018.

On February 8, 2019, the ALJ issued a Decision and Recommended Order in which he recommended that the charge be dismissed in its entirety.

Discussion and Conclusions of Law:

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." The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Taylor Sch Dist v. Rhatigan*, 318 Mich App 617, 636 (2016); *Saginaw Valley State Univ*, 30 MPER 6 (2016); *Utica Community Schools*, 28 MPER 11 (2014); *Grandvue Medical Care Facility*, 27 MPER 37 (2013); *City of Detroit*, 24 MPER 11 (2011); *Grand Valley State Univ*, 23 MPER 70 (2011); *Univ of Michigan,* 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707.

Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). See also *City of St Clair Shores*, 17 MPER 27 (2004); *North Central Cmty Mental Health Services*, 1998 MERC Lab Op 427, 436. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA v Evart Pub Sch,* 125 Mich App at 74.

In the present case, there is no dispute that Charging Party Somero engaged in activity protected by PERA when he acted as a union steward, filed grievances and participated in a unit clarification proceeding and an arbitration hearing. Similarly, there is no dispute that Respondent knew of his protected activity. Nonetheless, in his Decision and Recommended Order, the ALJ found that Charging Party failed to establish a prima facie case under Section 10(1)(c) because he failed to establish anti-union animus as it relates to Respondent's actions. We believe the evidence supports the ALJ's decision.

In his exceptions, Charging Party argues that he did establish anti-union animus when he testified that the phrase "paper begets paper" was used by Fire Chief Strohpaul and Union President Clough. According to Charging Party, this phrase meant "if you file grievances, you're going to see paper for everything they can write you up for." Charging Party finds it significant that his testimony was not even mentioned in the ALJ's Decision and Recommended Order.

Contrary to Charging Party's contentions, however, Clough testified that she never made such a statement and never heard anyone else make such a statement. Director Baum also testified that he never heard anyone make such a statement. Additionally, Fire Chief Strohpaul worked on the fire side of the Department, and the record does establish that he had anything to do with Charging Party's release from employment. Charging Party provided no indication of when or where the statement was made or of the context in which the statement was made. Finally, even assuming Fire Chief Strohpaul made such a statement, such does not rise to the level necessary to establish animus, i.e., Fire Chief Strohpaul did not disparage or in any way refer to the Union or its actions.

In his exceptions, Charging Party also argues that he submitted evidence of suspicious timing that was indicative of the City's unlawful motivation. Charging Party notes that the City did not have a negative reaction to his work performance until after he was reinstated by Arbitrator Frost in September 2016. Contrary to Charging Party's position, however, the record establishes that the City was having issues with his work performance when it assessed him a letter of reprimand in October 2014, a verbal counseling in July 2015, a letter of reprimand in November 2015, and discharged him in December 2015, approximately one year prior to referring him to Dr. Haskin for a fitness for duty exam.

Although Charging Party, in his exceptions, also argues that the reasons given for his termination were pretextual, the record establishes that Union President and/or Sergeant Clough approached Director Baum and asked whether Charging Party's fitness for duty should be evaluated after "looking at the big picture with what was going on with Officer Somero." Psychologist Daniel Post, a witness for the Charging Party, also testified that he believed it was appropriate for the Employer to refer Charging Party for a fitness for duty evaluation given Charging Party's recent heart attack, divorce, and involvement in a fatal shooting incident as well as Charging Party's 2015 discharge. The City's decision to refer Charging Party for a fitness for duty evaluation and his subsequent release from employment were thus not arbitrary or made in bad faith.

Although Post attempted to establish that the evaluation by Haskin was flawed in its approach and in its result, the ALJ correctly noted that, even if one were to accept that the evaluation by Haskin was flawed, there is no indication that the Respondent knew or should have known that it was flawed such that the evaluation could not be reasonably relied upon. Moreover, there is no indication that Respondent and Haskin colluded as to the ultimate results of the report.

Significantly, Director Baum testified, without contradiction, that Rule 204 of the Michigan Commission on Law Enforcement Standards (MCOLES) required the City to release Charging Party from employment after it received the results of Dr. Haskin's evaluation. Respondent, in its brief, argues that Director Baum's position is consistent with the District Court's decision in *Thompson v. Flint Twp Police Dept*, 2018 WL 994711 (ED Mich, 2018), in which the Court held that MCOLES standards are minimum standards that must be met by anyone serving as a law enforcement officer. Given that Charging Party has produced no evidence that any other employee of the City was allowed to work for any time period after being found unfit for duty as a result of a psychological evaluation, we believe that the Employer has provided a legitimate, non-discriminatory reason for Charging Party's release from employment. Consequently, even if Charging Party had established a prima facie violation of Section 10(1)(c), dismissal of the charge would nonetheless be appropriate. See *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983) and *Macomb County*, 31 MPER 32 (2017).

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.[5] We, therefore, affirm the ALJ's decision and adopt the Order recommended by the ALJ.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: NOV 12 2019

[5] In his exceptions, Charging Party correctly notes that the ALJ erred when he found that Charging Party also filed a ULP charge against the FOP. The error, however, is not material to the outcome of the case.

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STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF GRAYLING,
Public Employer-Respondent,

-and-

Case No. C17 F-059
Docket No. 17-012815-MERC

ALAN H. SOMERO,
Individual Charging Party.

_____/

APPEARANCES:

Cohl, Stoker & Toskey, P.C., by David G. Stoker, for the Respondent

Manda L. Danieleski, PLLC, by Manda L. Danieleski, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On June 15, 2017, Alan H. Somero filed the present unfair labor practice charge against his former employer, the City of Grayling (Respondent or City). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the above captioned case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

Somero's initial filing alleges that the City discriminated against him in violation of PERA "for exercising his right to be fairly represented by the Union (Michigan FOP)."[1] Respondent filed an answer to the charge on July 17, 2017, in which it denied any violation of PERA and further proffered justification for the actions complained of by Somero. The matter was set for hearing for July 25, 2017. This matter has been adjourned and rescheduled several times per the parties' requests.

On October 13, 2017, Respondent filed a motion for summary disposition seeking dismissal of the charge in its entirety pursuant to Rule 165(2)(c), (d), and (f). During an October 18, 2017, pre-hearing conference, held by telephone, Charging Party agreed to file its response to Respondent's motion by December 11, 2017; said response was received on November 29, 2017.

[1] The Charging Party also filed an unfair labor practice charge against Fraternal Order of Police contemporaneously with the present charge only to later withdraw it.

By Interim Order, dated January 9, 2018, I denied Respondent's motion. This matter was then set for hearing.

The parties appeared before the undersigned for hearing in Lansing, Michigan on February 16, 2018, April 5, 2018, April 23, 2018, and April 24, 2018. Based upon the entire record, including the transcripts of hearings, the exhibits admitted into the record and the parties' post hearing briefs received on June 29, 2018, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact:

Charging Party began his employment with the Employer in February 1999 as a law enforcement officer, in the position of patrolman, with the City of Grayling Police Department. The Police Department was overseen by a Chief of Police and typically included four (4) full-time officers working four (4) separate shifts, with part-time officers filling in to accommodate vacation leaves, sick leaves and other absences. The full-time officers were part of a bargaining unit represented by the Fraternal Order of Police (FOP). Charging Party testified that earlier in his career with Respondent he served as the assistant Union Steward before being voted in as Steward for the unit. City Attorney Michael Thomas Edwards testified that Charging Party filed "a lot" of grievances.

Sometime in 2013 the City made the decision to combine its Police Department and Fire Department into a single Public Safety Department (Department). Douglas Baum, who had been the Police Chief since 2009, assumed the position of Public Safety Director (Director). Following the creation of the Department, the full-time fire fighters – who had previously been unrepresented – came to be a part of the FOP bargaining unit alongside the law enforcement officers.

In early December 2013, Brock Baum was hired as a part-time fire fighter by Fire Chief Russel Strohpaul. Director Baum, who is Brock Baum's father, testified that he told Chief Strohpaul not to hire the younger Baum, explaining that he did not "want to have any perceived problems." Brock Baum, while working as a part-time fire fighter with the Department, attended the Police Academy at Kirtland Community College. Sometime in 2014 Cole Naggy was also hired in as a part-time fire fighter and he too attended Police Academy at Kirtland. The record indicates that both Brock Baum and Nagy paid for themselves to attend the Academy. In May of 2015 Brock Baum completed the Police Academy and was sworn in as an officer for Montmorency County Sheriff, where he was also working in addition to the Respondent; the record is not clear if or when Nagy finished the Academy.

Another fire-fighter, Todd Hatfield, who had begun employment with the City in 1997 as a paid on-call firefighter and who later became full-time in 2013 in the role of Assistant Chief, was sponsored by the City to attend the Police Academy in January of 2014. Unlike Brock Baum and Nagy, Hatfield's cost to attend the academy was borne by the City. Hatfield completed the Academy in May of 2014 and was then sworn in by the Respondent and began covering shifts on the police side for vacations and other absences. While Hatfield did cover shifts on the

Department's police side, he retained his duties on the fire side, one of which was to handle the scheduling for both sides of the Department.

In November of 2015, the FOP filed a Unit Clarification Petition, Case No. UC15 K-019; Docket No. 16-001866, in which it sought to represent part-time law enforcement officers. Also around this time Charging Party was issued discipline for events that had occurred earlier in October 2015. Although not entirely explored as part of this hearing, the record and exhibits, indicate that the allegations against Charging Party at that time involved possible falsification of time sheets and/or records relating to hours worked and/or overtime. Moreover, the record indicates that the FOP filed more than one grievance challenging discipline. Despite the FOP's grievances, Charging Party was terminated on December 21, 2015. Director Baum testified that it was his decision to terminate Charging Party. In early January 2016, the FOP sought to advance the grievances and Charging Party's termination to arbitration.

Prior to Charging Party's termination, the police side of the Department comprised of Charging Party, Amanda Clough, Art Clough, and Mike Grossberg as full-time officers. Hatfield, Brock Baum and Deputy Fire Chief Steve Eddy, who was also a certified law enforcement officer, were utilized to cover shifts. Following Charging Party's termination, the police side of the Department had to fill both his vacated position and also the position of Amanda Clough, who had gone out on maternity leave sometime in early 2015. Records provided by the Respondent indicate that after December 21, 2015, Art Clough, Brock Baum, Eddy, Hatfield and Grossberg worked law enforcement shifts for the remainder of December and through January of 2016 with the overwhelming majority of shifts worked by Art Clough, Eddy, Hatfield and Grossberg. Brock Baum worked just four shifts in late December and two shifts in January.

In early February 2016, Fire Chief Strohpaul was forced to take time off for medical reasons. Accordingly, Assistant Fire Chief Hatfield, who had been working fairly regularly on the police side covering shifts left open by Charging Party's termination and Amanda Clough's maternity leave, was moved back to the fire side. With Hatfield's move back to the fire side, the Department was in need of additional help on the police side. Director Baugh testified that he could either move Brock Baum, who had become a full-time fire fighter, from the fire side to the police side or go through the hiring process and try to fill the position. He further testified that he wanted the City Council to make that decision given his relationship to Brock Baum. Ultimately the Council chose to move Brock Baum over and make him a full-time officer on the police side of the Department. Around this same time Amanda Clough returned from maternity leave. In February and March of 2015, Respondent's records indicate that Brock Baum, Amanda Clough, Art Clough and Grossberg worked the majority of police side shifts with both Eddy and Hatfield occasionally filling in.

On March 25, 2016, the City and the FOP appeared in Lansing, Michigan, before Administrative Law Judge David M. Peltz, for hearing on the Union's unit clarification Petition, Case No. UC15 K-019; Docket No. 16-001866. Charging Party, who had been apparently subpoenaed to testify by the FOP, also showed for the hearing despite having been terminated in December of 2015. That hearing, upon request of the parties was adjourned without going on the record.

The FOP's grievances related to Charging Party proceeded to arbitration and were heard by Arbitrator Elaine Frost on April 29, 2016. The parties submitted post-hearing briefs by July 26, 2016. The arbitrator issued her Opinion and Award on September 2, 2016, in which she granted the FOP's grievances related to Charging Party, finding that, with respect to one of the grievances, the Department violated the contract as it related to overtime pay. In the second grievance the arbitrator found that the Department had failed to follow the grievance procedure. In the third grievance challenging Charging Party's termination, the arbitrator determined that the Department did not have just cause to terminate Charging Party. The arbitrator further found that, while just cause did not exist to terminate Charging Party, Somero was nonetheless "guilty of serious misconduct" and that a four-month suspension was the more appropriate discipline as opposed to termination. The arbitrator ordered Charging Party reinstated with only partial back-pay.

By letter, dated September 6, 2016, Fire Chief Strohpaul instructed Charging Party to report back to work on September 12, 2016. That letter went on to direct Charging Party to "make contact with Sargent [sic] [Amanda] Clough for direction."[2]

Roughly contemporaneously with Charging Party's return to work, Art Clough, who had for some time been assigned to a full-time position on the police side, was transferred back to the fire side.[3] With Charging Party's return to the Department and the transfer of Art Clough to the fire side, the police side was comprised of Grossberg, Amanda Clough, Brock Baum, and the Charging Party.

Upon Charging Party's initial return work, Sergeant Clough, at the direction of Director Baum, undertook the task of reorienting Charging Party to the Department's operations and making sure that he was up to date on any changes that may have occurred. As part of this task, Sergeant Clough rode with Charging Party for approximately two weeks during which she communicated to Director Baum that Charging Party was "was performing" and that he "was able to go solo."

Charging Party's first solo shift occurred on October 5, 2016. During that shift Charging Party was dispatched to an incident at a local motel development, the Hospitality House, to deal with an individual reported as highly intoxicated and who would not leave another individual's premises. Charging Party testified that he and two Otsego Sheriff's Deputies responded to the scene and that the individual was indeed highly intoxicated.[4] Charging Party claims that while on scene he confirmed that the man was non-violent but that "he appeared on the verge of consciousness." According to Charging Party's testimony, the individual stated, "I am a diabetic" and then appeared to lose consciousness. Charging Party then called for emergency medical personnel. According to a report prepared following the incident by a member of the Mobile Medical Response (MMR) crew, Paramedic Kathryn Webster, she and her crew had been advised

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[2] Amanda Clough had been promoted to Sergeant in June of 2016, while Charging Party was still separated from the department.

[3] There was testimony provided at the hearing that indicated that Art Clough's transfer from the police side to the fire side was made at his own request based on plans to retire soon. This testimony, while reasonable, cannot be relied on as a matter of fact, as it was delivered by individuals other than Art Clough and therefore is hearsay.

[4] The record indicates that the incident took place within the City's limits and that, therefore, Charging Party was the officer in charge of the scene, with the two Deputies providing back-up.

by "Law Enforcement that they had been dispatched out for a complaint and wanted the patient checked out before taking him into custody." The MMR crew did evaluate the individual and determined that this was not an "emergency medical situation." The report, and testimony provided at the hearing indicates that, with the exception of a "slight slurring of speech and odor noted to breath" the paramedic crew had no cause for alarm regarding the individual's medical condition. The paramedics then left the scene.

After the paramedics left Charging Party, with the assistance of the two Deputies, carried the individual into a unit of the Hospitality House, and according to Charging Party "put him in bed." Charging Party and the Deputies then also left the scene. Charging Party further testified that the individual in question "was known to be homeless" and that he, Charging Party, did not think that he paid rent to the motel but that "he was allowed to stay there." Charging Party claimed that there had been multiple incidents regarding the individual and that "reports" listed the motel as his address. There in no indication that either Charging Party, or the deputies, attempted to ascertain the individual's blood alcohol level, and/or whether he was permitted to stay at the motel. Likewise, there is no indication that any of the responding officers notified any motel staff that they had deposited the individual in one of the motel's rooms.

Director Baum testified that it was not until several days later that he learned of the incident after being notified by Officer Grossberg that a complaint had been made by one of the Deputies at the scene regarding the manner in which Charging Party had handled the situation. Director Baum then directed Sergeant Clough to investigate the matter, including viewing audio or video footage of the scene.[5] Sergeant Clough subsequently determined that, while video of some parts of the incident, including footage of Charging Party and the deputies helping the individual into a motel room, did exist, there was no audio present. Sergeant Clough testified that she then reviewed other time periods, both before and after the Hospitality House incident, in which Charging Party was wearing the body-mic and found that at some other times there was no audio recording. She further testified that she checked incidents where either she or Officer Brock Baum had been wearing that same body-mic before and/or after Charging Party and determined that there was sound recorded.[6]

Sergeant Clough, in a memo dated October 16, 2016, reported the result of her investigation as ordered by Director Baum. That report begins by indicating that the video recorded by Charging Party's patrol car camera is a continuation of a recording from an earlier incident, also responded to by Charging Party, involving a suicidal female subject. The report indicates that neither incident captured any audio recording. Clough's memo went on to discuss her review of the video recording made during the Hospitality House incident. The memo also identified several specific incidents from October 5, 2016, through October 7, 2016, in which Charging Party's wireless body-mic was not utilized or no recording, either video or audio, had occurred. The memo indicated that Charging Party's failure to properly record these incidents was in violation of a June

[5] As will be discussed in more detail below, the Department's patrol vehicles are equipped with both video and in-car audio recording capabilities as part of a system called "WatchGuard." The system also includes microphones that officers wear (body-mics).

[6] Testimony provided by witnesses by both sides attempted to articulate and explain how the recording system could be muted, both at the patrol car's control panel and at the actual body-mic worn by the officer. However, despite this testimony there is no definitive conclusion that the undersigned can rely upon to explain why or how Charging Party's body-mic had been configured such that it did not record audio.

15, 2015, directive from Director Baum that required law enforcement to ensure that their body-mics are operational when the officer is "out on a traffic stop, crash, complaint or having interactions with the public."[7]

Director Baum testified that, following receipt of Clough's memo, he thought it necessary to seek opinions of others as to how he should deal with information contained therein. The Director claims he spoke with the City's Mayor and former chief of police, Karl Schreiner, at least three instructors at the Kirtland Police Academy, and Edwards, the City's Attorney. Edwards testified that his recommendation to Director Baum was to terminate Charging Party.

Director Baum, Fire Chief Strohpaul, and Sergeant Clough met with Charging Party on October 25, 2016, to discuss the latter's handling of the Hospitality House incident. During that interview, Charging Party indicated that he made the decision to handle the situation in the manner he did based on his experience and training. Moreover, after Director Baum pointed out that the individual could have died and/or aspirated, Charging Party reportedly responded that he had placed the man on his side for that reason.[8] During that meeting, the issues regarding Charging Party's audio recordings were also discussed. Charging Party admitted that more time was spent on the audio issues at the meeting then the Hospitality House incident.

Ultimately, in a letter dated October 29, 2016, and provided to Charging Party on November 3, 2016, Director Baum chose to suspend Charging Party for five days as opposed to termination. In that letter Director Baum stated the following conclusions with respect to the Hospitality House incident:

> During this entire complaint you indicated that this suspect was highly intoxicated, you never checked or attempted to check his alcohol level with a PBT. By not checking this, you failed to be able to determine if his condition described above was actually due to his level of alcohol intoxication or not. His alcohol level could have been so great that he should have been hospitalized. By not checking his alcohol level you could not verify if his intoxication was worsening or not. You violated the Law Enforcement Code of Ethics by not safeguarding this man's life and well-being. By not seeking definitive medical attention for this man, arresting him and taking him to jail where he could be monitored or at the very least assuring you left him with someone who could watch him, you put his well-being and safety in jeopardy. You even said that you placed him on his side in case he vomited. That tells me that his safety was in question.
>
> During this complaint, you failed to assure your in-car camera video/audio system was turned on and working properly which is a direct violation of a directive dated June 15, 2015. There are no notations on your daily indicating that you were having

[7] Testimony was provided at the hearing regarding an officer-involved-shooting that occurred several years in the past, at which Charging Party was present. The record indicates that a Sheriff's Deputy and Charging Party were responding to a domestic disturbance during which time the Deputy shot and killed a suspect. A wrongful-death suit was filed against the City and others in which there appeared to be problems with the audio and/or video recording or its preservation of the incident. Director Baum testified that as a result of that incident and the subsequent suit's focus on the problems regarding audio and video recordings he felt it necessary to issue the directive.

[8] Charging Party further confirmed during the hearing that he placed the man on his side based on his "EMT training."

> any equipment issues. During our meeting on October 25, 2016, I talked about the audio from your wireless microphone not being turned on and showed you a copy of the directive and asked if you were familiar with it. You indicated you were, and I left that copy with you.

That letter went on to identify several more incidents in which Charging Party's use of the audio equipment was not in compliance with the Department's policy.

In answering a question posed by Charging Party's counsel as to why he made the decision to suspend as opposed to terminate, Director Baum stated:

> Because of the nature of the complaint that had happened. I felt it was severe enough because the person involved in the complaint could have easily died as a result of Mr. Somero's lack of actions, and I felt that was very -- a very severe situation that potentially would put the City in great – a bad position as far as any legal consequences down the road, and I felt that discharge was not appropriate at that time, because I felt at that time discharging him would have been looked at as just another reason to fire him.

It is clear from the Director's testimony that he was concerned with possible litigation, similar to the prior arbitration, if he were to terminate Charging Party and also with potential liability on the part of the City had something happened to the individual.

Subsequent to the Hospitality House incident and Charging Party's suspension, Sergeant Clough, who had been tasked by Director Baum to review and update the Department's policies, came across a Department policy that dealt with fitness for duty evaluations. Sergeant Clough testified that after reviewing and "looking at the big picture with what was going on with Officer Somero" she approached Director Baum with the idea that Charging Party might need to be evaluated as to his fitness for duty. Here too, Director Baum discussed the issue with other individuals, including the City's Mayor and City Attorney. At hearing, the City's Mayor and former Police Chief, testified he had not had any problems with Charging Party during the time that they worked together. Both the Mayor and City Attorney were in agreement with Director Baum that Charging Party should be sent for a fitness for duty exam. When Director Baum described the conversation he had with Sergeant Clough he stated that he had concerns whether Charging Party was "doing something on purpose" because "he wanted to get fired again."

Director Baum and Sergeant Clough called Dr. John A. Haskin, a licensed forensic psychologist that the Department had used in the past for evaluations.[9] Haskins, during that initial conversation, agreed that Charging Party should be evaluated and further urged Director Baum to place him on administrative leave pending the results of the evaluation. By letter dated November 17, 2016, Director Baum placed Charging Party on paid administrative leave and further stated that "[d]ue to ongoing questionable and concerning choices relating to decisions making regarding complaints and conduct" Charging Party was directed to submit to a fitness for duty exam with Haskin. The evaluation was scheduled for November 29, 2016, at Haskin's Traverse City office.

[9] The record indicates that the Department had routinely utilized Haskin, and his former partner, to evaluate potential new hires.

Director Baum claimed at the hearing that he fully expected that the evaluation would come back without any issues.

During the phone call with Haskin, the psychologist requested that the Department provide a written report describing the incidents that had caused it concern; Sergeant Clough was directed to write and provide the report.

On November 29, 2016, Charging Party appeared for his evaluation. The evaluation, as conducted by Haskin, consisted of a full day of various tests and evaluations. According to Haskin's testimony the evaluation he conducted with Charging Party was the same he used with other fitness for duty evaluations and that it was more extensive than what would be used to evaluate new hires. Moreover, while Haskin was the psychologist that evaluated Charging Party previously following his involvement in the prior described officer-involved-shooting, he testified that in those situations his work is not a "formal evaluation" but rather serves as "decompression, debriefing" and "educational" for individuals following a traumatic event.

At some point during the evaluation process, Haskin informed Charging Party that the officer could submit information for Haskin to use as part of the evaluation, i.e., letters or any other information the person being evaluated might want to have included. Charging Party submitted several reference letters. Haskin explained that when someone provides supplemental information it is also necessary for that individual to provide written releases that would allow a psychologist to contact and speak with the people who wrote said letters. Haskin testified that while Charging Party did provide releases along with the reference letters, those releases were "one-sided", i.e., the releases allowed the individuals to submit information to Haskins but that they did not give him permission to contact them to discuss the information provided. Despite the preceding, Haskin's report did include mention of the letters of support.

After the evaluation Haskin provided a draft report to Respondent. Haskin and Director Baum discussed the draft report during which Haskin expressed concern regarding Charging Party's physical health and suggested that he be sent for a physical exam.

Following up on the suggestion by Haskin that Charging Party undergo a physical examination, Respondent facilitated an exam at a local hospital. That exam occurred on January 20, 2017. According to Director Baum, the report regarding Charging Party's physical health, while finding some potential health concerns, nonetheless found the officer physically fit for duty. At some point the results of Charging Party's physical exam were provided to Haskin.

According to testimony, Haskin issued his final report sometime after receiving the results of Charging Party's physical examination. The copy of the report entered into the record during the hearing lists a cover date of December 5, 2016; however, post bearing briefs filed by the parties both indicate that Haskin issued his final report on February 8, 2017. Haskin testified that it is his practice to list the date upon which he authored the report. Regardless of when the actual "final" report was issued, neither party disputes that said report diagnosed Charging Party with "Passive Aggressive Personality Disorder with Antisocial Personality features and Narcissistic Personality traits." Haskin's report concluded with his determination that:

> Officer Somero is not fit for duty as a law enforcement officer and has no reasonable chance of being rehabilitated to the point where he would be fit for duty as a law enforcement officer.

The report went on, as "One final point", the following:

> While we find Officer Somero unfit for Duty in your Department we do not advise that you share this finding with any other Department, agency, or individual. People with Officer Somero's personality profile are prone to litigation, as you know. If he litigates your decision not to return him to duty, however, this document will become public and might affect him in ways beyond your or his control.

Following receipt of the report by Haskin, Director Baum again sought counsel from other individuals including the City's Mayor and City Attorney. The Director also spoke with Haskins directly regarding the report and his recommendation. At hearing Director Baum testified that given the diagnosis he did not think that he had any other option but to terminate Charging Party, citing concerns regarding the safety of both the community and Charging Party himself, as well as potential liability on the part of the City if Charging Party were to somehow harm a member of the public or even himself.

By letter from Director Baum dated February 28, 2017, Charging Party was notified that there would be a meeting on March 21, 2017, to discuss his "employment status."[10] That letter went on to state that Charging Party would, effective immediately, be placed on "Unpaid Medical/FMLA leave" but that his banked vacation hours would be used to continue both his pay and health insurance through March 21, 2017.

During the March 21, 2017, meeting, which included Director Baum, Respondent's Counsel David Stoker, Charging Party and FOP Representative, Dave Willis, Haskin's report was discussed. Director Baum testified that the parties also discussed whether the City could move Charging Party to a different position as well as whether Somero would take a medical retirement because of the findings made by Haskin. Charging Party testified that Stoker said to him, "If we want to screw with you, we'll just bring you back and walk you off the cliff." No further testimony was provided by either party as to the context of the preceding.

On March 27, 2017, Willis, by email, communicated to Respondent's Counsel that Charging Party would not seek a medical retirement.

By letter dated May 5, 2017, Director Baum informed Charging Party of his decision to terminate him from employment effective immediately. Director Baum's letter indicated that the reason for termination was the finding by Haskin that Charging Party was not fit for duty. That letter also appears to be the first instance that the topic of a second opinion ever came up with respect to the diagnosis. The letter stated:

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[10] Both the letter and witness testimony indicate that there had been attempts to hold the meeting sooner but that Charging Party was out of town on an annual vacation.

> You have been on paid leave while your fitness status has been evaluated, since November 17, 2016, including paid leave while using vacation leave, personal leave, and sick leave in excess of 12 weeks since Dr. Haskin's final report was issued. During this time the City has not received any second opinion reports that in any manner contradict Dr. Haskin's conclusions as to your mental health fitness for duty.

The FOP did not file a grievance contesting the termination. While no FOP representative testified, there was testimony provided at hearing that the reason the FOP did not file a grievance is that there had been a determination that the contract between the Union and Respondent did not prohibit or limit the latter's ability to order the fitness for duty examination and that any grievance filed would lack "arbitrability."

On August 18, 2017, Charging Party sat for a fitness for duty evaluation before Dr. Daniel S. Post. That report, in addition to taking several issues with the earlier report of Haskin, including criticisms of the latter's choice of tests and final determinations, found Charging Party fit for duty, stating:

> It is the opinion of the psychologist that Mr. Somero be considered without major behavioral or emotional dysfunction and considered from a psychological perspective fit for duty without reservation.

Hatfield, in testifying in support of Charging Party claimed, that during a discussion with Director Baum in the summer of 2017 in which he communicated displeasure on behalf of the firefighters in being "forced" into the FOP, the Director responded that "he didn't think we needed a union because we were treated – he treated us fairly and our benefits were good." Hatfield also claimed that while he was in charge of setting the Department's schedule there was a time that he could have offered overtime to Charging Party but that Director Baum, after hearing that the overtime would be given to Somero, instructed him to leave the "shift open." Hatfield further claimed that following Charging Party's reinstatement the Department issued a couple of directives that "were aimed towards [Charging Party]. Hatfield, when questioned on what directives he was referring to, identified a directive that prohibited parking of personal cars in certain areas, a directive that officers were supposed to be dressed and ready for work on time, and a directive that officers could not sleep while on duty. Hatfield, in further discussing the directives stated, "I just believe they were looking for a reason to fire him again."

Discussion and Conclusions of Law:

Charges under PERA must be filed within six months of the alleged unfair labor practice. MCL 423.216(a). The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch*, 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). As such, any cause of action pursued by Charging Party against the Respondent is limited to events or actions that occurred after December 15, 2016. Accordingly, Charging Party is precluded from

seeking relief under PERA as it relates to Somero's discipline issued because of the Hospitality House incident, his placement on administrative leave and direction to appear for a fit for duty evaluation, along with anything else that occurred more than six-months prior to filing of the present charge.

Section 10(1)(c) of PERA makes it unlawful for a public employer to "[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." In order to establish a *prima facie* case of discrimination under Section 10(1)(c) of the Act, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee' s protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983). However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id* at 74; *City of Grand Rapids (Fire Dept),* 1998 MERC Lab Op 703, 706. Establishing a violation of PERA requires more than mere suspicion; evidence of anti-union animus must be shown. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). The preceding notwithstanding, a finding that a respondent's purported motive for its actions lack merit or credibility can be considered circumstantial evidence that the respondent was motivated by anti-union animus. *Detroit Pub Sch,* 30 MPER 2 (2016); *Wayne Co*, 21 MPER 58 (2008).

Charging Party argues that he was discriminated against and ultimately terminated in May of 2017 as retaliation for his engagement in activity protected by Section 9 of the Act. Easily the most apparent source of protected activity which could have been the source of retaliation was Charging Party's arbitration and resulting reinstatement from his first termination. Additional instances of protected activity included Charging Party's position as a Union Steward. Moreover, as stated by Attorney Edwards, Somero filed "a lot" of grievances. It is the opinion of the undersigned that Charging Party has clearly met the first two elements necessary to establish a prima facie case under Section 10(1)(c) of the Act.

Addressing the last two elements necessary to establish a Section 10(1)(c) violation, Charging Party suggests that, immediately following his reinstatement in September of 2016, the Employer began targeting him. As evidence of this, Charging Party points to several separate events or actions, including Director Baum's directive to Sergeant Clough to reorient Somero; the issuance of several directives that, according to Hatfield were aimed at Charging Party; Director Baum's comments to Hatfield questioning the necessity of a union; the discipline meted out to Charging Party following the Hospitality House incident and for failure to ensure his recording equipment was functioning properly; and the sending of Charging Party to a fitness for duty evaluation which ultimately led to his termination.

Considering the above actions individually or taken as a whole, none of them provide direct evidence of union animus. Addressing first the reorientation of Charging Party by Sergeant

Clough in September of 2017, I note that Somero had been separated from the Department from the prior December and further that Sergeant Clough was a member of the same bargaining unit as Charging Party. There was no evidence offered connecting that action with anti-union animus. Moving on to the issuance of the directives which Hatfield claimed were aimed at Charging Party, the undersigned is at a loss as to how a directive prohibiting parking in certain areas, requiring officers to be ready at the beginning of their shift, and prohibiting sleeping on duty are indicative of anti-union animus. Moreover, Hatfield's statements that he believed Charging Party was being targeted are conclusory and without support. Furthermore, while Director Baum did question the necessity of a union in discussions with Hatfield, his comments do not rise to the level of showing animus, i.e., Director Baum did not disparage the Union or its actions.

With respect to the discipline given to Charging Party following his reinstatement, here too there is no evidence that the decisions made to issue discipline were grounded in anti-union animus. Charging Party does point out that Director Baum's own testimony reveals that he was conscious of Charging Party's prior arbitration when he made the decision to suspend rather than terminate, however, the fact that actions may have been guided out of a fear of appearing retaliatory do not, in the opinion of the undersigned, establish retaliation.

Lastly, addressing the fitness for duty evaluation, Charging Party alleges that Respondent undertook that action in order to preclude Charging Party from having the ability to grieve the issue and that by doing so, Respondent could ensure that it could be rid of Charging Party without challenge by the Union. First and foremost, there is no indication in the record that the Respondent was aware of the Union's position as to the "arbitrability" of the issue at any point prior to taking the action it did. Moreover, accepting this argument would require the undersigned to take the further leap, without any evidence in support thereof, that Respondent knew or could have known with any certainty that Haskin would ultimately find the way he did or even that Respondent and Haskin somehow colluded in the diagnosis.[11] In contrast, Director Baum testified that he was surprised by the diagnosis. Additionally, while Charging Party did provide a competing fitness for duty evaluation provided, it is not the place of the Commission, absent credible evidence of some nefarious or otherwise suspicious nexus between the Employer and Haskin, to engage in a determine which report is correct.

As such, it is my finding that Charging Party failed to establish anti-union animus as it relates to Respondent's actions. Accordingly, I find that Charging Party failed to establish a prima facie case necessary to prosecute a Section 10(1)(c) claim under PERA.

Even if I were to conclude that Charging Party had established a prima facie violation of the Section 10(1)(c) and applied the burden shift to the Employer dismissal of the charge would remain nonetheless appropriate because of the fitness for duty evaluation provided by Haskin. Moreover, as stated above, the absence of credible evidence of some nefarious or otherwise

[11] Charging Party went to great lengths to establish that the evaluation by Haskin was flawed in its approach and/or in its result. In support of this contention Charging Party not only sought a second opinion but also provided testimony by Post as to the issues with the report by Haskin. Even if one were to accept that the evaluation by Haskin was flawed, there is no indication that the Respondent knew or should have known that it was flawed such that it could not be reasonably relied upon. Moreover, as stated above, there is no indication that Respondent and Haskin colluded as to the ultimate results of the report.

suspicious nexus between the Employer and Haskin precludes the undersigned from questioning the reasonableness of the Employer's reliance on the report as the basis for termination.

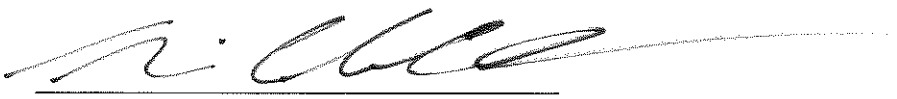
I also note that Charging Party took great care to introduce testimony and evidence into the record alluding to possible impropriety regarding treatment of Brock Baum by his father, Director Baum. [12] To the contrary, however, the record indicates that Director Baum was not only aware of the possible perception of favoritism but also that he also took explicit steps in order to prevent the same by advising Chief Strohpaul not to hire his son as a firefighter and further by causing the City Council to make the decision to move Brock Baum from the fire side to the police side fulltime. Even if I was to determine that Brock Baum did receive preferential treatment by nature of his relationship with Director Baum, there remains the absence of any connection between that and the rights as provided under the Act, as nepotism is not a violation of PERA. See *Huron School District,* 1991 MERC Lab Op 309.

I have considered all other arguments as set forth by the parties and conclude such does not change the outcome. As such, and for the reasons set forth above, I recommend that the Commission issued the following order:

Recommended Order

The unfair labor practice charge filed by Alan H. Somero against the City of Grayling is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 8, 2019

[12] Charging Party also spent considerable time questioning whether there had been deliberate action by Sargent Clough, Brock Baum or someone else to disable or otherwise interfere with his recording equipment. However, the record does not provide any credible evidence that could be relied upon to come to that conclusion.