STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF INKSTER,
Public Employer-Respondent,

Case No. C09 J-203

-and-

INKSTER FIRE FIGHTERS UNION, IAFF LOCAL 1577
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Toma, P.C., by Mark Knoth, for the Respondent

Michael L. O'Hearon P.L.C., by Michael L. O'Hearon for the Charging Party

DECISION AND ORDER

On May 18, 2011, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, City of Inkster (Employer) violated § 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a), when it questioned John Nichols, an employee in the bargaining unit represented by Charging Party, Inkster Fire Fighters Union, IAFF Local 1577 (Union), about a rumor regarding the assignment of bargaining unit work to non-bargaining unit employees. The ALJ found that Respondent interfered with Nichols' exercise of his § 9 rights when it: demanded to know whether he made a statement at a union meeting alleging that the Employer planned to hire nonunion workers to do bargaining unit work; threatened to conduct an investigation into whether he made the statement to other employees; and threatened to discipline him if he had made the statement. The ALJ found that Respondent did not demonstrate that it had a legitimate and substantial business justification for questioning employees about their discussion at a union meeting of a rumor that, if true, would impact their terms and conditions of employment or for threatening to discipline employees for bringing the rumor to the attention of other employees. The ALJ recommended dismissal of the charge regarding Respondent's questioning of Brett Karwowski, another fire fighter in Charging Party's bargaining unit, because she concluded that given the context in which the questioning occurred, there was no evidence of interference with, restraint, or coercion of Karwowski in the exercise of his § 9 rights. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA. After requesting and receiving an extension of time,

Respondent filed its exceptions to the ALJ's Decision and Recommended Order on July 11, 2011. Charging Party also requested and was granted an extension of time. On August 15, 2011, Charging Party filed cross-exceptions to the Decision and Recommended Order.

In its exceptions, Respondent contends that: the questioning of Nichols did not constitute an inquiry into activities protected by PERA; that the Employer's brief questioning of Nichols was not a restraint of protected rights; and that the ALJ erred in finding that Respondent failed to demonstrate a legitimate and substantial business justification for questioning Nichols about the source of a rumor regarding the hiring of non-bargaining unit employees to perform bargaining unit work.

In its cross-exceptions, Charging Party argues that the ALJ erred when she concluded that Respondent's questioning of Karwowski did not violate § 10(1)(a) of PERA.

We have considered each of the arguments made in support of Respondent's exceptions and Charging Party's cross-exceptions. We find Respondent's exceptions to be without merit. We find Charging Party's cross-exceptions to have merit.

Factual Summary:

Charging Party represents a bargaining unit of full-time fire fighters. Respondent also uses the services of trained, but unpaid, volunteer auxiliary fire fighters who are not part of the bargaining unit. When the events involved in this matter occurred in 2009, Charging Party and Respondent were involved in negotiations for a new collective bargaining agreement. Fire fighters in the bargaining unit represented by Charging Party operate Respondent's only ambulance/rescue unit. As a result of the demands on that unit, once patients are stabilized, their transportation to the hospital is handled by private ambulance. An issue during the parties' 2009 contract negotiations was Charging Party's proposal for a second ambulance/rescue unit that would also be staffed by bargaining unit fire fighters. Respondent rejected that proposal.

John Nichols has been employed by Respondent as a full-time fire fighter for about 26 years, most recently as a captain. Nichols has also worked part time for Schoolcraft College, teaching in its fire academy. In 2009, Nichols encountered another Schoolcraft College employee, Brian Perry, who is also one of Respondent's volunteer auxiliary fire fighters. Perry is not a member of Charging Party's bargaining unit. For reasons of his own, Perry misrepresented to Nichols that he had taken a physical examination for employment by Respondent as a member of a new auxiliary ambulance/rescue unit. Without identifying Perry by name, Nichols reported Perry's story to Charging Party's president, Jason Kaye. Subsequently, Perry told this same false story to Brett Karwowski, who also works as a fire fighter in Charging Party's bargaining unit.

On October 14, 2009, Charging Party held a union meeting. Two days later, three fire fighters told the chief of Respondent's fire department, Mark Hubanks, that they had heard at "a meeting," that he was preparing to use auxiliary fire fighters to operate a second ambulance/rescue unit. Hubanks denied the report. After his conversation with the three fire

fighters, Hubanks met with Jason Kaye, Charging Party's president. Hubanks told Kaye what the three fire fighters had said, and asked Kaye who started the rumor. Hubanks testified that Kaye said Nichols had started it. Kaye testified that he told Hubanks that Nichols had heard the rumor from an employee of Schoolcraft College and informed him, Kaye, of the rumor in his capacity as Union president. The ALJ credited Kaye's testimony that Kaye did not tell Hubanks that Nichols had started the auxiliary ambulance/rescue unit rumor.

After his conversation with Kaye, Hubanks called Deputy Chief Jerry Williams to his office and summoned Nichols to join them. Chief Hubanks confronted Nichols and asked Nichols if he had started the rumor about an auxiliary ambulance/rescue unit. Nichols denied starting the rumor. In Nichols' presence, Hubanks instructed Williams to begin an investigation and said that there would be disciplinary action when they discovered who started the rumor. According to Nichols' testimony, Hubanks also asked if Nichols had told members at a union meeting that Hubanks was going to hire auxiliary fire fighters and pay them $10.00 per hour to run a backup rescue unit, to which Nichols replied that what he said at a union meeting was none of Hubanks' business. Nichols also testified that Hubanks said: "I'm going to have an investigation done on you, and if these statements are found true, I'm going to have you suspended."

At the hearing, Hubanks denied asking Nichols about the union meeting. He testified that Nichols asked him whether he was inquiring about what happened at the union meeting. According to Hubanks, he told Nichols that he didn't care what happened at the union meeting and that they were talking about a rumor that Nichols was reported to have started. Williams, who was called to testify for Respondent, was not asked whether the union meeting was mentioned during the interview, or what, if anything, Hubanks said about discipline. Since Hubanks had asked Williams to attend the interview as a witness, the ALJ found it significant that Williams did not support Hubanks' assertion that it was Nichols who brought up the union meeting during the interview, and that Williams also was not asked whether discipline had been mentioned. Because Respondent failed to elicit testimony from Williams corroborating Hubanks' testimony, the ALJ credited Nichols' account of the interview.

Williams proceeded to investigate the auxiliary ambulance/rescue unit rumor by talking to Kaye and Perry. Kaye told Williams that Nichols said he had heard the rumor at Schoolcraft College. Perry admitted that he had started the rumor, explaining that he did so to get back at Nichols. Perry also admitted to Williams that he had also told Brett Karwowski that he had taken a physical for a position as an auxiliary ambulance/rescue unit fire fighter.

After talking with Perry, Deputy Chief Williams interviewed Karwowski, who confirmed that he had heard about the auxiliary ambulance/rescue unit from Perry. According to Williams, he did not ask Karwowski what was said at the union meeting, but Karwowski volunteered that he brought the matter up at the meeting. According to Karwowski, Williams had ordered him to disclose what he said during the union meeting. Williams told Karwowski to give him a written statement including everything that Karwowski had said to Williams in their interview. Karwowski testified that he would not have given a written statement about what was said at a union meeting if he had not been ordered to do so. In his written statement, Karwowski

recounted what Perry had told him and acknowledged that he had brought up the issue of the auxiliary ambulance/rescue unit at the union meeting.

The ALJ concluded: “There is nothing in the record to explain how Williams could have known that Karwowski talked about the rumor at the union meeting unless Karwowski told him.” Karwowski appeared to the ALJ to be an honest witness. However, the ALJ opined that Karwowski’s testimony might have been influenced by “the fact that he was upset at being ordered to write down what he said at a union meeting.” Based on this reasoning, the ALJ credited Williams’ testimony that Karwowski volunteered the information about what was said at the union meeting.

On November 4, 2009, Williams prepared a report on the results of his interviews with Kaye, Perry, and Karwowski and submitted it to Hubanks. By that time, Perry had moved out of the state. Neither Nichols nor Karwowski were disciplined.

Discussion and Conclusions of Law:

Respondent’s Exceptions

In its exceptions, Respondent contends that the ALJ erred by concluding that Hubanks' questioning of Nichols inquired into activities protected by PERA. Respondent has acknowledged that "participating in meetings with other employees at which issues related to their common employment are discussed is concerted protected activity." However, Respondent argues that Hubanks did not inquire into Nichols' participation in the union meeting or statements made at that meeting. Respondent contends that Hubanks’ questioning was limited to the issue of whether Nichols had started the rumor about an auxiliary ambulance/rescue unit. Respondent's argument is consistent with Hubanks' testimony. However, the ALJ did not credit that testimony because it was not corroborated by the testimony given by Williams, the other witness called by Respondent to testify about Hubanks' meeting with Nichols. Instead, the ALJ credited the testimony given by Nichols about Hubanks' questioning of him. The ALJ accepted Nichols’ testimony that Hubanks asked if Nichols had told members at a union meeting that Hubanks was going to begin a second ambulance/rescue unit with auxiliary fire fighters.

We agree with the ALJ's basis for doubting the credibility of Hubanks' testimony. Moreover, the ALJ is in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. This Commission will not overturn the ALJ’s determinations of witness credibility unless presented with clear evidence to the contrary. See *Redford Union Sch Dist*, 23 MPER 32 (2010); *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Zeeland Ed Ass’n*, 1996 MERC Lab Op 499, 507; 9 MPER 27097. We also agree with the ALJ that by inquiring into statements made by Nichols at the union meeting, Hubanks probed into activities protected by PERA.

Respondent further contends that the ALJ erred when she concluded that Respondent's interrogation of Nichols constituted a restraint on protected rights. Respondent asserts that § 10(1)(a) was not violated when Hubanks interviewed Nichols because Nichols had no

protected right to start or spread a false rumor. However, there is no evidence that Nichols knew the rumor was false. Since the rumor in question was that Respondent was preparing to hire auxiliary employees to perform bargaining unit work, Charging Party had a legitimate interest in the subject matter. Nichols, a bargaining unit member, engaged in activity protected by § 9 when he shared the rumor with the Union president, Kaye, without knowing that the rumor was false.

In determining whether a public employer's statement constitutes a violation of § 10(1)(a), both the content and the context of the employer's statement must be examined. *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *New Haven Cmty Sch*, 1990 MERC Lab Op 167, 179. The test is whether a reasonable employee would interpret the statement as an express or implied threat. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *City of Greenville*, 2001 MERC Lab Op 55, 56; 14 MPER 32028; *New Buffalo Bd of Ed*, at 48. The issue of whether § 10(1)(a) has been violated is not determined by the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions may reasonably be said to tend to interfere with the free exercise of protected employee rights. *City of Greenville*, at 58; See also[1] *Carry Companies of Illinois v NLRB*, 30 F3d 922, 934 (CA 7 1994); *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *Cooper-Jarrett*, 260 NLRB 1123 (1982); *American Freightways Co*, 124 NLRB 146, 147 (1959).

Here, Nichols was summoned into Chief Hubanks' office and, in the presence of Deputy Chief Williams, Nichols was interrogated by Hubanks about whether Nichols had started the auxiliary ambulance/rescue unit rumor. Hubanks also questioned Nichols about what he had told employees at a union meeting. In Nichols presence, Hubanks went on to instruct Williams to investigate Nichols and threatened to discipline Nichols if it were determined that Nichols had told other union members that the Employer was going to hire auxiliary fire fighters to operate a second ambulance/rescue unit. A reasonable employee in Nichols' position would have interpreted Hubanks' actions to be an attempt to prevent him from informing the Union that the Employer planned to hire non-unit workers to perform bargaining unit work. That is, a reasonable employee in that situation would view Hubanks' actions as an effort to restrain his exercise of protected concerted activity.

Respondent argues that it had a legitimate and substantial business justification for questioning Nichols about the rumor. As it did before the ALJ, on exceptions Respondent relied on the Court of Appeals decision in *Ingham Co Sheriff v Capital City Lodge No. 141*, 273 Mich App 133 (2007) as support for its contention that it did not violate § 10(1)(a). The *Ingham Co* case set forth three criteria for determining whether "an employer can lawfully apply an employment rule to discipline an employee for engaging in what would otherwise be a protected activity under § 9 of PERA" stating, at 141-142:

Under the first prong of the test, we look at whether the employer's action

[1] Given the similarity between the language of §§ 9 and 10(1)(a) of PERA and §§ 7 and 8(a)(1) of the National Labor Relations Act (NLRA), the Commission is often guided by federal cases interpreting the NLRA. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 260; 215 NW2d 672 (1974), *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44; 214 NW2d 803 (1974) and *U of M Regents v MERC*, 95 Mich App 482, 489 (1980).

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

Unlike the employer in *Ingham Co*, Respondent had no rule governing the employee action that was potentially subject to discipline. Although Hubanks had recently expressed his concern about the spread of unverified rumors during a meeting of command staff, which included Nichols, Respondent had not adopted a policy prohibiting employees from discussing unverified rumors. Respondent claims that rumors were causing unspecified dissension and friction. Although an employer has a legitimate interest in preventing disruptions in the workplace that interfere with the employees' ability to perform their work, Respondent has presented no evidence that the auxiliary ambulance/rescue unit rumor affected order in the workplace. Contrary to Respondent's argument on exceptions, the mere fact that three fire fighters contacted Hubanks about the rumor does not show that the rumor interfered with employees' ability to perform their duties. Respondent has not shown a legitimate and substantial business justification for either questioning Nichols about his discussion of a rumor concerning the outsourcing of bargaining unit work, or threatening to discipline him if it were determined that he had engaged in such discussion within the confines of a union meeting. In the absence of a legitimate and substantial business justification for its actions, Respondent violated § 10(1)(a) when it questioned Nichols about comments made at a union meeting, when it threatened to investigate whether Nichols had made comments at a union meeting about the auxiliary ambulance/rescue unit rumor, and when it threatened to discipline him if its investigation revealed that he had made those comments.

Charging Party's Cross-Exceptions

In its cross-exceptions, Charging Party argues that the ALJ erred in her conclusion that Respondent's questioning of the second of the two employees at issue, Brett Karwowski, did not violate § 10(1)(a) of PERA. The ALJ concluded that Deputy Chief Williams did not ask Karwowski what he had said at the union meeting. The ALJ credited Williams' testimony that Karwowski volunteered that he had brought up the auxiliary ambulance/rescue unit rumor at the union meeting. The ALJ reasoned that there was nothing in the record to explain how Williams could have known about Karwowski's discussion at the union meeting if Karwowski had not volunteered the information. Charging Party also takes exception to the ALJ's credibility determination that Karwowski volunteered the information about what he said at the union meeting.

Kaye, who was interviewed by Williams before Williams interviewed Karwowski, testified, "He [Williams] wanted a statement from Brett [Karwowski] about what was said at the union meeting, and yeah, it would have been for what he said -- John [Nichols] said what the allegations were of what John said at a union meeting." Although Williams knew about the union meeting before he interviewed Karwowski, Kaye's testimony shows that Williams was focused on finding out what Nichols had said at the union meeting. After his discussion with Karwowski, Williams ordered Karwowski to prepare a written statement. The next day, Karwowski prepared the document on which he wrote that he was ordered to write the statement "regarding . . . [w]hat was brought up in a (sic) Inkster fire department local 1577 union meeting." Karwowski's written statement goes on to explain that he mentioned during the union meeting that he had heard the auxiliary ambulance/rescue unit rumor and wanted to know the facts relating to the matter.

As previously indicated, this Commission will not overturn the ALJ's credibility findings unless they are clearly contrary to the record. *Bellaire Pub Sch*, 19 MPER 17 (2006); *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499, 507; 9 MPER 27097; *Michigan State Univ*, 1993 MERC Lab Op 52, 54. Given the divergence in the testimony, we can only speculate as to what caused Karwowski to respond to Williams' questioning about Nichols and the auxiliary ambulance/rescue unit rumor by recounting his own comments about the rumor at the union meeting. Inasmuch as Karwowski was not the focus of the Employer's investigation, we accept the ALJ's credibility finding to the effect that Williams did not specifically ask Karwowski what he said at the union meeting.

Williams was directed by Hubanks to conduct an investigation to determine the source of the auxiliary ambulance/rescue unit rumor. Perry, who was not a union member, admitted that he started the rumor. Williams approached Karwowski purportedly seeking confirmation of what Perry had told him. Karwowski provided that confirmation and Williams was satisfied that Perry had started the rumor. Whether Karwowski volunteered information about the union meeting or was ordered by Williams to provide it, there was no legitimate reason for Williams to order Karwowski to submit a written statement containing information about Karwowski's conduct at the union meeting. Karwowski testified that the matter upset him because he believed that attendees at a union meeting "should be able to say pretty much anything you want to." He explained that Williams' actions in ordering him to write down what happened at the union meeting violated the confidentiality he had believed existed with respect to comments made at union meetings. Clearly, the fact that he could be ordered to write down and submit to the Employer information about what had transpired at a union meeting would have caused Karwowski to question whether he could speak candidly at future union meetings. Thus, we find that Williams' actions in requiring Karwowski to prepare a written statement about the contents of the union meeting unlawfully interfered with Karwowski's exercise of rights protected under § 9 of PERA.

Conclusion

For the aforementioned reasons, the ALJ's decision is affirmed in part and reversed in part. As stated above, we agree with the part of the ALJ's Decision and Recommended Order

finding Respondent violated § 10(1)(a) by: demanding that Nichols tell Hubanks whether Nichols told union members at a union meeting that Hubanks was going to hire auxiliary fire fighters and pay them $10.00 per hour to run a second ambulance/rescue unit; threatening to conduct an investigation of whether Nichols made this statement; and threatening to discipline Nichols if he was found to have made this statement. We find that the ALJ erred in concluding that Respondent did not violate § 10(1)(a) by requiring Karwowski to prepare a written statement reporting events at a union meeting. Respondent's actions unlawfully interfered with Karwowski's right to engage in protected concerted activity in violation of § 10(1)(a) of PERA.

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

ORDER

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

1. Cease and desist from interfering with its employees' exercise of rights protected by Section 9 of PERA by coercively interrogating and threatening to discipline them for engaging in activity protected by that section, including, but not limited to, bringing information related to their wages, hours, and other terms and conditions of employment to the attention of other employees at union meetings.

2. Ensure that all employees, including John Nichols and Brett Karwowski, are free to engage in lawful concerted activity, through representatives of their own choice, for the purposes of collective bargaining or other mutual aid or protection.

3. Post, for a period of thirty (30) consecutive days, the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees represented by the Inkster Fire Fighters Union, IAFF, Local 1577, are normally posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **CITY OF INKSTER** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

1. **WE WILL NOT** interfere with our employees' exercise of rights protected by Section 9 of PERA by coercively interrogating and threatening to discipline them for engaging in activity protected by that section, including, but not limited to, bringing information relating to their wages, hours and other terms and conditions of employment to the attention of other employees at union meetings.

2. **WE WILL** ensure that all our employees, including John Nichols and Brett Karwowski, are free to engage in lawful concerted activity, through representatives of their own choice, for the purposes of collective bargaining or other mutual aid or protection.

CITY OF INKSTER

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case No. C09 J-203.

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF INKSTER,
Public Employer-Respondent,

Case No. C09 J-203

-and-

INKSTER FIRE FIGHTERS UNION, IAFF LOCAL 1577,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C., by Mark C. Knoth, for Respondent

Michael L. O'Hearon, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on June 24, 2010, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on November 3, 2010, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Inkster Fire Fighters Union, IAFF Local 1577 filed this charge against the City of Inkster on October 23, 2009, alleging that it violated Section 10(1)(a) of PERA. Charging Party represents a bargaining unit of full-time fire fighters employed in Respondent's fire department. The charge, as originally filed, read as follows:

> On or about October 16, 2009, by and through its fire chief, Mark Hubanks, the above named public employer coercively interrogated bargaining unit member John Nichols regarding statements he allegedly made at a Union meeting, notified him of the employer's intention to investigate the matter, and threatened Nichols with discipline if the investigation revealed that Nichols made the alleged remarks. Subsequently the employer carried out further interrogations of bargaining unit members regarding the statements allegedly made by Nichols at

the union meeting. Through these actions, the employer illegally coerced, interrogated and threatened bargaining unit members with discipline for their protected activity, created the impression of surveillance, and chilled support for the Union as the unit's exclusive bargaining representative.

According to testimony presented at the hearing, in addition to questioning Nichols, Hubanks asked Charging Party president Jason Kaye about the statements Nichols allegedly made at the union meeting. On March 18, 2010, Charging Party amended the charge to allege, in addition, that on or about October 29, 2009, Respondent Deputy Fire Chief Jerry Williams unlawfully interrogated unit member Brett Karwowski about remarks Karwowski made at the same union meeting and unlawfully ordered him to write a statement regarding what had transpired at the meeting.

Findings of Fact:

Background

Mark Hubanks was hired as the chief of Respondent's fire department in 2006, after working for a fire department in another city. John Nichols has worked for Respondent as a full-time fire fighter for about twenty-six years and has the rank of captain; Nichols was one of the applicants for the chief position when Hubanks was hired. Nichols testified that he has "had trouble" with Hubanks ever since Hubanks became chief. Hubanks testified that Nichols has repeatedly caused trouble in the department by starting or spreading rumors. As examples, Hubanks testified that he learned from a former department employee that Nichols was incorrectly telling fire fighters outside the department that Respondent had installed surveillance cameras in its day room. Hubanks also testified that in early 2008, a fire fighter admitted to Hubanks that he deliberately started a false story that Respondent was about to create and fill some new positions as a joke because he knew that Nichols would spread the rumor. Respondent produced documents from Nichols' personnel file to support its claim that Nichols had a history of starting rumors. One document, a memo dated November 6, 2007 from Hubanks to Nichols, chastised Nichols for, among other things, "starting rumors and exaggerations that caused confusion and dissension." The second document was a disciplinary reprimand issued to Nichols by Hubanks on November 12, 2007 for, among other things, making false statements to Hubanks, to other officers, and to Charging Party's executive board.

The Rescue Unit Rumor

Respondent has one ambulance/rescue unit manned by full-time fire fighters. Because of demands on the unit, private ambulance companies generally transport patients to hospitals after Respondent's fire fighters have stabilized them. In the spring of 2009, the parties began negotiating a new collective bargaining agreement. During these negotiations, Charging Party proposed that Respondent staff a second rescue unit with full-time fire fighters. Respondent rejected the proposal on the grounds that it would cost too much. Respondent has a group of trained, but unpaid, volunteer fire fighters which it calls auxiliaries. According to Charging Party during discussion of Charging Party's proposal, Respondent said that it was considering paying auxiliaries ten dollars per hour to staff a second rescue unit; Respondent denied making this

statement. By the time of the hearing in this case, the parties had settled their contract. On October 16, 2009, however, they were still involved in negotiations.

Nichols works part-time for Schoolcraft College teaching in its fire academy. In the fall of 2009, Brian Perry, a volunteer auxiliary fire fighter for Respondent, also worked there. In September 2009, Perry told Nichols, while both were at Schoolcraft, that Perry had taken a physical to be employed by Respondent to staff a rescue unit as a part-time fire fighter. This was not true. According to an account Perry later gave Deputy Chief Williams, Perry told Nichols this story because he felt Nichols "enjoyed messing with people," and Perry wanted to give Nichols a taste of his own medicine. Shortly thereafter, Nichols, without using Perry's name, told Charging Party's president Jason Kaye what Perry had told him. Kaye did not mention this story to anyone else; it is unclear whether Nichols did. In late September or early October, 2009, however, Perry told this same story to Brett Karwowski, another member of Charging Party's unit.

Around the first week of October 2009, Hubanks called a meeting of command staff to discuss the spread of rumors. Hubanks testified that there were rumors floating around that were causing distress and upsetting his command staff, although he was vague about whether a specific rumor precipitated the meeting. At the meeting, Hubanks told the command officers that the rumors had to stop. He reminded them that they always had the right to speak to him personally and told them that they had the responsibility to verify rumors before passing them along. Nichols was a command officer, but testified that he did not recall attending this meeting.

On October 14, 2009, Charging Party held a union meeting for its members at the fire station. There was no direct testimony regarding what took place at this meeting. However, according to the statement Karwowski later gave Respondent, Karwowski related what Perry had told him because he wanted to know what other members might have heard about the matter.

On the morning of October 16, 2009, Hubanks was approached in the fire station's day room by three fire fighters who asked him whether he was bringing auxiliaries in to staff a second rescue unit. Hubanks told them that he did not know what they were talking about. When the fire fighters said that they were told that he was bringing in auxiliaries to run a second rescue, Hubanks replied that he didn't know who told them that, but that the department was not doing this. According to Hubanks, the fire fighters told him they heard this at "a meeting,"

Hubanks' Meetings with Kaye and Nichols

Hubanks testified that immediately after his conversation with the three fire fighters, he called Charging Party president Kaye and asked him to come to Hubanks' office. Kaye testified that he could not have met with Hubanks on October 16 because Kaye did not work between October 14 and October 19, 2009. Kaye believed that he met with Hubanks shortly after he returned to work, on October 19 or 20. According to Hubanks, after telling Kaye what he had heard from the three fire fighters, he said to Kaye, "I've got to ask you who started this rumor," and Kaye said that Nichols started it. Kaye testified that Hubanks said, in Kaye's words, that he had "heard that Nichols had started this rumor at the union meeting or brought it up at the union meeting." According to Kaye, he told Hubanks that Nichols had called Kaye about two months

earlier and told Kaye that he had heard from an employee of Schoolcraft College that the employee had taken a physical to be hired by Respondent to be an auxiliary and possibly run a back up rescue. According to Kaye, he told Hubanks that Nichols called him because he thought that the union president should know about this. In his direct testimony, Hubanks said that Kaye told him at their meeting that Nichols had *started* the rumor. However, Hubanks testified on cross-examination that Kaye told him that he had *heard* the rumor from Nichols. I credit Kaye's testimony regarding what was said at his meeting with Hubanks, including that Kaye did not say to Hubanks that Nichols had started the rescue unit rumor. When exactly their meeting took place is not material to any issue in dispute.

According to Hubanks, immediately after Kaye left his office, Hubanks called Deputy Chief Jerry Williams and the two men discussed what occurred that morning. Hubanks then paged Nichols to come to his office because Hubanks wanted to confront Nichols about starting the rumor. He told Williams that he wanted him present when he spoke to Nichols. Hubanks' version of the interview with Nichols was as follows. Hubanks told Nichols that he had been told by several members of the department that he (Hubanks) was going to use auxiliaries to run a second rescue, and that he (Hubanks) had just talked to the union president who said that Nichols had told him this. Hubanks then asked Nichols directly if he started the rumor. Nichols said no. Hubanks said again that he had just been told by the union president that Nichols told him about it, and asked Nichols again if he started the rumor. Nichols again said no. Hubanks then turned to Williams and told him to conduct an investigation. Hubanks said, "There will be consequences, there will be disciplinary action when we find out who started this rumor." Hubanks denied asking Nichols about the union meeting. According to Hubanks, at some point after Hubanks told Nichols what the three fire fighters had said, Nichols asked Hubanks if he was asking Nichols what happened at the union meeting. Hubanks replied that he didn't care what happened at the union meeting, that it had nothing to do with that, and that they were talking about a rumor that Hubanks had just been told that Nichols started.

Nichols' version of the meeting was as follows. When Nichols entered Hubanks' office, Williams was also there. After Nichols sat down, Hubanks said, "Are you telling your members at a union meeting that I'm going to hire auxiliary fire fighters and pay them $10.00 per hour to run that backup rescue?" Nichols responded that it was none of Hubanks' business what he said at a union meeting. Hubanks replied, "I'm going to have an investigation done on you, and if these statements are found true, I'm going to have you suspended." Nichols asked Hubanks who told him that Nichols had said this. Hubanks told Nichols that the executive board had approached him, and also three fire fighters.

Respondent called Deputy Chief Williams to testify regarding this meeting. Williams testified that Hubanks called him into his office and told Williams that he wanted him at a meeting with Nichols to hear what was going to be said. Williams testified that during the meeting, Hubanks asked Nichols about rumors and Nichols denied starting any rumors. Respondent did not ask Williams whether the union meeting was mentioned during the interview or, if so, whether it was Nichols or Hubanks who brought it up. Respondent also did not ask Williams what, if anything, Hubanks said during the interview about discipline.

The record indicated that Hubanks and Nichols had a mutual antagonism which predated the rescue unit rumor incident. Neither of these men impressed me as completely credible. In determining what was actually said at Nichols' interview, I give substantial weight to the fact that Williams did not support Hubanks' assertion that Nichols, not Hubanks, brought up the union meeting during the interview. Williams was brought into the October 16 interview to serve as a witness to the conversation between Hubanks and Nichols. At the hearing, Williams confirmed Hubanks' testimony that he asked Nichols in the meeting whether he had started the rumor. The fact that Respondent did not ask Williams what was said about the union meeting suggests to me that Hubanks demanded that Nichols tell him whether he had made the statement about the rescue unit at the union meeting as Nichols testified. Respondent also did not ask Williams what Hubanks said about discipline during Nichols' interview. For this reason, I also credit Nichols' testimony that Hubanks said he would investigate whether Nichols made the statement at the union meeting and that Nichols would be disciplined if he was found to have made the statement, not if he was found to have started the rumor.

Williams' Investigation

According to Williams, he started his investigation of the rescue unit rumor by talking to Kaye sometime between October 16 and October 29. Williams testified that Kaye told him that Nichols had called Kaye to tell him that he had heard the rescue unit story at Schoolcraft College. According to Kaye, Williams did not talk to him until sometime after Williams had spoken to Perry, as discussed in the paragraph below.

Williams testified that sometime after talking to Kaye, Williams happened to run into Perry at the fire station. Perry was preparing to relocate to another state. Because Perry had worked at Schoolcraft College, Williams asked Perry if he knew anything about a rumor regarding a second rescue unit using auxiliaries. According to Williams, to his surprise Perry told him that he had started this rumor. As indicated above, when Williams asked why, Perry said that Nichols enjoyed "messing with other people," so Perry thought he would give Nichols a taste of his own medicine. Perry admitted to Williams that he had also told Brett Karwowski that he (Perry) had taken a physical to be hired to staff a rescue unit as a part-time fire fighter.

On October 29, Williams approached Karwowski on the apparatus floor at the fire station. According to Williams, he asked Karwowski to come to his office, and then asked him if he had talked to Perry about the rescue unit. According to Williams, Karwowski said that Perry had told him about the proposed new rescue unit when Perry was visiting Karwowski's home. Karwowski then volunteered that he (Karwowski) had brought up this rumor at a union meeting. Williams then told Karwowski to write down everything that Karwowski had told Williams in a written statement. He testified that he did not ask Karwowski what was said at the union meeting.

Karwowski testified that Williams approached him and asked him if he would write a statement regarding a conversation that he had with Brian Perry and also what Karwowski said in the union meeting about this. Karwowski asked Williams if this was an order, and Williams said it was. Karwowski denied volunteering the fact that he had brought up the rumor at the union meeting. He also testified that he would not have given a written statement about what he

had said at a union meeting unless he had been ordered to do so. In his written statement, Karwowski said that Perry had told him, when Perry was visiting Karwowski's house, that there was to be an auxiliary rescue and that Perry had said that he had taken a physical for the program. Karwowski also wrote that he had brought the matter up at the union meeting because he wanted to find out what the other members had heard about the matter.

There is nothing in the record to explain how Williams could have known that Karwowski talked about the rumor at the union meeting unless Karwowski told him. Karwowski appeared to be an honest witness. However, I conclude that his recollection may have been colored by the fact that he was upset at being ordered to write down what he said at a union meeting. I credit Williams' testimony that he asked Karwowski only about his conversation with Perry and that Karwowski volunteered the information that he had brought up the rumor at the union meeting.

On November 4, 2009, Williams prepared an investigative report and submitted it to Hubanks relating the results of his interviews with Kaye, Perry, and Karwowski. By the time Hubanks received the report attributing the rumor to Perry, Perry had left the state and was no longer an auxiliary fire fighter for Respondent. Neither Nichols nor Karwowski were disciplined for their actions in connection with the rumor.

Discussion and Conclusions of Law:

Section 10(1)(a) makes it unlawful for a public employer or an officer or agent of a public employer to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed by Section 9 of PERA. Like those guaranteed by Section 7 of the National Labor Relations Act (NLRA), 29 USC 157, these rights include the right to form, join or assist in labor organizations and the right to engage in lawful concerted activities for the purposes of collective negotiation or bargaining or other mutual aid and protection.

Respondent asserts that there was no violation of Section 10(1)(a) in the exchange between Hubanks and Nichols because Nichols had no protected right to either start or spread a rumor which was both false and disparaged Respondent and the fire chief. I disagree with Respondent that this case does not involve Section 9 rights. Participating in meetings with other employees at which issues related to their common employment are discussed is concerted protected activity. *Goya Foods, Inc,* 356 NLRB No 73 (2011). In this case, the subject of the rumor about which Nichols was questioned was Respondent's hiring of nonunit employees to perform unit work. Charging Party's members had a legitimate interest in hearing this story and discussing it, as it directly concerned their employment. I find that even though the story was, in fact, false, bringing the rumor to the attention of other union members for discussion and possible union action was concerted activity protected by Section 9. Accordingly, I find that, in the absence of affirmative evidence that he knew the rumor was false, Nichols' phone call to Kaye to tell him about the rescue unit story was protected activity. I also find that unless the speaker knew the story was false, whoever related the rescue unit rumor to other employees at the union meeting was also engaged in activity protected by the Act. I note that I have not credited Hubanks' testimony that Kaye told him that Nichols had started the rumor, and that find

that Hubanks had no evidence that Nichols knew the rumor was false when Hubanks decided to question him on October 16.

An employer violates Section 10(1)(a) of PERA when it engages in conduct which it can reasonably be said tends to interfere with the employees' free exercise of the rights protected by Section 9. *City of Detroit (Fire Dept),* 1982 MERC Lab Op 1220, 1225-1226, 1235. See also *City of Detroit,* 19 MPER 15 (2006); *St Clair Co Intermediate Sch Dist,* 1999 MERC Lab Op 38; *Illinois Tool Works,* 153 F2d 811, 814 (CA 7, 1946). While unlawful discrimination under Section 10(1)(c) requires a finding of unlawful motive, whether particular conduct violates Section 10(1)(a) does not turn on the employer's motive or whether the employees were, in fact, coerced. Rather, the test is whether a reasonable employee would be coerced. *City of Greenville,* 2001 MERC Lab Op 55, 56. In making this determination, the Commission looks at both the content of the employer's statements or other conduct and the context in which the conduct occurred. *City of St Clair Shores,* 17 MPER 76 (2004).

An employer's questioning of employees about their union activities or sympathies is not per se a violation of the statute. Either the words themselves or the context in which they are used must suggest an element of coercion or interference. *Midwest Stock Exchange, Inc v NLRB,* 635 F2d 1255, 1267 (CA 7, 1980). In *Rossmore House,* 269 NLRB 1176, 1178 at fn 20 (1984), aff'd sub nom *Hotel Employees Union Local 11 v NLRB, 7*60 F2d 1006 (CA 9, 1985), the National Labor Relations Board (NLRB) listed certain factors it considered helpful in analyzing whether an employer's questioning of employees about their union activities or sympathies should be considered coercive. The factors which the NLRB considers include whether the interrogator appears to be seeking information on which to base taking action against individual employees; how high the interrogator is in the company hierarchy; whether the questioning takes place as part of an informal conversation or whether the employee is called to the supervisor's office, and whether the employee responds truthfully. *Westwood Health Care Center,* 330 NLRB 935, 939-940 (2000).

In the instant case, as I have found, Chief Hubanks called Nichols to his office and, in the presence of the deputy fire chief, demanded that Nichols tell him whether he had told other union members at a union meeting that Respondent was creating a new rescue unit using auxiliaries. Hubanks then, as I have found, declared that an investigation would be conducted, and threatened to discipline Nichols if he was found to have made the statement. I conclude that a reasonable employee would have interpreted Hubanks' question and his threat of discipline, in this context, as a restraint on his or her protected right to inform other employees, in a union meeting, about a rumor that Respondent was about to hire nonunit employees to do unit work.

Respondent argues that in determining whether it violated Section 10(1)(a), the Commission must also consider whether Respondent "met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule," and must "balance the diminution of the employee's rights against the application of the rule by the employer. " For this, Respondent relies on *Ingham Co Sheriff v Capital City Lodge No. 141,* 273 Mich App 133 (2007). In *Ingham Co,* a union steward sent a copy of an internal memo she had received in her capacity as a sheriff's deputy to the union's attorney. She was disciplined for violating a written departmental rule prohibiting sheriff's deputies from releasing departmental documents to the

public without authorization. The Court of Appeals in *Ingham* established a four prong test for analyzing whether an employer can lawfully apply an employment rule to discipline an employee for engaging in what would otherwise be protected activity under PERA. The test includes determining whether the employer had a legitimate and substantial justification for instituting and applying the rule and whether the application of the rule in the case at hand unreasonably restricted the protected activity. The Court held in *Ingham Co* that the sheriff in that case had a paramount interest in ensuring that the department's internal documents were not released without prior authorization. It also concluded that the application of the rule in that case did not unduly restrict the union in the performance of its duties because the sheriff had the obligation under both PERA and the FOIA to release nonprotected information to the union upon request.

At a meeting of the command staff held in early October 2009, Hubanks told the command staff that they had a responsibility to verify rumors before passing them along. However, Respondent had no rule that explicitly prohibited employees from discussing unverified information. Respondent insists that it had both the right and responsibility to investigate the source of the rescue unit rumor, since rumors were causing unnecessary dissension and friction within the department. An employer, of course, has a legitimate interest in preventing disruptions in the workplace which affect its employees' ability to perform their duties. The rescue unit rumor, however, was not a garden-variety rumor, and Respondent presented no evidence that its need to maintain order in the workplace required it to track down the source of this rumor. I find that Respondent did not demonstrate that it had a legitimate and substantial business justification for questioning employees about their discussion, at a union meeting, of a rumor that, if true, would clearly impact their terms and conditions of employment or for threatening to discipline employees for bringing the rumor to the attention of other employees. [2]

For reasons set forth above, I conclude that Respondent violated Section 10(1)(a) by demanding that Nichols tell Hubanks whether he told union members at a union meeting that Hubanks was going to hire auxiliary fire fighters and pay them $10.00 per hour to run a backup rescue, by threatening to conduct an investigation of whether Nichols made this statement, and by threatening to discipline Nichols if he was found to have made this statement.

Like Nichols, Kaye was called to Hubanks' office and questioned about the statement Nichols' had supposedly made about the rescue unit at the union meeting. Kaye, however, responded readily and truthfully to Hubanks' question about the source of the rumor. Kaye apparently believed that his information was evidence that Nichols had not originated the rumor, although Hubanks did not take it as such. There was no indication from either man's testimony that Hubanks ordered Kaye to answer his question or that Kaye considered himself obliged to do so. I conclude that Hubanks' questioning of Kaye, in the context in which it occurred, did not

[2] Respondent cites *Seventeenth District Court*, 19 MPER 88 (2006), for the proposition that an employer can lawfully threaten to discipline employees for false statements made in the course of protected activity. In that case, the employer accused a union steward of giving employees misinformation about the employer's bargaining table positions. The Commission did not hold in that case that the employer could lawfully threaten to discipline the steward for misrepresenting the employer's positions, but that the employer's statement to the steward that it "knew how to handle the matter" could not reasonably be construed as a threat of discipline.

restrain, coerce or interfere with its employees' exercise of their Section 9 rights. I conclude, therefore, that the allegation concerning the questioning of Kaye should be dismissed.

As discussed in my findings of fact, I conclude that Deputy Chief Williams did not ask Karwowski what Karwowski said at the union meeting, but that Karwowski volunteered the information that he had brought up the rescue unit rumor after Williams asked him about his conversation with Perry. I conclude that Williams did not unlawfully interfere with Karwowski's exercise of his Section 9 rights by ordering him to write what Karwowski had voluntarily told him in the form of a statement. I conclude, therefore, that the allegations involving Williams and Karwowski should also be dismissed.

RECOMMENDED ORDER

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

1. Cease and desist from interfering with its employees' exercise of rights protected by Section 9 of PERA by coercively interrogating and threatening to discipline them for engaging in activity protected by that section, including, but not limited to, bringing information related to their wages, hours and other terms and conditions of employment to the attention of other employees at union meetings.

2. Ensure that all employees, including John Nichols, are free to engage in lawful concerted activity, through representatives of their own choice, for the purposes of collective bargaining or other mutual aid or protection.

3. Post, for a period of thirty (30) consecutive days, the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees represented by the Inkster Fire Fighters Union, IAFF, Local 1577, are normally posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____