

STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of

Docket No. 2011-478

North Berrien Fire Rescue,  
Petitioner

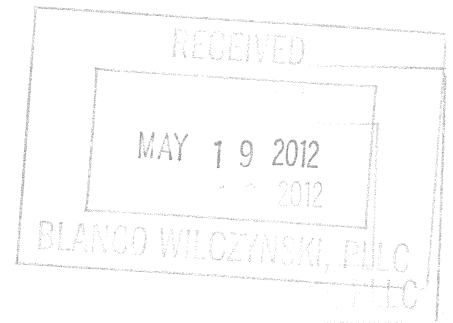
Agency No. D-10-269-1

V  
Keith Schmidt,  
Respondent

Agency: MIOSHA

Case Type: MIOSHA Discrimination

Issued and entered  
this 16<sup>th</sup> day of May, 2012  
by Renée A. Ozburn  
Administrative Law Judge



DECISION OF ADMINISTRATIVE LAW JUDGE

PROCEDURAL HISTORY

This is a proceeding conducted pursuant to Section 65(1) of the Michigan Occupational Safety and Health Act (MIOSHA), 1974 PA 154, as amended, MCL 408.1001 *et seq.*, and the Administrative Procedures Act (APA), 1969 PA 306, as amended, MCL 24. 201, *et seq.*

On April 6, 2010, Keith Schmidt (Respondent) filed a MIOSHA Discrimination Complaint with the Employee Discrimination Section of Michigan's Department of Energy Labor and Economic Growth (currently the Department of Licensing and Regulatory Affairs). MIOSHA investigated whether a safety complaint filed by Mr. Schmidt in January 2010, resulted in his termination by North Berrien Fire Rescue (NBFR/Petitioner). On March 16, 2011, Employee Discrimination Section Acting Program Manager Dana Girty, issued a decision finding that NBFR violated Section 65(1) of Act 154 in separating Keith Schmidt. On April 1, 2011 NBFR filed an appeal and a contested case hearing was scheduled.

On May 11, 2011 a telephone prehearing was conducted. Hearings were held on July 18 & 19, 2011, October 17, 18 & 19, 2011 and January 30, 2012. Attorney Orlando Blanco appeared on behalf of NBFR. Attorney Dawn Jack appeared on behalf of MIOSHA. Respondent Keith Schmidt appeared in pro per with the assistance of Attorney Jack. Keith Schmidt and Charles Collier were called as witnesses by MIOSHA. Kenneth Parrigin, Paul Sewcyck, David Woodward, Robert Wooley and James Spiegel testified on behalf of Petitioner NBFR. The record remained open until April 23, 2012 for submission of written closing arguments.

**ISSUES AND APPLICABLE LAW**

The issue is whether Keith Schmidt was terminated by NBFR for engaging in protected activity in violation of Section 65(1) of MIOSHA which provides:

**408.1065 Discharging or discriminating against employee prohibited; complaint; investigation; order; notice; review; finality of determination; parties; hearings officers; conduct of proceedings; determination as final disposition; judicial review; venue; civil action to enforce order; powers of director of labor.**

Sec. 65.

(1) A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under or regulated by this act or has testified or is about to testify in such a proceeding or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

**SUMMARY OF EXHIBITS**

Petitioner/NBFR Exhibits:

Exhibit 1	(duplicate of Exhibit ff)
Exhibit 2	Not offered
Exhibit 3	Fax & Letter dated May 28, 2010
Exhibit 4	Not offered
Exhibit 5	Not offered
Exhibit 6	Job Application dated February 10, 2000
Exhibit 7	Not offered
Exhibit 8	Incident Report dated May 12, 2009
Exhibit 9	Field Exception Report dated August 8, 2009
Exhibit 10	(duplicate of Exhibit aa)
Exhibit 11	Todd Bohle letter
Exhibit 12	Verbal Reprimand dated October 20, 2009
Exhibit 13	Not offered
Exhibit 14	Facebook pages
Exhibit 15	(duplicate of Exhibit cc)
Exhibit 16	Facebook pages
Exhibit 17	Not offered
Exhibit 18	Police Complaint dated January 13, 2010
Exhibit 19	NBFR request for MIOSHA consult dated January 18, 2010
Exhibit 20	MIOSHA findings dated January 30 2012 re: K. Schmidt complaint
Exhibit 21	(duplicate of Exhibit gg)
Exhibit 22	Not offered
Exhibit 23	Not offered

Exhibit 24	(duplicate of Exhibit ee)
Exhibit 25	Not offered
Exhibit 26	(included as part of Exhibit 3)
Exhibit 27	NBFR Organizational Chart
Exhibit 28	Not offered
Exhibit 29	K. Schmidt Handwritten Notes
Exhibit 30	K. Schmidt Typed Notes dated May 6, 2010
Exhibit 31	K. Schmidt Interview Report dated May 6, 2010
Exhibit 32	MIOSHA Field Narrative re: Safety Complaint
Exhibit 33	Investigation Report dated March 3, 2011
Exhibit 34	Case Contact Sheet
Exhibit 35	List of Witnesses
Exhibit 36	List of Witnesses
Exhibit 37	B. Medina Interview Statement
Exhibit 38	Letter from J. Spiegel to K. Schmidt dated April 20, 2010
Exhibit 39	E. Dolezan Statement
Exhibit 40	Letter from MIOSHA to K. Schmidt dated March 16, 2010
Exhibit 41	MIOSHA Safety File
Exhibit 42	K. Schmidt Record of Calls

MIOSHA Exhibits:

Exhibit aa	K. Schmidt Leave Request dated September 14, 2009
Exhibit bb	MIOSHA Safety Complaint dated January 13, 2010
Exhibit cc	K. Schmidt Safety Officer Resignation, February 1, 2010
Exhibit dd	Note
Exhibit ee	NBFR Letter re: K. Schmidt resignation, March 29, 2010
Exhibit ff	MIOSHA Discrimination Complaint dated April 6, 2010
Exhibit gg	MIOSHA Letter to NBFR dated April 9, 2010
Exhibit hh	Equipment Checklists dated April 1, 2010 & May 10, 2010
Exhibit ii	MIOSHA Investigator Recommendations, March 3, 2011
Exhibit jj	MIOSHA Letter to K. Schmidt dated March 16, 2011
Exhibit kk	MIOSHA Letter to NBFR dated March 16, 2011
Exhibit ll	(duplicate of Exhibit 3)
Exhibit mm #1	J. Spiegel Interview Statement July 28, 2010
Exhibit mm #2	J. Spiegel Interview Statement (typed)
Exhibit nn #1	P. Sewcyck Interview Statement
Exhibit nn #2	P. Sewcyck Interview Statement (typed)
Exhibit oo #1	S. Thurlow Interview Statement
Exhibit oo #2	S. Thurlow Interview Statement (typed)
Exhibit pp #1	D. Woodward Interview Statement
Exhibit pp #2	D. Woodward Interview Statement (typed)
Exhibit qq #1	E. Dolezan Interview Statement
Exhibit qq #2	E. Dolezan Interview Statement (typed)
Exhibit rr #1	T. Schuck Interview Statement
Exhibit rr #2	T. Schuck Interview Statement (typed)
Exhibit ss	Association Meeting Minutes dated 10/09 – 5/10

FINDINGS OF FACT

Based on the entire record in this matter, including the testimony of witnesses and exhibits, the following findings of fact were established:

1. In 2000, Keith Schmidt began working as a firefighter for the Coloma Fire Department, which subsequently became part of North Berrien Fire and Rescue (NBFR). This was an on-call position that involved getting equipment to fire/emergency scenes, firefighting, salvage operations and attending monthly meetings. The job covered two fire stations in Coloma and Riverside. Mr. Schmidt had sets of protective gear and equipment at each station. He carried a pager and was issued a portable 2-way radio. Dispatch was through the local Sheriff's Department.
2. At the time he was hired in 2000, Randy Morris was the Fire Chief. In or around 2003, Mr. Morris appointed Mr. Schmidt the NBFR Safety Officer. The duties of this position included checking power lines, shutting off gas and appraising the entry to buildings at fire scenes.
3. In 2009, Randy Morris's position as Fire Chief ended, but he stayed on as a firefighter. David Woodward became Acting Fire Chief and the NBFR Board began the process of recruiting a new Fire Chief.
4. During a meeting in August 2009, attended by Mr. Schmidt, Acting Chief Woodward and Captain Todd Bohle, there was a discussion of two complaints filed against Mr. Schmidt. The first complaint involved Mr. Schmidt's behavior at a conference in April 2009. The second complaint was that Mr. Schmidt made derogatory comments about EMS employees at a fire scene sometime in or around August 2009. When Mr. Woodward attempted to interview Mr. Schmidt about the allegations, Mr. Schmidt walked out after stating "I don't have to listen to this fucking bullshit."
5. Prior to the August 2009 meeting, Mr. Woodward had investigated an Incident Report dated May 12, 2009 (Exhibit 8) filed by Chief Engineer Dale Stover alleging that Mr. Schmidt publicly berated and cursed at Mr. Stover on April 24, 2009 while they were attending a Fire Department Instructors Conference (FDIC). Mr. Woodward found no grounds to officially discipline Mr. Schmidt after investigating the Stover complaint.
6. Based partially on budget concerns and partially on reports of behavior at the 2009 FDIC event, the NBFR Board decided not to send firefighters to the 2010 FDIC event. The decision not to send firefighters to the Spring 2010 FDIC event was made prior to October 2009 when new Fire Chief James Spiegel began at NBFR. Chief Spiegel was not involved in the decision to eliminate funding for the 2010 FDIC event.

7. On September 14, 2009, Mr. Schmidt submitted a note to NBFR stating "I Keith Schmidt am requesting a leave of absence for personal reasons from North Berrien fire effective for a period of no more than 30 days." (Exhibit aa)
8. Between the August 2009 meeting where Mr. Schmidt walked out on Acting Chief Woodward, and his letter requesting a leave of absence on September 14, 2009, no one from NBFR informed Mr. Schmidt that he was about to be suspended. Although Mr. Woodward had considered formally disciplining Mr. Schmidt after the August 2009 complaint, he decided not to issue a formal suspension after Mr. Schmidt "self-imposed" a leave of absence on himself. There were no written disciplinary actions in any file maintained on Mr. Schmidt prior to October 20, 2009.
9. In October 2009, James Spiegel was named the new Fire Chief for NBFR. Mr. Spiegel came from Indiana and had not been associated with NBFR prior to his appointment. Shortly after beginning as Chief, Mr. Spiegel met with Mr. Woodward who advised Chief Spiegel not to "reinstate" Mr. Schmidt because of his past conduct. NBFR employee Stuart Thurlow and NBFR Board Chair Paul Sewcyck also spoke to Chief Spiegel about past incident's where Mr. Schmidt's conduct was disruptive or constituted an inappropriate expression of anger. When Chief Spiegel indicated that he was not inclined to terminate Mr. Schmidt before forming his own opinions of staff, Mr. Woodward asked that Mr. Schmidt's return to work be conditioned on him apologizing to the EMS personnel he had recently offended.
10. On October 20, 2009, Mr. Schmidt met with Chief Spiegel. During this first meeting, Mr. Schmidt expressed his concerns and disagreements with developments at NBFR. When Mr. Schmidt asked Chief Spiegel about rumors that he was brought in to get rid of people, Chief Spiegel responded that there was no 'hit list'. When they discussed Mr. Schmidt returning to work, Chief Spiegel informed Mr. Schmidt that he could return if he made certain apologies. Mr. Schmidt agreed to make the apologies.
11. Chief Spiegel was hired, in part, to bring better practices and procedures to NBFR. There were a number of unwritten policies and practices prior to his arrival. In an attempt to begin a system of keeping better employee records, Chief Spiegel initiated use of a form (Exhibit 12) entitled "Documentation of Verbal Reprimand". After meeting with Mr. Schmidt on October 20, 2009, Chief Spiegel filled out a Verbal Reprimand form and placed it in Mr. Schmidt's employee file. On the reprimand form, Chief Spiegel noted information about Mr. Schmidt's alleged conduct at the August 2009 meeting with Mr. Woodward and his offensive verbal comments to EMS personnel. All of the incidents noted in the Documentation of Verbal Reprimand occurred prior to Chief Spiegel's arrival. Chief Spiegel did not show the Exhibit 12 reprimand form to Mr. Schmidt or ask that he sign it.

12. After the October 20, 2009 meeting with Chief Spiegel, Mr. Schmidt made the apologies he agreed to and returned to work in or around late October/early November 2009.
13. In early November 2009, Mr. Schmidt and Chief Spiegel were at an extrication training site. Mr. Schmidt told Chief Spiegel that he was "thinking about retiring" and/or "planned to retire" when he completed 10 years of service. In the months and years prior to November 2009, Mr. Schmidt had shared his thoughts about retiring with a number of individual firefighters and Board members.
14. When Mr. Schmidt made his statements to Chief Spiegel about retiring in November 2009, he did not state that he had definitively picked a day to retire, although technically he would complete 10 years of service as of April 1, 2010. Chief Spiegel told Mr. Schmidt that he would work with him on completing his 10 years. This conversation in November 2009 was the only conversation between Mr. Schmidt and Chief Spiegel about retirement. Shortly after the November 2009 conversation with Mr. Schmidt, Chief Spiegel told others associated with NBFR including Paul Sewcyck, David Woodward and Stuart Thurlow, that Mr. Schmidt had expressed his intention to retire after achieving 10 years of service.
15. There was no change in Mr. Schmidt's role as an active NBFR firefighter between the conversation with Chief Spiegel at the extrication training in November 2009 and April 1, 2010.
16. Mr. Schmidt had a side business selling and installing lights and sirens on official vehicles. He posted Facebook pages regarding this business (Exhibits 14 & 16) and coworkers were aware of the business. Mr. Schmidt did not intend to quit or retire from firefighting on April 1, 2010 to work full time on his lighting business.
17. NBFR did not have a written policy regarding the process for retiring in the fall of 2009 or as of April 2010. There was no requirement that a decision to retire be submitted in writing. Neither were there any traditions of awarding plaques or holding ceremonies to recognize service. However, there was a practice of allowing retiring firefighters, with 10 years of service, to keep certain gear (e.g. boots and uniforms).
18. Between December 2009 and January 2010, Mr. Schmidt contacted the Firefighter Training Council, which sets standards and qualifications for different fire fighting positions. Mr. Schmidt had observed Chief Spiegel at fire scenes and was unsure what role the Chief was assuming at the scenes. Mr. Schmidt speculated that there might be a potential safety violation if Chief Spiegel was acting as scene commander without proper certification.
19. Unbeknownst to Mr. Schmidt, at the time Chief Spiegel was hired in October 2009, the Board and Chief Spiegel agreed that he would act as communications officer and administrative assistant to scene commander David Woodward at fire scenes until it was determined that he met all Michigan standards for commanding a scene.

20. Between October 2009 and April 2010, David Woodward was in charge of at all fire scenes, made all calls regarding equipment and attack plans and gave directions to others. All firefighters and officers at the scene fed information to Mr. Woodward for purposes of his role as scene command. Although Chief Spiegel was at fire scenes during this period and communicated with Mr. Woodward, he was never in charge at the scenes.
21. Although Randy Morris had remained a firefighter after his position as Fire Chief came to an end in 2009, on January 10, 2010, Chief Spiegel fired Mr. Morris, citing insubordination.
22. On January 12, 2011, Mr. Schmidt and other firefighters boycotted a training session scheduled for that day to protest the termination of Randy Morris. Instead, the group held a meeting at Captain Todd Bohle's barn. Mr. Schmidt told others present at the barn meeting that he planned to file a MIOSHA Safety Complaint against Chief Spiegel on January 13, 2011. On January 12, 2011, Mr. Schmidt also posted statements on his Facebook page (Exhibit 16) stating "...everybody just hold on take a breath and lets see what is going to happen believe me there will be recourse!! I promise you that!"
23. On January 13, 2011, Mr. Schmidt filed a "Notice of Alleged Safety or Health Hazards" form with MIOSHA alleging:

"We have a fire chief who is not firefighter 1 & 2. He is certified in Illinois. He is on fire scenes as a command officer." (Exhibit bb)
24. On January 13, 2010, Mr. Schmidt also filed a police report (Exhibit 18) with the Coloma Police Department claiming that the NBFR Board met in violation of the Open Meetings Act on December 8, 2011. This complaint was subsequently dismissed.
25. On January 18, 2011 Chief Spiegel filed a Request for Consultative Assistance with MIOSHA (Exhibit 19) seeking a consultation to determine if NBFR had any outstanding hazards or safety issues. At the time Chief Spiegel filed this consultation request with MIOSHA he had not been contacted by MIOSHA about the January 13, 2011 MIOSHA Safety Complaint filed by Mr. Schmidt.
26. Another incident involving Mr. Schmidt's display of temper occurred in mid-to-late January 2010 after a huge transformer fire. Mr. Schmidt and other firefighters attended a critique of the fire which was led by Chief Spiegel. During this critique, Mr. Schmidt stood up and began cursing (e.g. "bullshit" "fucking shit") and making accusations that the fire scene was managed inadequately and incompetently. Although, Chief Spiegel considered Mr. Schmidt's conduct very unprofessional, he chose not to discipline him because he was expecting that Mr. Schmidt would be gone in April 2010.

27. MIOSHA investigated Mr. Schmidt's Safety Complaint (Exhibit bb) on January 28, 2010 by conducting interviews and reviewing documentation (Exhibit 32). There is no MIOSHA regulatory provision that requires specific firefighter certifications to be scene commander, rather the language requires that training be commensurate with duties. MIOSHA concluded that the fire chief's duties were commensurate with his training and no citation was recommended (Exhibit 20).
28. On February 1, 2010, Mr. Schmidt submitted correspondence stating: "I Keith Schmidt resign my position of Safety Officer with North Berrien Fire effective February 1, 2010." (Exhibit cc) He did not discuss with anyone that this was an act in anticipation of retiring as a firefighter on April 1, 2010. He returned only his Safety Officer equipment (i.e. orange helmet, radio). He continued to respond to fire calls after resigning as Safety Officer.
29. On February 25, 2010, MIOHSA informed both Mr. Schmidt and NBFRR that no violations of MIOSHA safety standards were found. The official notification to NBFRR that the enforcement investigation was closed (Exhibit gg) was issued on April 9, 2010.
30. In early March 2010, Chief Spiegel was in a budget meeting with Coloma Township Supervisor Kenneth Parrigin and NBFRR Board member Paul Sewcyck when Mr. Schmidt entered the meeting and angrily accused Mr. Parrigin of showing disrespect to firefighters at a station meeting a few days earlier. When Mr. Parrigin asked Chief Spiegel why he had not terminated Mr. Schmidt, Chief Spiegel responded that Mr. Schmidt had already tendered a resignation that would be effective shortly.
31. In or around mid-March 2010, Mr. Schmidt approached Chief Spiegel and accused him of cancelling firefighter attendance at the 2010 FDIC convention in retaliation for the filing of the MIOSHA Safety Complaint. Mr. Schmidt told Chief Spiegel that he was the person who filed the complaint and he did not want the Chief to penalize all firefighters because of his actions. Chief Spiegel told Mr. Schmidt that he already knew that he was the person who filed the complaint. Chief Spiegel denied that the MIOSHA complaint played any part in the decision to cancel funding for the FDIC event. He told Mr. Schmidt that it was a decision made by the NBFRR Board before he became chief and that it was based on budget concerns. This conversation deteriorated into angry statements from Mr. Schmidt and both men making statements that they "knew people".
32. Chief Spiegel drafted correspondence dated March 29, 2010 (Exhibit ee) from himself to Mr. Schmidt with the subject line entitled "Resignation" which stated:

"Please be informed that I have accepted your resignation as given to me last November during the department's extrication drill effective April 1, 2010. I have honored your request to achieve ten years of service with the department and understand the value that means to both you and the community. Thank you for your years of service to the



community and may you and your family enjoy good health and prosperity.”

33. Chief Spiegel arranged to have Mr. Schmidt's gear removed from lockers at both stations before directly communicating with Mr. Schmidt and before assuring that Mr. Schmidt received the March 29, 2010 correspondence.
34. Mr. Schmidt first heard about the separation when he received calls from other firefighters indicating that his equipment had been removed from the stations. He was surprised. He had not received anything in writing indicating that he was separated. He went to the stations and confirmed that gear had been removed from his lockers. He found notes on his lockers saying "see chief" (Exhibit dd). Subsequently, Mr. Schmidt received the March 29, 2010 (Exhibit ee) correspondence from Chief Spiegel at the Coloma fire station.
35. After 10 years of service, firefighters are allowed to keep their boots and uniform. If an employee is fired, he does not get to keep his boots and uniform. On April 1, 2010, Chief Spiegel prepared an equipment checklist (Exhibit hh) for Mr. Schmidt specifying what equipment needed to be returned to NBFR.
36. On or about April 2, 2010, Mr. Schmidt called Chief Spiegel and asked "where's my fucking gear?" When Mr. Schmidt asked, Chief Spiegel if he had been fired, the response was "No, I'm going to take you up on your offer to resign." Mr. Schmidt informed Chief Spiegel that he did not want to retire or resign and the Chief suggested he take his complaints to the next Fire Board meeting. Mr. Schmidt then called Chief Spiegel an "asshole".
37. Robert Wooley is the Treasurer of the NBFR Board. Mr. Wooley spoke with Mr. Schmidt shortly after Mr. Schmidt's gear was removed from the two fire stations in early April 2010. Mr. Schmidt expressed his objection to being "forcibly resigned". Mr. Wooley suggested he come to the next Fire Board meeting and present his complaint. Mr. Wooley also recommended that Mr. Schmidt continue showing up at the stations for calls until the April Board meeting was held. Although Mr. Schmidt continued to appear at fire stations after his protective gear was removed, he was not sent out on calls or paid for responding to calls after April 1, 2010. Mr. Schmidt did not attend the April 12, 2010 Fire Board meeting to present complaints about his separation.
38. Because Mr. Schmidt did not attend the April Fire Board meeting, Chief Spiegel sent him correspondence dated April 20, 2010, (Exhibit 38) indicating that Mr. Schmidt should return equipment by April 30, 2010.
39. On or about May 10, 2010, Mr. Schmidt encountered Chief Spiegel in the parking lot of a station when he went to turn in his radio equipment. Mr. Schmidt asked Chief Spiegel "where's my fucking shit?" meaning his boots. Chief Spiegel indicated they were at another station and offered to bring them to Mr. Schmidt's home. Chief Spiegel also attempted to hand Mr. Schmidt his last paycheck. Mr. Schmidt began yelling obscenities at Chief Spiegel and threatened to variously

“kill him” and/or “kick his ass” if the Chief were to venture near his property. Because of the threats of physical violence, Chief Spiegel went to the police, but after reviewing his options decided not to file an official police report. The incident in the parking lot was witnessed by Eric Dolezan. (Exhibit 39)

40. If Mr. Schmidt had received the March 29, 2010 memorandum from Chief Spiegel, accepting his resignation, on that date, and indicated he did not want to retire effective April 1, 2010, Chief Spiegel would have started a ‘personal review’ to determine if Mr. Schmidt could stay. Chief Spiegel had withheld disciplinary action against Mr. Schmidt for his outbursts and unprofessional behavior between November 2009 and April 2010, in an attempt to honor a commitment he made to Mr. Schmidt to help him achieve his 10 years of service. Chief Spiegel considered Mr. Schmidt a “troubled individual” who needed help.
41. On April 6, 2010, Mr. Schmidt filed a MIOSHA Discrimination Complaint. MIOSHA staff person Karen Swanberg took the complaint and summarized Mr. Schmidt’s position on the Complaint Form (Exhibit ff). This summary states as follows:

“In November 2009 during a conversation with Jim Spiegel, Fire Chief, complainant mentioned that he was thinking about retiring in April. Spiegel told complainant he would put him on a list until he decided. In January 2010 complainant filed a MIOSHA enforcement complaint regarding the Fire Chief not being certified and he was in charge on fire calls. Complaint was investigated on January 28, 2010; no citations were issued. About March 22, 2010 complainant heard Spiegel blaming others for filing with MIOSHA. Spiegel told everyone, “I can’t send you guys because you called OSHA”. (Spiegel was referencing the upcoming Fire Convention held in Indianapolis April 21 through April 24, 2010, to which the department normally sent 8-10 personnel). Complainant told Spiegel he was the one who filed the complaint. On April 1, 2010 complainant was told by Spiegel that he was no longer on the active roster and his gear was pulled. Complainant asked why and Spiegel said he was honoring complainant’s retirement request from last November. Complainant told Spiegel he didn’t submit paperwork for retirement and that he was just talking. Note: Complainant continued to report to station for fire calls but could not go out because his gear had been pulled. On April 5, 2010 complainant received a letter from Spiegel stating he received complainant’s resignation from November 2009 and he is honoring complainant’s request.

Complainant believes he was terminated for filing the MIOSHA (enforcement) complaint. “

42. Charles Collier is an Investigator with the MIOSHA Employee Discrimination Complaint Division. Mr. Collier was assigned to investigate Mr. Schmidt's April 6, 2010 discrimination complaint. The investigation process entailed conducting interviews and reviewing documents. In determining whether discrimination exists under Act 154, Mr. Collier looks for protected activity (i.e. an employee filing a safety complaint), employer knowledge of the protected activity and whether there is a connection between the protected activity and an adverse action such as a sanction or termination of the employee who participated in protected activity. The interview process consists of Mr. Collier writing an interview statement in long-hand as he conducts the interview. He then reads the statement back to the interviewee and has that person sign Mr. Collier's handwritten interview statement verifying its accuracy. Subsequently, Mr. Collier types a "Narrative" of the interview.
43. Mr. Collier interviewed Mr. Schmidt on May 6, 2010. He interviewed James Spiegel on July 28, 2010. He also interviewed Paul Sewcyck, Stuart Thurlow, David Woodward, Eric Dolezan, Brandon Medina and Tim Schuck. (Exhibits mm, nn, oo, pp, qq & rr, 34, 35, 36, 37).
44. Mr. Collier determined that Mr. Schmidt's filing of a MIOSHA Safety Complaint on January 13, 2010 was protected activity. He determined that the employer removing the protective gear that allowed Mr. Schmidt to perform his job in late March 2010, was an adverse action.
45. Chief Spiegel told Mr. Collier that the decision to accept Mr. Schmidt's resignation necessitated pulling his gear. Chief Spiegel acknowledged that there was no written documentation from Mr. Schmidt indicating his intent to retire or resign on April 1, 2010. Chief Spiegel acted on the basis of their November 2009 discussion and the fact that Mr. Schmidt never told him that he had changed his mind about retiring between November 2009 and April 2010. Although there was evidence that Mr. Schmidt had a well known history of problems with anger and profanity, NBFR never asserted that Mr. Schmidt's past behavior was the reason for his separation.
46. Mr. Collier's interviews with other NBFR employees and Board members indicated that, although Mr. Schmidt talked about the possibility of retiring, he never made any definitive statements that he planned to retire effective April 1, 2010. During their May 6, 2010 interview, Mr. Schmidt told Mr. Collier that in speaking to Chief Spiegel after his gear was removed, he stated that when he was ready to resign he would put it in writing like he did when he stepped down as Safety Officer (Exhibit 31).
47. Mr. Collier's determination that Mr. Schmidt did not intend to resign combined with the temporal proximity between the time he filed the MIOSHA Safety Complaint on January 13, 2010 and the time of his forced resignation on April 1, 2010, led Mr. Collier to issue an Investigative Report dated March 3, 2011, (Exhibits ii & 33) recommending that Mr. Schmidt's April 6, 2010 discrimination complaint should be sustained.

48. Mr. Collier concluded that, at a minimum, Chief Spiegel knew of the MIOSHA complaint by February 25, 2010, when the case was closed. In addition, Mr. Schmidt had announced his plans to file a safety complaint in the presence of a number of people connected to NBFR the day prior to filing the complaint. Mr. Collier opined that the totality of his findings established that NBFR held an animus towards Mr. Schmidt that, coupled with the temporal proximity of his protected activity to his termination, constituted discrimination under Section 65(1).
49. In correspondence dated March 16, 2011 from MIOSHA Acting Program Manager Dana Girty to Chief Spiegel (Exhibit kk), NBFR is informed that pursuant to the conclusion that NBFR violated Section 65, NBFR was ordered to make restitution by expunging Mr. Schmidt's personnel file of all written material relating to his separation, make a written offer of reinstatement to Mr. Schmidt for employment in his former or a like-position, pay lost wages with interest from April 1, 2010 to the date of reinstatement, post the MIOSHA Employee Discrimination Poster for 30 days and schedule a meeting with the MIOSHA Employee Discrimination Section.
50. NBFR appealed the MIOSHA determination and the matter proceeded to a contested case hearing.

### CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleadings and Practice, §60.48 at 239 (2d ed. 1994). As the trier of fact, the Administrative Law Judge must determine the weight, effect and value of the evidence. Also, the Administrative Law Judge must determine the extent to which testimonial evidence is credible and plausible, taking into consideration any bias, prejudice or motive that may have influenced witness testimony.

An employee has the burden of proving, by a preponderance of evidence, a prima facie case of discrimination in an employer's adverse action against that employee. If the employee satisfies this threshold burden of proof, the burden shifts to the employer to articulate some legitimate non-discriminatory reason for the employer's actions. If the employer satisfies this burden of proof then the burden shifts back to the employee to prove by a preponderance of evidence that the reasons offered in support of the employer's action were only a pretext for discrimination. *Texas Dept. of Community Affairs v Burdine*, 450 US 248; 101 S.Ct. 1089; 67 L.Ed2d 207 (1981).

An employer is prohibited from retaliating against an employee who reports or expresses opposition to an unlawful employer practice. Conduct or communication by employees opposing an unlawful employer practice may be "protected activity". There must be a causal connection between the employee's protected activity and an employer's adverse action against the employee. Further, an employee must do more than generally assert unfair treatment. *Shallal v Catholic Social Services*, 455 Mich 604 (1971) and *Barrett v Kirtland Community College*, 245 Mich App 306 (2001).

In *Whitman v City of Burton*, 293 Mich App 220 (2011), the court held that a critical inquiry in a claim involving retaliation is whether the employee acted in good faith, with the public concern in mind, when filing a complaint because the Legislature did not intend the (*Whistleblowers*) Act to be used as an offensive weapon by disgruntled employees. The purpose and legislative intent of MIOSHA's Section 65 is, in many respects, analogous to the Whistleblowers Act. A MIOSHA safety complaint filed for reasons other than legitimate public safety concerns may not qualify as protected activity.

The basis of Mr. Schmidt's MIOSHA discrimination complaint is an assertion that he was forcibly separated from NBFR for filing a safety complaint with MIOSHA. The safety complaint alleged that NBFR Chief Spiegel was acting as a fire scene commander without proper certification. Mr. Schmidt was still Safety Officer at the time he filed the MIOSHA safety complaint and, as such, it would have been appropriate for him to concern himself with safety issues. Mr. Schmidt consulted with the Firefighters Training Council before filing his complaint. Further, Chief Spiegel was at fire scenes and the role he was playing may not have always been clear to frontline firefighters. Mr. Schmidt's complaint addressed a plausible and legitimate public safety concern. Therefore, the evidence has established that Mr. Schmidt's safety complaint was "protected activity" for purposes of Section 65(1).

However, even if Chief Spiegel knew that Mr. Schmidt filed the safety complaint, he had no reason to be concerned because he, David Woodward and the NBFR Board all knew that only Mr. Woodward was acting as scene commander. On February 25, 2010 MIOSHA confirmed that there were no safety violations regarding Chief Spiegel's qualifications. The evidence does not support a conclusion that Chief Spiegel was alarmed or angry about the MIOSHA safety complaint investigation, or concerned about who filed the complaint.

The above Findings of Fact establish that Mr. Schmidt did not intend to retire effective April 1, 2010. Although there were no written policies or procedures for firefighter resignation or retirement, Mr. Schmidt had a practice of putting any intended change of status in writing as evidenced by his request for a leave of absence in September 2009 and his resignation from the position of Safety Officer in February 2010. Further, there was no requirement that firefighters separate on their 10<sup>th</sup> anniversary date. General discussions between coworkers and supervisors about retirement thoughts and plans occur in practically every work environment. A mere conversation about retiring five months down the road, without any further discussion or action verifying plans, does not constitute an official irrevocable notice of retirement.

Although Mr. Schmidt talked casually about retiring to a number of NBFR coworkers before and after Chief Spiegel came on board, when he expressed thoughts about retiring after completing 10 years in the November 2009 conversation with the Chief, it opened up an avenue for Chief Spiegel to plan for the least acrimonious way of separating a volatile employee. In the interim between November 2009 and April 1, 2010, a number of incidents occurred that further confirmed to Chief Spiegel that Mr. Schmidt was a disgruntled and disruptive employee, but the Chief chose not to take

disciplinary action because it was a relatively short period of time between November 2009 and April 1, 2010, when Mr. Schmidt would be eligible for retirement.

In November 2009, Chief Spiegel hatched his plan to separate Mr. Schmidt no later than April 1, 2010, notwithstanding Mr. Schmidt's actual plans as of April 1, 2010. Chief Spiegel's decision to label the separation an "acceptance of a resignation" does not negate the fact that it was a forced resignation. The MIOSHA complaint filed by Mr. Schmidt in January 2010 did not cause or affect Chief Spiegel's decision to make April 1, 2010 the effective date of Mr. Schmidt's separation. Further, the evidence established that the legitimate, non-discriminatory reason for separating Mr. Schmidt was his history of unprofessional conduct.

In summary, the evidence established that Mr. Schmidt filed a MIOSHA safety complaint, involving a legitimate public safety concern. The filing of this safety complaint was protected activity. The evidence established that NBFRR forcibly separated Mr. Schmidt, effective April 1, 2010. This constitutes an adverse action. However, the evidence did not establish that the protected activity caused or was connected to the adverse action. The decision to separate Mr. Schmidt was made months before the filing of the safety complaint. Therefore, the evidence has not established a violation of Section 65 (1) of MIOSHA.

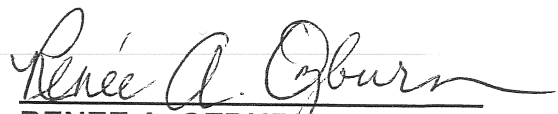
### **DECISION AND ORDER**

Based on the above Findings of Fact and Conclusions of Law, it is Decided and Ordered that the **Department's decision in Case No. D-10-269-1 is REVERSED.** Petitioner North Berrien Fire Rescue did not violate Section 65(1) of MIOSHA.

### **APPEAL PROCEDURE**

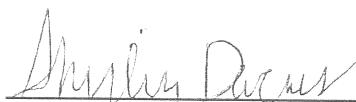
The parties may appeal a decision in accordance with the provisions of MCL 408.1065(6), which provides:

A party to the proceeding may obtain judicial review within 60 days after receipt of the determination of the hearings officer pursuant to Act No. 306 of the Public Acts of 1969, as amended. Venue for an appeal under this act shall be only in the circuit where the employee is a resident, where the employment occurred, or where the employer has a principal place of business.

  
**RENEE A. OZBURN**  
**ADMINISTRATIVE LAW JUDGE**

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on this 16<sup>th</sup> day of May, 2012.



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