

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

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF WATER & SEWERAGE),
Public Employer-Respondent,

-and-

MERC Case No. C12 G-141
Hearing Docket No. 12-001253

SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION,
Labor Organization-Charging Party.

APPEARANCES:

Schultz & Young, P.C., by Gregory T. Schultz, for Respondent

Sachs Waldman, P.C., by John R. Runyan, Jr., for Charging Party

DECISION AND ORDER

On May 18, 2016, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by either of the parties.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 8, 2016

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

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF WATER & SEWERAGE),
Public Employer-Respondent,

Case No. C12 G-141
Docket No. 12-001253-MERC

-and-

SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION,
Labor Organization-Charging Party.

APPEARANCES:

Schultz & Young, P.C., by Gregory T. Schultz, for Respondent

Sachs Waldman, by John P. Runyan, Jr., 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 on January 28, 2013, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on or before March 18, 2013, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and History:

The Sanitary Chemists and Technicians Association (SCATA) filed this unfair labor practice charge against the City of Detroit on July 19, 2012. At the time the charge was filed, Charging Party represented a bargaining unit of nonsupervisory chemists employed by the City of Detroit and working in its Department of Water & Sewerage (DWSW). Saulius Simoliunas was employed in the DWSW as a water systems chemist in its Wastewater Treatment Plant. On July 10, 2012, Simoliunas approached a supervisor, Beatrice Wanji, about the fact that she had been doing work normally performed only by SCATA members. On or about July 16, 2012, Respondent issued Simoliunas a three-day suspension for his conduct during his exchange with Wanji. Charging Party asserts that Simoliunas was engaged in activity protected by Section 9 of PERA when he questioned Wanji about why she was doing the work, and that his alleged

misconduct during this exchange did not remove him from the protection of the Act. It alleges, therefore, that Respondent interfered with Simoliunas' Section 9 rights, and violated Section 10(1)(a) and/or 10(1)(c) of PERA, by disciplining him for the July 10, 2012 incident.

On July 16, 2012, Respondent met with Simoliunas to discuss the July 10 incident. As set out below, Mike Jurban, supervisor of the operations laboratory at the Wastewater Treatment Plant, testified that he had prepared a written suspension notice in advance of the meeting but was prepared to reduce the suspension to a written reprimand if Simoliunas either apologized or provided a good explanation for his conduct. During the meeting, Simoliunas asked Respondent why Wanji had been permitted to do SCATA work. He also accused Respondent of orchestrating the incident in order to discipline him, and threatened to file a lawsuit against Wanji if he was disciplined. Charging Party also alleges that Simoliunas' remarks in the July 16 meeting were an extension of his previous protected conduct, and that Respondent violated Section 10(1)(a) and/or 10(1)(c) of PERA by suspending Simoliunas, rather than reducing his discipline to a reprimand, because of his behavior at the July 16 meeting.

Respondent maintains that the activity for which Simoliunas was disciplined on July 16, 2012, was not protected by PERA. It also asserts that the Commission lacks jurisdiction to find an unfair labor practice in this under the terms of an order issued on November 4, 2011, by Federal District Judge Sean Cox. The November 4, 2011, order, discussed in more detail in the section below, enjoined the Commission from exercising jurisdiction over disputes "arising from the changes ordered by the Court" in that order.

The record in this case had closed, but I had not yet issued a decision, in July 2013 when Respondent filed a petition in the U.S. Bankruptcy Court. This case, like all other cases then pending before the Commission involving the City of Detroit, was held in abeyance while the bankruptcy petition was pending. On August 26, 2015, I sent the parties a letter stating that as the bankruptcy proceeding had concluded, I planned to move forward with this case, and the other charges filed against the City of Detroit that were pending before me. The letter stated that if any party believed that placing the case back on the active docket would be in contravention of an order issued by the Bankruptcy Court or any other lawfully issued order, the party was to notify me within twenty-eight days of the date of the letter. I did not receive any response to this letter and, on October 14, 2015, I notified the parties that I had placed this case back on my active docket.

On December 15, 2015, Judge Sean Cox issued another order in the same litigation that gave rise to the November 4, 2011, order. The December 15, 2015, order included directives as to how pending claims involving the DWSD, including unfair labor practice charges, were to be resolved. On December 30, 2015, I sent the parties another letter informing them that, as I interpreted Judge Cox's December 15 order, the Commission was to decide, as a threshold issue, whether the DWSD's actions in this case were "ordered or specifically permitted to be taken" by orders issued by him.

Findings of Fact:

Judge Cox's Orders

On November 4, 2011, Federal District Judge Sean Cox issued an order in a longstanding federal case between the United States Environmental Protection Agency and the City of Detroit pertaining to the City's compliance with the Clean Water Act, 33 USC §1251 et seq. The November 4, 2011, order required the City of Detroit and DWSD to take a number of actions that impacted collective bargaining between Respondent and its unions, including negotiating separate collective bargaining agreements (CBAs) for DWSD employees and employees of other City departments. The two paragraphs of that order pertinent to this proceeding are the following:

6. DWSD CBAs shall provide that excused hours from DWSD work for union activities are limited to attending grievance hearings and union negotiations, with prior notification to DWSD management. The Court strikes and enjoins any current CBA provisions to the contrary.

* * *

13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

Judge Cox's December 15, 2015, order modified Paragraph 13 of his November 4, 2011, order to read as follows:

a. Except as provided in this Order, labor claims filed or later filed that challenge actions of DWSD which were ordered or specifically permitted by the Labor Orders are permanently enjoined unless dismissed with prejudice by the parties.

b. Upon execution of this Order, the injunction previously issued is modified to return jurisdiction to Wayne County Circuit Court, MERC and the grievance arbitrators for those claims challenging DWSD actions which were neither ordered nor specifically permitted by Labor Orders. These labor claims may proceed whether filed before or after this Order's date.

c. There are also certain pending claims where the parties disagree as to whether or not DWSD's actions, which were challenged with such claims, were ordered or specifically permitted to be taken by the Labor Orders. For such claims, the tribunal where the matter is pending will decide whether DWSD's actions were ordered by Labor Orders. This shall occur also for claims yet to be filed.

Background

SCATA represented nonsupervisory chemists employed in the DWSD for a substantial period of time. For some portion of that time, SCATA was known as the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 2334/SCATA. Saulius Simoliunas was president of SCATA between 1986 and 1990 and became president of UAW Local 2334/SCATA again in about 2009. Simoliunas was still president when, in September 2011, SCATA filed a petition with the Commission seeking an election in which unit employees would vote whether to be represented by SCATA or by UAW Local 2334/SCATA. As a result of that election, SCATA was certified by the Commission as the bargaining representative for the unit on December 5, 2011. However, a dispute then arose within SCATA as to which of two factions had authority to bargain with the DWSD on its behalf. One of these factions was headed by Simoliunas. Simoliunas testified that when he and his faction arrived for a scheduled negotiating session with Respondent, they were told that Respondent had received a letter from the other faction claiming to represent SCATA. When Simoliunas' faction asserted that they were the real representatives, Respondent told both factions to settle it themselves. When they could not, Respondent refused to negotiate with either faction. Jurban, the supervisor of the sewage plant operations lab, told Simoliunas that Jurban would not process any grievances until the dispute was resolved because Jurban did not know who the SCATA president was.

In early 2012, both factions filed unfair labor practice charges against the Respondent. These unfair labor practices were settled on July 3, 2012, when all parties involved agreed to allow the Commission to conduct an internal union election to resolve the dispute over the union's leadership. The ballots in that internal election were mailed on July 30, 2012, and opened on August 16, 2012. Simoliunas' slate of candidates was chosen by SCATA's membership, and Simoliunas resumed his role as SCATA's president. As noted above, the suspension which is the subject of this charge was issued on July 16, 2012, after the parties had agreed to an election, but before the ballots were mailed.

Simoliunas argued at the hearing that Mike Jurban, the supervisor who issued his suspension, tacitly fueled the internal power struggle within SCATA in favor of the "rebels" by refusing to process grievances until the dispute was resolved.

The July 10, 2012, Incident

On July 10, 2012, Simoliunas was working as a water systems chemist in the operations laboratory at the DWSD's Wastewater Treatment Plant. At that time, sample testing work in the operations laboratory at the Wastewater Treatment Plant was normally performed by three classifications in the SCATA unit: water systems chemists, assistant water systems chemists, and junior water systems chemists. Senior water systems chemists, a supervisory classification, normally assigned chemists to labs, made sure that the chemists performed their sampling, and checked their results. If the results were not within normal limits, senior water systems chemists decided whether the chemists should resample or if some other action needed to be taken. Water systems chemists and senior water systems chemists were in separate units represented by different bargaining agents.

On July 10, 2012, Simoliunas worked a shift that began at 7:30 a.m. His immediate supervisor on that shift was senior water systems chemist Samuel Gibson. Beatrice Wanji was a senior water systems chemist assigned to a shift that began at midnight and concluded sometime between 7:30 a.m. and 8:00 a.m., depending on what had to be done that day. Wanji had been promoted to senior water systems chemist from water systems chemist a month earlier. However, on July 10, 2012, Wanji, as she had for some time before that date, worked in the lab performing the same type of sample testing that she had performed before her promotion to senior water systems chemist. Jurban, the sewage plant laboratory supervisor, had assigned Wanji to do this work on a temporary basis because five water systems chemists had been promoted to senior water systems chemists at the same time and there was a temporary shortage of SCATA chemists.

Simoliunas and Wanji had different versions of their encounter. Simoliunas testified as follows. On the morning of July 10, Simoliunas arrived at the operations lab approximately 45 minutes prior to the start of his shift, as was his habit. He looked at the laboratory log book and observed that Wanji had signed herself in as performing testing usually performed by SCATA chemists for five days in a row. Simoliunas decided that Wanji's performance of unit work had become excessive. He decided to ask Wanji why she was doing the work of a water systems chemist when she had been promoted, and who authorized her to do that, because he wanted to file a grievance over Wanji's performing the work. After Simoliunas arrived at the lab that morning, Wanji returned to the lab from delivering samples to another location. Sometime between 7:05 and 7:10 a.m., he approached Wanji and asked her, "Why do you do the job of water systems chemist when you are a senior water systems chemist?" Wanji replied that it was none of his business. Simoliunas said that it was his business because Wanji was doing SCATA work. Simoliunas then asked her who authorized her to do that job, and Wanji told him to talk to Jurban. Simoliunas told Wanji that he was going to ask labor relations about this because this was not right and Jurban did not have the authority to authorize it. Wanji then became upset, told him angrily not to bother her, and stormed out of the room. Simoliunas did not raise his voice, did not get any closer to her than three feet, and did not follow her as she moved to leave the lab. Simoliunas initially testified that he only asked why she was doing the work and who authorized her to do it, and that he did not repeat these questions. However, on cross-examination he testified that after Wanji replied that it was none of his business, he also asked her, "Why do you do these things, you have been our member ... why are you doing this work?" Simoliunas testified that there was another water systems chemist working at the back of the lab, and other people coming and going because it was shift change, but that no one was standing immediately next to Wanji and himself during their brief conversation.

Simoliunas testified that Gibson was entering the lab just as Wanji was leaving. Simoliunas approached Gibson and asked him who authorized Wanji to do water systems chemist work. Gibson told him that after the shift started he would sit down with him and explain. Simoliunas testified that the whole incident, including his exchange with Gibson, lasted about two minutes. About a half hour to forty minutes later, Gibson called Simoliunas into his office and told him that they were short of chemists and that Jurban might have authorized Wanji to do the work. Simoliunas told Gibson that this was not right, and Gibson told him that if he believed that was the case he should file a grievance.

Wanji's version of the encounter was as follows. Wanji arrived at the operations lab shortly after 7:30 a.m. She was speaking to another employee in the primary area of the operations lab, when Simoliunas approached her. Wanji testified that she was sure that it was after 7:30 a.m. when Simoliunas came up to her because when she delivered samples she did not return to the operations lab until after 7:30 a.m. Wanji also testified that when Simoliunas approached her, all the day shift chemists were in the lab, which would not have been the case before 7:30 a.m.. Simoliunas asked her why she was doing SCATA work, and she replied, "Don't talk to me, talk to Mike." Wanji denied telling Simoliunas that it was none of his business. Simoliunas said he wouldn't talk to Mike, he would talk to labor relations, and Wanji said "Fine." Simoliunas then said he needed to talk to Wanji because she was the one doing the work. Wanji told Simoliunas not to talk to her, and again said he had to talk to Jurban. At that point, Simoliunas came within two feet of Wanji's face and began shouting that he was talking to her because she was doing the work, and why was she doing the work? Wanji told Simoliunas for the third time to talk to Jurban and started walking toward the door, but Simoliunas followed her and said again that he was talking to her because she was the one doing the work. Gibson was standing outside in the hall as Wanji exited the lab. Simoliunas followed her and then said to Gibson that he should tell her (Wanji) to stop doing SCATA work. Gibson told Simoliunas to get back to work, although he had to repeat this several times before Simoliunas complied. Wanji agreed that with Simoliunas that the incident, in its entirety, lasted about two minutes and that Simoliunas did not physically touch her. Wanji admitted that she may have raised her voice during the exchange, but maintained that Simoliunas was speaking much more loudly.

Wanji testified that she went with Gibson to the office and that she sat down for a while to calm down. Later the same day, she went to the plant's security office to file a complaint. In her complaint, she stated that Simoliunas had asked her why she was doing a SCATA job since she was a senior chemist. She wrote that when she told him to talk to Jurban and walked towards the door, Simoliunas had followed her shouting at the top of his voice that he had to talk to her because she was the one doing the work and "was right in my face telling me to stop doing SCATA work." The complaint said that this was not the first time she had been harassed by Simoliunas and that his actions were intimidating.¹

Wanji also filed a complaint of harassment with Respondent's human rights department. This complaint said, "Simoliunas yelled at me and was in my face for working in the lab and assignment [sic] given to me by my supervisor. He followed me to the door shouting at the top of his lungs and was in my face." In the section of the form asking Wanji what resolution she was seeking, she wrote, "I wish that Mr. Simoliunas be made aware of the consequences of workplace violence by documentation."

After Wanji filed her complaint, she met with Jurban and a representative from human resources, Tiffany Alexander. Wanji told them her version of events. Three chemists who Wanji said had witnessed the incident were asked to prepare written statements, as was Gibson. Simoliunas was not interviewed or asked to prepare a written statement.

None of the four individuals who submitted statements testified at the hearing. However, their written statements were admitted as exhibits. Gibson reported that he was walking into the

¹ No evidence was introduced of any other encounter between Simoliunas and Wanji.

lab from the hallway when he saw Wanji walking angrily away from Simoliunas toward the door. According to Gibson, Simoliunas turned to him and asked him if Wanji was a senior chemist or a water systems chemist, and, if she was a senior chemist, why was she working in the lab. Gibson told Simoliunas to return to work and that Gibson would talk to her later, and Simoliunas did so. One of the three chemists said that Simoliunas stopped Wanji and started screaming at her not to do SCATA work as she was promoted. According to this chemist, Simoliunas and Wanji had a brief argument and, when Simoliunas followed her as she walked away, Wanji told him that if he had a problem he should talk to management. The second chemist reported that Simoliunas “confronted” Wanji about working the chemist position while holding the senior chemist title, and that she told him if he had a problem he should address management. The third chemist wrote, “Dr. Saul asked Beatrice for clarification of her position. Is she a chemist or senior chemist? Beatrice said go ask Mike. This question and response were repeated four to five times.”

I credit Wanji’s testimony that her reply to Simoliunas’ question about why she was doing SCATA work was, “Don’t talk to me, talk to Mike.” I also credit her testimony that Simoliunas continued to ask her why she was doing SCATA work and, in fact, berated her for doing so. In addition, I credit her testimony that sometime during their exchange, Simoliunas began speaking in a loud voice, that at one point he came within two feet of her, and that he attempted to follow her as she moved toward the door of the lab. I note that one of the three chemists who witnessed this brief encounter said in his written statement that Simoliunas shouted, another described him as “confronting” Wanji, and the third said that Simoliunas repeated his question about her doing the work over and over. I find that these statements corroborate Wanji’s testimony and that her testimony was also corroborated by Simoliunas’ own testimony that he said, “Why do you do these things, you have been our member ... why are you doing this work?” I make no finding regarding the exact time of the encounter. There is no dispute that Simoliunas’ and Wanji’s exchange took place in the operations lab and that either Wanji or Simoliunas, if not both, were “on-the-clock” when it occurred.

The July 16, 2012, Meeting and Discipline

On July 16, 2012, Simoliunas was called to a meeting with Jurban, Alexander, and assistant sewage laboratory supervisory Jerry Scales. Respondent had not interviewed Simoliunas about the July 10 incident before this meeting, and Simoliunas was told only that the meeting involved “some incident.” When Simoliunas arrived, Jurban, Alexander, Wanji, and Scales were waiting for him. Jurban asked Simoliunas if he wanted a union representative, but Simoliunas said he did not. According to Wanji and Jurban, Scales asked Simoliunas what happened on July 10, and Simoliunas said that he had asked Wanji why she was doing SCATA work and then Wanji had started shouting as if she were crazy. According to their testimony, there was also a discussion of whether Simoliunas had followed Wanji to the door; it is not clear from Wanji or Jurban’s testimony whether Simoliunas admitted that he had followed her.

Simoliunas had a different account of the first part of the meeting. He asked what the meeting was about and was told that he was abusing Wanji. Simoliunas said that this was not true. Jurban said, “We always lose our temper sometimes, and this is what you did.” Simoliunas asked what proof they had. Alexander said that she had a folder of statements. Simoliunas asked

to see them, but Alexander refused. Simoliunas then asked Jurban, “Why did you permit her to work?” referring to Wanji’s performing SCATA work. Jurban replied that he could do anything he wanted.

After these exchanges, Respondent representatives went into another room for about fifteen minutes. When they returned, Jurban asked Simoliunas to sign a form confirming that he did not want union representation at the meeting. Simoliunas then asked for a union representative. The union representative needed to come from another location, and the parties sat down to wait for him. While they were waiting, Simoliunas threatened to file a lawsuit against Wanji if he was disciplined and accused Respondent representatives of orchestrating the incident because of the internal SCATA dispute. Respondent representatives then told Simoliunas that they were going to leave the room because Simoliunas was saying things that might get him into trouble. They then left the room again and did not return until Simoliunas’ union representative arrived. During this interval, Jurban signed the suspension notice that he had previously prepared. Jurban testified that he had come to the meeting prepared to reduce the suspension to a written reprimand. According to Jurban, he had hoped that Simoliunas would apologize to Wanji and admit that he (Simoliunas) should have talked to Jurban about the work issue, but that Simoliunas instead became defensive. Jurban testified that it was clear to him by this point that Simoliunas was not going to “offer an explanation other than the facts presented,” and that he could see from the interactions between Simoliunas and Wanji that “the intensity was still there.” When the union representative arrived, Jurban returned to the room and handed Simoliunas the suspension notice. The union representative tried to ask questions but Jurban said that he did not have to answer them. The suspension notice stated that Simoliunas was guilty of insubordination for disobeying the orders of Wanji, a supervisor, to stop talking to her. It also found him guilty of “boisterous behavior causing undue attention and work stoppage,”

Simoliunas served the three day suspension on July 16, 17 and 18, 2012. Upon his return to work on July 18, he filed a grievance asserting that it was against DWSD practices and rules to allow senior chemists to do chemists’ work.

Discussion and Conclusions of Law:

Jurisdiction of the Commission

Respondent asserts that the Commission lacks jurisdiction to resolve this charge because of the order issued by Federal District Judge Sean Cox on November 4, 2011, enjoining the Commission from “exercising jurisdiction over disputes arising from the changes ordered by this Court.” As discussed above, I have concluded that under the order issued by Judge Cox in December 15, 2015, the Commission must decide, as a threshold issue, whether Respondent’s actions in this case were “ordered or specifically permitted to be taken” by orders issued by him. If the Commission finds in the affirmative, the Commission has no further jurisdiction, and the charge must be dismissed. However, if the Commission concludes that the actions in this were not “ordered or specifically permitted to be taken” by Judge Cox’s orders, the Commission is then obligated to address the case on its merits.

I conclude that Paragraph 6 of Judge Cox's November 4, 2011, order did not, as Respondent asserts, specifically permit it to prohibit all union or other protected concerted activities, except grievance hearings and union negotiations, during work time. I also find that Judge Cox's order did not give Respondent carte blanche to discipline employees for engaging in such activities. Paragraph 6 explicitly addresses "excused hours" for union activities, and prohibits Respondent from agreeing to excuse employees from work except for grievance hearings/meetings and union negotiations. Simoliunas, however, was not excused from work in order to speak to Wanji about her performance of work in the lab, nor did he ask to be. It is axiomatic that work time is for work. Moreover, as Respondent points out in its brief, it is clear from the fact that Judge Cox devoted an entire paragraph in his November 4, 2011, order to excused hours for union activities that he felt that the amount of time DWSD employees were excused from work for union activities was having a significant impact on the DWSD's ability to perform its functions and comply with the Clean Water Act. However, two employees, or an employee and a supervisor, having brief conversations during the course of their workday about grievances or other topics related to wages or working conditions clearly does not have the same disruptive effect as employees leaving their jobs to perform union business. I conclude that Paragraph 6 of Judge Cox's order did not prohibit DWSD employees from having such conversations during work time.

Unlawful Discrimination

The charge, as filed, alleged that the discipline issued to Simoliunas both unlawfully interfered with his Section 9 rights and constituted unlawful discrimination against him in violation of Section 10(1)(c) of PERA. In order to establish a violation of Section 10(1)(c), Charging Party must present substantial evidence establishing that Respondent had an illegal motive for the action constituting the unlawful discrimination. *Lake Erie Transportation Commission*, 16 MPER 21 (2003); *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. However, proof of unlawful motive is not required for a violation of Section 10(1)(a). *City of Inkster*, 26 MPER 5 (2012).

Simoliunas argued that Respondent orchestrated the July 10 incident during the dispute between the SCATA factions to make him, and by extension his faction, look bad and thereby influence the results of the election that was to be held to resolve the internal dispute. That is, Simoliunas asserted that Respondent's motive for disciplining him was discriminatory. Charging Party does not make this argument directly in its brief. However, it does argue that it is "significant" that while Respondent conducted a relatively thorough investigation of Wanji's complaint, it did not attempt to interview Simoliunas to get his side of the story before the July 16, 2012, meeting. It also asks the Commission to consider other facts that, it argues, suggest that Respondent was anxious to "over-punish" Simoliunas for a minor incident. These include that Jurban prepared the notice of suspension before the July 16 meeting and before talking to Simoliunas directly; that even at the July 16 meeting, Respondent did not tell Simoliunas specifically what he was supposed to have done on July 10; and that even Wanji, in her harassment complaint, requested only that Simoliunas be reprimanded for his behavior toward her. I find that Charging Party has argued, albeit indirectly, that the motive for suspending Simoliunas was to retaliate against him for his prior union activities as SCATA president and/or interfere in the internal union election that was to take place at the end of the month.

As Respondent correctly notes in its brief, the elements of a prima facie case of unlawful discrimination or retaliation under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's exercise of his or her protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Schoolcraft College*, 25 MPER 46 (2011); *Southfield Pub Schs*, 22 MPER 26 (2009); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Ewart Pub Schs*, 125 Mich App 71, 74 (1983); *Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). In this case, Simoliunas was union president prior to Charging Party's certification in December 2011. I find, however, that Respondent's refusal to negotiate with Simoliunas' faction or process grievances was a reasonable response to the fact that after the certification another group claimed to represent the Charging Party, and was not evidence of anti-union animus or hostility toward the faction headed by Simoliunas. I find that Charging Party did not produce any evidence of hostility on the part of Respondent or Jurban toward Simoliunas' union activities prior to July 10 or any evidence to support a claim that there was a connection between those activities and Simoliunas' July 16, 2012 suspension. I conclude, therefore, that Charging Party did not establish a prima facie case of unlawful discrimination under section 10(1)(c) of PERA, and that this claim should be dismissed.

Unlawful Interference and the July 16 Suspension

Charging Party also argues that by disciplining Simoliunas for alleged misconduct that occurred as part of the "res gestae" of concerted protected activity, Respondent interfered with Simoliunas' Section 9 rights in violation of Section 10(1)(a) of PERA. Misconduct in the course of concerted activity, including insubordination, is not immune from discipline. See, e.g., *AFSCME, Michigan Council Local 574-A v City of Troy*, 185 Mich App 739, 744 (1990). However, there is a long line of Commission cases, and also cases arising under the National Labor Relations Act, 29 USC 150 et. seq., recognizing that tempers may become heated and harsh words exchanged in the course of grievance meetings, collective bargaining sessions and other activity protected by the Act, and that the protections afforded these activities under PERA and the NLRA would be illusory if employees were held to the same standards of conduct in dealing with their supervisors in these contexts as when dealing with their supervisors in the general workplace.

In the instant case, Simoliunas saw that Wanji, a senior chemist and supervisor, had been performing sample testing work normally done only by SCATA members. At this time, Simoliunas was arguably, and certainly believed himself to be, SCATA president and thus responsible for enforcing the union contract. Because Simoliunas and Wanji worked different shifts, Wanji was not Simoliunas' immediate supervisor. However, since Wanji was the senior chemist on her shift, and senior chemists normally assign work to chemists, it was reasonable for Simoliunas to ask Wanji, before he filed a grievance, whether she herself or some other supervisor had decided that she would do sample testing. I find that Simoliunas was engaged in protected concerted activity when he asked Wanji why she was doing SCATA work and who

had authorized her to do so. However, the question remains whether Simoliunas lost the protection of the Act by his conduct during their exchange.

In *Atlantic Steel Co*, 245 NLRB 814, 816 (1979), the National Labor Relations Board (NLRB), set out four factors to consider in analyzing whether an employee lost the protection of the Act by engaging in opprobrious conduct occurring during direct communications with a manager or supervisor, face-to-face in the workplace, in the course of what would otherwise constitute concerted protected activity. These four factors are: (1) the place of the discussion; (2) the discussion's subject matter; (3) the nature of the outburst on the part of the employee; and (4) whether the outburst was provoked by the employer's unfair labor practices. As the NLRB stated in *Plaza Auto Center, Inc*, 355 NLRB 493, 494 (2010), enf'd in part 664 F3d 286 (CA 9, 2011), the four *Atlantic Steel* criteria are intended to permit some latitude for impulsive conduct by employees during protected concerted activity, while acknowledging the employer's legitimate need to maintain order. See also, *Three D, LLC*, 361 NLRB No. 31 (2014).

In *Isabella County Sheriff*, 1978 MERC Lab Op 168 (no exceptions), the ALJ, citing *Bettcher Mfg Corp*, 76 NLRB 526 (1948), concluded that a sheriff's deputy was engaged in concerted protected activity when he participated, along with several other deputies, in a meeting between the sheriff and a union steward to discuss a proposed new work schedule. The ALJ also found that the deputy did not lose the protection of the PERA by screaming at the sheriff and pointing his finger at him, or by calling the sheriff lazy, the undersheriff stupid, and the sergeant a drunk. The ALJ noted that the Commission had held that the protection of the Act extended to employees concertedly complaining about the conduct and performance of supervisors. See, e.g., *Bloomington Bd of Ed*, 1976 MERC Lab Op 337, and that "if the purposes of Section 9 are to be assured and employees are to be allowed to act in concert, bargaining must be done as equals."

In *City of Detroit (Police Department)*, 1978 MERC Lab Op 1020, the Commission affirmed the finding of the ALJ that a police officer was engaged in concerted protected activity when his superior officer called him into his office and attempted to engage the police officer in a discussion of the grievance the officer had filed. It also agreed with the ALJ that the police officer did not lose the protection of the Act by refusing to discuss the grievance, pointing his finger at his supervisor, raising his voice, and telling the supervisor repeatedly to "read the grievance."

In *Unionville-Sebewaing Area Schools*, 1981 MERC Lab Op 932, the Commission held that an employer violated the Act by discharging the charging party for his conduct at a meeting called by the employer's superintendent "to allow the employees to speak directly to him about their concerns." Prior to the meeting, the charging party and his co-workers had discussed some concerns that they wanted presented at the meeting, including wages, work schedules and seniority. During the meeting, the charging party complained about pay and also about his failure to receive a promotion and the employer's failure to follow seniority in awarding promotions. When the employer responded that "there was no seniority," the charging party angrily accused him of lying. When the employer began to speak again, the charging party rose from his seat and said that since no one was listening, "I guess the only thing I think I can do is hit you." The charging party did not move from his seat toward the superintendent. Affirming the ALJ, the

Commission held that the charging party was engaged in concerted protected activity when he spoke at the meeting. It also held that his conduct at the meeting, including making reference to hitting or punching the superintendent, did not remove him from the protection of the Act when he had not demonstrated a propensity for violent or uncontrolled behavior. It stated, at 934-935:

Rude or insulting remarks, obstreperous comments, and other forms of rough language, are protected when made spontaneously in the course of concerted, otherwise protected, activity. [citations omitted]. Mere reference to an act of physical violence in the context of concerted protected activity does not, by itself, remove an employee from the Act's protection. The fact that objectionable remarks are made in the presence of other employees does not make such remarks unprotected when they are made in the course of protected concerted activity.

In *Baldwin Cmty Schs*, 1986 MERC Lab Op 513, the Commission held that an employee did not lose the protection of the Act by angrily accusing his principal of being a homosexual, and waiving a pencil in the principal's face, in a meeting called to discuss his grievances. It noted:

Although grievance meetings may sometimes result in heated exchanges, frank discussion in this setting may reduce the likelihood that the dispute will spill over into the workplace. For this reason, a disciplinary remedy should be applied to conduct occurring during the course of such a meeting only in the most extreme cases.

The Commission concluded, however, that this same employee was not protected by the Act when, in a dispute over the scheduling of a grievance meeting, he shouted at his principal in the hallway, grabbed at his arm to keep him from walking away, and attempted to close a door through which the principal was walking. It also found that the employee was not protected by the Act when, in this same dispute, he entered the superintendent's office, shouted at the superintendent, ignored the superintendent's orders to remain in the office, and went out into the courtyard of the school shouting that he dared the superintendent to suspend or fire him. The Commission found that although this conduct was arguably part of the employee's protected grievance filing activity, the employee lost the protection of the Act because the conduct took place during the school day and in public areas rather than in a grievance meeting; the Commission found that the employee's conduct created a public scene and embarrassed the principal and superintendent in front of students and staff.

The Commission has since repeatedly refused to find employees to have lost the protection of the Act by making rude, hostile, and even racist comments during grievance meetings or during employee meetings called by the employer to allow employees to ask questions or express concerns about working conditions. In *City of Detroit (Water & Sewerage Dept)*, 1988 MERC Lab Op 1040, a union steward went to the office of the employer's equal employment officer on behalf of a member because he believed, incorrectly, that she was the person who had proposed that the member be transferred to another position. In the course of their conversation, the steward used an obscenity and told the equal employment officer that she "was just another minority" who got her job through affirmative action and who was not

qualified to do the job. In *City of Detroit (Dept of Water and Sewerage Dept)*, 18 MPER 27 (2005) (no exceptions), a union officer participated in a disciplinary conference at the request of the employer. During the conference, she instructed the employee whose conduct was the subject of the disciplinary conference not to surrender his driver's license to a supervisor in response to his request. The supervisor accused her of being insubordinate. After the conference ended, the union officer and the supervisor continued discussing the proposed discipline, and the union officer suggested that human resources be consulted regarding the driver's license surrender issue. After the supervisor repeatedly accused her of insubordination, the union officer, using a raised voice, told him that he should "let her do her motherfucking job." In *Midland Co Rd Commission*, 21 MPER 42 (2008) (no exceptions), a union representative, during a grievance meeting held to discuss the employer's call-in policy, pointed his finger at the employer's superintendent and repeatedly called him a liar. The union representative also said, "Judgment Day is coming." In *City of Detroit*, 22 MPER 32 (2009) (no exceptions), an alternate steward, while asking questions of a supervisor and raising safety concerns during an employer meeting called to discuss safety practices, refused to put his hand down when the supervisor requested it, interrupted the supervisor several times by speaking without being recognized and questioned the supervisor's authority. He also, at one point, got out of his seat and moved toward the supervisor in the middle of the room. In *Wayne State University (Dept of Housing)*, 22 MPER 104 (2009) (no exceptions), an employee complained at a meeting of employees called by the employer about his failure to get a promotion, an issue over which he had filed a grievance. The employer representative at first refused to discuss the issue, but then began responding to the employee's complaints. The ALJ found that rude and confrontational remarks made by the employee after the employer representative began discussing the grievance at the meeting were protected by the Act.

In all of the above cases, however, the employee's outburst took place outside of the regular workplace, i.e., in a grievance or disciplinary meeting or a meeting of employees called by the employer where working conditions were discussed. In *City of Detroit (Fire Dept)*, 1986 MERC Lab Op 14 (no exceptions), an ALJ concluded that an emergency medical service lieutenant, a supervisor, was not protected by the Act when he walked into an office reserved for supervisors and began shouting and using profanity at two other lieutenants about their failure to schedule him for overtime, and then refused an order from his supervisor, a captain, to leave the office. In addition, as discussed above, the Commission held in *Baldwin* that an employee who shouted at his supervisors in the hallway and in the courtyard of their school, and who tried to block the passage of one of them in a hallway, was not protected because the employee's conduct took place in a public place, created a public scene, and embarrassed his supervisors in front of students and other employees. See also *City of Detroit (Dept of Water & Sewerage)*, 23 MPER 54 (2010), in which an employee's insistence on complaining about the assignment of overtime and other working conditions in a meeting with his supervisor, in contravention of the supervisor's legitimate order that he confine himself to reporting on some work he had been assigned, was not protected.

In *Atlantic Steel*, at 816, the NLRB commented, "the Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employee's use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance

proceeding or in contract negotiations.” However, the NLRB has, after considering all four *Atlantic Steel* factors, found rude or insulting remarks directed at a supervisor in a work area to be protected. In *Kiewit Power Constructors Co.*, 355 NLRB 708 (2010), aff’d *Kiewit Power Constructors Co v NLRB*, 652 F3d 22 (CA DC, 2011), the employer announced a new break policy to a group of employees on the production floor and handed out warnings to several employees for violations of the new policy. One employee angrily said the situation could “get ugly” and that the supervisor had “better bring [his] boxing gloves,” and another then agreed that “things could get ugly.” The NLRB held that since the employer chose to hand out the warnings on the production floor knowing that employees would oppose the new policy, it could not complain when employees reacted spontaneously to the announcement. In *3815 9th Ave Meat & Produce Corp.*, 2012 WL 2992089 and 2014 WL 4060033, an employee was discharged for shouting at the store owner and using an obscenity in a work areas and in front of customers. The Board’s ALJ noted that the incident began with the store owner ordering the employee to remove a tip box that had provided a substantial amount of money to employees from a store counter after the tip box was broken into. The owner then said that “the problems in the market were caused by workers in the meat department,” which, the ALJ held, was a reference to a union organizing campaign then taking place. The employee shouted that the problems in the store were caused by the owner’s mistreatment of employees, and that the store owner was “treating the employees like a bag of shit.” Analyzing the facts under *Atlantic Steel*, the ALJ found that the location factor militated against finding the outburst protected. However, she found that the employee’s outburst was provoked by the store owner’s announcement, in a public area of the store, that the tip box would be removed. She concluded that because, other than the location of the outburst, the *Atlantic Steel* factors supported a finding that the conduct was protected, the employee’s discharge was unlawful.

As discussed in the findings of fact, I have credited Wanji’s testimony regarding her July 10, 2012, exchange with Simoliunas. Wanji testified that Simoliunas repeated his questions about why she was doing SCATA work at least three times even though she had told him to talk to Jurgen, that at some point he raised his voice and approached within two feet of her, and that he tried to follow her when she left the lab. As I noted in the findings of fact, Simoliunas did not only question Wanji about why she was doing the sampling work, he berated her for doing so. However, Simoliunas’ behavior was a spontaneous reaction to Wanji’s refusal to discuss why she was performing the testing work. As outlined in the discussion above, the Commission has repeatedly found rude, disrespectful, and hostile behavior toward a supervisor to be protected when it occurs in a grievance or other meeting whose purpose is to discuss wages, hours, or terms or conditions of work. In this case, Simoliunas did not use obscenities in his confrontation with Wanji or insult her. Simoliunas’ behavior was not opprobrious conduct of the type that would have removed him from the protection of the Act had it occurred in a grievance or other meeting whose purpose was to discuss the performance by senior chemists of work normally done by SCATA members.

However, Simoliunas was disciplined for his behavior not in a meeting, or even within the confines of an office, but in the operations lab of the Wastewater Treatment Plant within the view and earshot of other employees. Unlike the supervisors in *Kiewit Power* and *3815 9th Ave Meat & Produce Corp.*, Wanji neither initiated nor agreed to participate in the conversation that led to Simoliunas’ outburst. Here, Simoliunas approached Wanji, who refused to discuss with him the issue of her performance of SCATA work and in fact exited the lab to avoid doing so. I

find that by shouting at Wanji and berating her for doing the work, and by attempting to follow her out the door, Simoliunas created a public scene in the lab which disrupted work and undermined Wanji's supervisory authority. I conclude that because of the location of the exchange between Simoliunas and Wanji, and because Wanji neither initiated nor agreed to participate in the conversation, Simoliunas' outburst during their exchange was not protected by Section 9 of the Act. I conclude, therefore, that Respondent did not violate Section 10(1)(a) by disciplining Simoliunas for his outburst.

Charging Party also alleges that Respondent violated Section 10(1)(a) and/or 10(1)(c) of PERA by suspending Simoliunas because of his behavior at the July 16, 2012, meeting. This behavior included angrily demanding to know why Wanji had been allowed to do SCATA work, accusing Respondent representatives of orchestrating the incident because of the internal SCATA dispute, and threatening to file a lawsuit against Wanji if he was disciplined. Charging Party argues that the July 16, 2012, meeting arose out of Simoliunas' protected concerted activity in questioning why bargaining unit work was assigned to a non-unit work, and thus was part of his protected activity. According to Charging Party, Jurban's own testimony that he had been prepared to reduce the suspension to a written reprimand but decided not to do so established that Respondent retaliated against Simoliunas for his behavior at this meeting. The subject of the July 16, 2012, meeting, however, was not the assignment of SCATA work to a non-unit employee, but Simoliunas' July 10 outburst. Moreover, no matter whose testimony regarding the events at the July 16 meeting is credited, the evidence indicates that Respondent representatives entered the meeting already having concluded that Wanji's account of July 10 was basically accurate. Jurban had also concluded that unless Simoliunas apologized or made some other conciliatory gesture toward Wanji, a three-day suspension was the appropriate discipline for the offense. Nothing occurred at the meeting to alter these conclusions. I find that even if the statements made by Simoliunas' in the July 16 meeting were protected concerted activity, the evidence does not establish that Jurban's decision not to reduce Simoliunas' discipline to a written warning constituted retaliation against him for these statements.

Based on the findings of fact and discussion and conclusions of law above, I conclude that Respondent did not violate Section 10(1)(a) and/or Section 10(1)(c) of PERA by issuing a three-day suspension to Saulius Simoliunas on July 16, 2012. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 18, 2016