STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB COUNTY CLERK,
Public Employer-Respondent,

MERC Case No. C17 K-088

-and-

INTERNATIONAL UNION, UAW REGION 1, LOCAL 412,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Joseph Hunt for Respondent

Shira Roza, Assistant General Counsel, for Charging Party

DECISION AND ORDER

On February 15, 2018, Administrative Law Judge Travis Calderwood (ALJ) issued his Decision and Recommended Order[1] in the above matter finding that Respondent violated Section 10(1)(a)(c) and (d) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended MCL 423.210(1)(a)(c) and (d). The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

Pursuant to Rule 176 of the General Rules of the Employment Relations Commission, 2014 AACS, R423.176, exceptions to the Decision and Recommended Order were due on March 12, 2018. No exceptions were filed on or before the specified date. Instead, on March 15, 2018, we received Respondent's exceptions accompanied by her motion for a retroactive extension of time to file her exceptions. On March 19, 2018, Charging Party filed a brief in opposition to Respondent's motion.

In her motion, Respondent claims that she never received the paper copy of the ALJ's decision that was sent to her by U.S. mail. She acknowledges that in February, she received the copy that the ALJ's staff sent to her by email, but she asserts that she did not discover it until "after the fact." Respondent further acknowledges that her representative Joseph Hunt did receive the copy of the ALJ's decision that had been mailed to him. She states that he gave that copy to her to make copies of it, but that copy was subsequently misplaced. She complains that the copy of the ALJ's decision that had been sent to Hunt by email was sent to the wrong email address. Respondent further asserts that during the period between her receipt of the ALJ's decision and the exceptions' due date she had been busy with other matters and mistakenly assumed that the exceptions were not due until March 16, 2018.

[1] MAHS Hearing Docket No. 17-023634

In Charging Party's response to Respondent's motion, Charging Party explains the means by which the deadline for filing exceptions is calculated. Charging Party notes that "the Commission will not consider late-filed exceptions absent a showing of good cause." Charging Party asserts that Respondent's claims of being busy do not excuse Respondent's failure to timely file her exceptions since Respondent does not allege that the matters causing her to be busy were unforeseen. Moreover, Charging Party notes that prior to March 12, 2018, Respondent could have requested an extension of time to file her exceptions pursuant to Commission Rule 423.176a.[2]

Discussion and Conclusions of Law:

The Commission grants a retroactive extension of time for filing exceptions only upon a showing of good cause. In *Frenchtown Charter Twp*, 1998 MERC Lab Op 106; 11 MPER 29042, the Commission denied the respondent's motion for a retroactive extension of time stating, "We will not consider late-filed exceptions absent a showing of good cause." *Id*. at 110. In affirming both the Commission's decision and its subsequent denial of the respondent's request for reconsideration, the Court of Appeals found that the Commission had not abused its discretion in denying respondent's motion for a retroactive extension of time to file late exceptions. *Int'l Union v Frenchtown Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued November 2, 1999 (Docket No. 211639), 1999 WL 33432169. See also *City of Detroit (Fire Dep't)* 2001 MERC Lab Op 359, 360; 15 MPER 33013 (the Commission refused to consider the respondent's untimely exceptions when the respondent failed to file a motion for a retroactive extension of time that established good cause for the untimely filing); *Battle Creek Police Dep't*, 1998 MERC Lab Op 684, 686 (since the charging party failed to file a motion for a retroactive extension of time in which it showed good cause for the untimely filing of its brief, the Commission found that the charging party waived its right to have its brief considered); *Pontiac Pub Sch*, 1993 MERC Lab Op 667, 668 (the Commission denied a subsequent motion to set aside the order adopting the ALJ's decision, finding that the charging party's claim of illness did not establish good cause for the untimely filing of exceptions). But see *Detroit Police Officers Ass'n*, 1999 MERC Lab Op 78; 12 MPER 30023, where the Commission granted the charging party's motion for a retroactive extension of time because she had established good cause for the untimely filing of her exceptions. There, a Commission order granting the charging party an extension of time to file her exceptions listed the new filing deadline as January 18, 1999. That date was a holiday on which the Commission's offices were closed. However, the charging party sent copies of her exceptions by mail, attempted to file the exceptions by facsimile, and also claimed to have left copies of her exceptions in the building in which the Commission's offices were housed. Thus, the Commission found that the charging party's good faith effort to comply with the rules demonstrated good cause for the untimely filing of her exceptions.

Although Respondent denies that she received the copy of the ALJ's Decision and Recommended Order that was mailed to her, she acknowledges that Hunt received the copy that

[2] It has long been our practice to consider requests for an extension of time filed by the close of business on the day that the exceptions are due. Although the Commission rules have changed over the years, there have been no significant changes with respect to this issue. A first request for an extension of time to file exceptions to an ALJ's decision and recommended order may be granted if it is filed, with a statement of service on the opposing parties, by the close of business of MERC's offices on the day on which the exceptions are due.

had been mailed to him. She further acknowledges that Hunt provided her with that copy. Although she states that Hunt did not receive the copy of the Decision and Recommended Order that was sent to him by email, she admits receiving the copy that was emailed to her. Thus, of the four copies of the Decision and Recommended Order that were sent to Respondent and her representative, Respondent admits receiving two of them. Therefore, her claim that she did not receive the copy that was sent to her by U.S. mail and her claim that Hunt did not receive the copy that was emailed to him do not establish good cause for her failure to timely file exceptions. See *Detroit Federation of Teachers*, 1985 MERC Lab Op 1214 (since the record showed that a copy of the decision and recommended order was served on charging party's representative, the Commission found that her claim that she did not personally receive a copy of the ALJ's decision did not establish good cause for her failure to file timely exceptions).

We also find that Respondent's assertion that she thought her exceptions were due March 16, 2018 does not establish good cause. Accompanying each of the copies of the Administrative Law Judge's Decision and Recommended Order that were sent to Respondent and her representative by U.S. mail and by email was a cover letter that explicitly stated that the exceptions must be *received* at a Commission office by the close of business on March 12, 2018. The cover letter further explains that "the burden is on the parties to comply with the deadlines in the statute and Commission Rules." That letter also includes the addresses of both Commission offices, as well as an explanation of the process parties are to use in filing exceptions.

Under § 16(b) of PERA, exceptions to an ALJ's decision and recommended order must be filed within 20 days of the date the decision and recommended order was issued. Additionally, Commission Rule 176(3) provides that "exceptions and supporting documents shall be filed with the commission, and not with the administrative law judge, within 20 days of service of the decision and recommended order." Further, Commission Rule 183 provides in relevant part:

> In computing any period of time prescribed or allowed by LMA, PERA, or these rules, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day, which is neither a Saturday, Sunday, nor legal holiday. . . . Whenever a party has the right or is required to do some act within a prescribed period after being served with a document or pleading by mail, 3 days shall be added to the prescribed period.

On February 15, 2018, the staff of the Michigan Administrative Hearing System served the ALJ's Decision and Recommended Order on Respondent and her representative at their respective addresses and email addresses of record. Twenty days from that date was Wednesday, March 7, 2018. Since the decision and recommended order was served by U.S. mail, the addition of three days pursuant to Rule 183 extended the due date to March 10. However, since March 10 was a Saturday, under Rule 183, the deadline was extended to Monday, March 12, 2018.

As noted in the cover letter attached to the Administrative Law Judge's Decision and Recommended Order, it is the responsibility of the parties to comply with the deadline set by PERA and the Commission Rules. Copies of the Commission Rules and the Public Employment

Relations Act are available on the Commission's website, www.michigan.gov/MERC. Therefore, if Respondent questioned the March 12, 2018 date listed on the cover letter to the Decision and Recommended Order, Respondent could have determined the date by which her exceptions had to be filed by looking at the Commission Rules. Her mistaken belief that the exceptions were due on March 16, 2018, is not good cause for failing to timely file her exceptions.

Moreover, the fact that Respondent was busy does not demonstrate good cause. While we have no doubt that Respondent had many tasks occupying her time, she has not established that her other responsibilities prevented her from filing her exceptions on time. She has not indicated that the conferences she traveled to were unforeseen or how they prevented her from either filing her exceptions or filing a motion for an extension of time before she commenced her travels. Unlike the charging party in *Detroit Police Officers Ass'n*, 1999 MERC Lab Op 78; 12 MPER 30023, who faxed, mailed, and may have even attempted to personally deliver her exceptions on the day they were due, Respondent has made no such showing of a good faith effort to comply with the rules.

Accordingly, we deny Respondent's motion for a retroactive extension of time and adopt the recommended order of the Administrative Law Judge as our final order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: April 18, 2018

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MACOMB COUNTY CLERK,
Respondent-Public Employer,

Case No. C17 K-088
Docket No. 17-023634-MERC

-and-

INTERNATIONAL UNION, UAW REGION 1, LOCAL 412,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Joseph Hunt for Respondent

Shira Roza, Assistant General Counsel, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On November 1, 2017, International Union, UAW Region 1, Local 412 (Charging Party or Union), filed the present unfair labor practice charge against the Macomb County Clerk (Respondent or Clerk). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission).

In its charge, the Union alleges that the Clerk violated Sections 10(1)(a) and (c) of PERA with respect to a series of actions taken against the Unit Chair and a Union Steward in retaliation for and in response to their exercise of rights under the Act, including but not limited to their attendance and participation in a prior unfair labor practice proceeding involving these same parties - Case No. C17 C-023; Docket No. 17-006263-MERC.

An evidentiary hearing was scheduled for and held on December 8, 2017. Prior to going on the record, Respondent's representative filed an eleven (11) page document at the Commission's office in Detroit that can best be described as a position statement and/or answer to the charge. Immediately prior to beginning the hearing I learned of the document's filing and delayed the start until I could retrieve it and provided Charging Party with a copy. On the record I indicated that given the such late filing of the document I would not consider it prior to beginning the hearing. I further indicated that the issue, and the document's submission, could be revisited later upon Respondent's request.

As described in more detail below I did in fact review and consider the document, both at the hearing but also after the record closed and prior to issuing this Decision and Recommended Order.

Also, at the beginning of the hearing, Charging Party moved to amend its charge to include a violation of Section 10(1)(d) of PERA in addition to the already alleged Section 10(1)(a) and (c) violations. I allowed the amendment over Respondent's objection because the underlying factual allegations in support of the 10(1)(d) allegation were included within the initial charge's allegations.

After Charging Party's case in chief, which consisted of witness testimony provided by both the Unit Chair and the bargaining unit member, as well as another union witness, Respondent elected not to put forth any witness testimony. Instead, Respondent requested once again that I consider the document it filed immediately prior to the hearing - offering such as a "rebuttal statement that offers [the Clerk's] perception of the unfair labor practice [charges]."

Charging Party then moved for summary disposition under Rule 165(2)(f) of the Commission's General Rules, R 423.165(2)(f), 2002 AACS; 2014 AACS. Respondent was provided an opportunity to respond to Charging Party's motion and once again relied upon its filing from earlier in the day.

After considering the evidence presented during the hearing as well as the arguments made by the Parties, I concluded, on the record, that summary disposition in favor of Charging Party on most, but not all of its allegations, was appropriate. I then informed the parties of my findings and indicated that following the receipt of the transcript, I would issue a written decision and recommended order. That decision and recommended order is as follows.

Findings of Fact:

The Parties are signatories to a collective bargaining agreement effective from January 1, 2017, through December 31, 2019. Appendix E-2 of that contract is entitled "Representation" and provides the following under subsection (F):

> The Unit Chairperson shall be permitted a maximum of two (2) hours per day during working hours, without loss of time or pay, for the purpose of conducting labor relations related union business to include, but not limited to, investigating grievances referred to the Chairperson. A greater period of time may be permitted by prior authorization from their immediate Supervisor of the Department.

Appendix E-2, Subsection D provides the following:

> Stewards shall be permitted a maximum of one (1) hour per day during working hours, without loss of time or pay, for the purpose of investigating and presenting grievances to the Employer. A greater period of time or pay may be permitted by prior authorization from their immediate supervisor of the Department.

In the November 2016 general election, Karen Spranger was elected Macomb County Clerk. Spranger took office in early January 2017.

Also, sometime in January of 2017, Brian Brdak, the Supervisor for the Vital Records Department in the Clerk's office, was appointed the Union's Unit 75 Chairperson following the retirement of the prior Chair.[3] According to Brdak, a Unit Chair runs local unit meetings, participates on the bargaining team, assists the Union Steward with respect to grievances, and otherwise acts as a resource for bargaining unit members regarding work situations. In May of 2017, Brdak was officially elected as the Unit's Chairperson.

On March 16, 2017, Charging Party filed an unfair labor practice charge, Case No. C17 C-023; Docket No. 17-006263-MERC, alleging violations of Section 10(1)(a) and (c) of PERA following incidents that occurred both before the Clerk took office in January and soon afterwards. Central to that charge were allegations that Spranger had violated Section 10(1)(a) of the Act in certain actions directed towards Lisa Emerson, the Chief Court Clerk, and Roger Cardamone, the Chief Election Clerk.[4]

From January 2017 through March 9, 2017, Brdak reported directly to Deputy Clerk Paul Cardas. Brdak testified that during that time, when he would use union time under Appendix E-2 of the contract he would let Cardas know by email. According to Brdak, he would average around two hours of union time a week. Beginning on March 9, 2017, after Cardas had left the position of Deputy Clerk, Brdak began reporting directly to Spranger.

On August 8, 2017, Brdak emailed Spranger informing her that he would be using union time on August 10, 2017, from 9:00 a.m. to 11:00 a.m. The next morning Spranger responded by email and stated in the relevant part:

> No, I do not approve of you just taking union time without my approval.
>
> You are the Supervisor of Vital Records and that is your first priority.
>
> Brian consider this a verbal reprimand.
>
> I have asked you to give me proper notice before you take time union business time. I want to have it in writing and for us to verbally discuss who is covering your Supervisory role while you are gone.
>
> Brian you have taken considerable amount of time for all this union business and perhaps we need to evaluate whether you can continue being Supervisor of Vital Records effectively.

[3] Charging Party, Local 412, is a very large union representing approximately 3,500 members, the majority of which are employed in the private sector. County employees represent about 280 of Local 412's membership base. Within that number are various "Units" of which Unit 75 is comprised of Supervisors employed in various departments throughout the County. Seven supervisors from Unit 75 are employed in the Clerk's office.

[4] Sometime following the acts that gave rise to Case No. C17 C-023; Docket No. 17-006263-MERC, Emmerson's testimony in that case revealed that she had assumed the position of Alternate Steward and then Steward. Both Brdak's and Emmerson's testimony in the present case confirms that Emmerson is still a Steward with the Union.

Later that same day, Vicki Kolomyjec, a Local 412 administrative assistant, emailed Karen Bathanti, the County's Director of Human Resources and Labor Relations, copying Spranger, a request by Local 412 President Jerry Witt that Lisa Emerson and Roger Cardamone be excused for "official Union Business" on August 10, 2017 from 11:00 a.m. through the rest of the day.[5]

On the morning of August 10, 2017, at approximately 9:00 a.m., Spranger presented Emerson with three separate written reprimands, two for insubordination and the third for sending an "inappropriate" email to staff. The first reprimand was dated on August 8, 2017, and stated in the relevant part:

> On Tuesday, August 8, 2017, at approx. 2 p.m., you were asked to take an employee off the counter in the court areas and assign them e-filings.
>
> Computer Maintenance Clerk Jane Blazejewski has been assigned to do e-filing and overtime on August 8. Lisa [Emerson] has not assigned any e-filing to Jane's que so that Jane can e-file throughout the day and on overtime.
>
> Please consider this your notification that you will receive a reprimand for not following my orders as [the] Supervisor concerning e-filing on Tuesday, August 8, 2017.

Regarding the above incident, Emerson claims that Spranger never actually communicated that directive to her but that it was given to Emerson's staff. Emerson further claims that at 2:00 p.m. on August 8, 2017, she was not in the Clerk's Office area but rather was at a meeting in the Court Administrator's Office. Emerson testified that after she returned to her work area sometime after 3:00 p.m. she learned of Spranger's directive from her staff and did in fact take the employee off the counter and assigned them to e-filing.

The second reprimand issued was dated August 9, 2017, and provided in the relevant part:

> This letter serves as notification that you will receive a reprimand for not cooperating with me on Wednesday, August 9, 2017 at approx. 4:20 p.m..
>
> A customer arrived at 4:00 p.m. on Wednesday, August 9, 2017 and Clerk Robin O'Neal was assisting this customer and needed the Supervisor, Lisa Emerson to help assist with this customer. Lisa Emerson refused to help with the customer. Lisa Emerson also refused to sign the document regarding proof of service, which is a job task that is Lisa Emerson's to do.

Emerson testified that the above incident centered around her refusal to sign a proof of service on behalf of the County. According to Emerson, the past practice within the Clerk's office is that either the County Clerk or Chief Deputy Clerk would sign a proof of service on behalf of the County and that she informed the Clerk of that at the time.

[5] The hearing for Case No. C17 C-023; Docket No. 17-006263-MERC, was set for August 18, 2017.

Emerson further testified that sometime between 4:20 p.m. and 4:30 p.m., Spranger asked Emerson to contact the County's Corporate Counsel regarding the proof of service. Emerson refused to. At the hearing she claimed she did so because it would have required her to stay after 4:30 p.m., her scheduled end time, and that the Clerk could not require her to do so.

The final reprimand, also dated August 9, 2017, stated in the relevant part:

> This letter serves as notification that on Wednesday, August 9, 2017 at approx. 3:59 p.m. you are being reprimanded for sending an inappropriate email without speaking with me first concerning employees in my departments.
>
> You have been asked to do your supervisor role and you have refused. I have asked you to do tasks to help make the needed changes in the department to get the efiling done, and the mail opened every day. You have not made the changes. The Chief Judge has even asked that the mail be opened every day without fail and it has not happened. Lisa Emerson has refused to have the staff process the mail. She has refused to make the appropriate changes that I have asked her to implement in the court area.
>
> Rebecca and Jackie are under orders from me concerning my special project regarding efiling. Lisa Emerson is causing the confusion by giving a directive against what I already informed the staff to do. Lisa Emerson is undermining my authority as the County Clerk.
>
> You are a Supervisor, but you are not the County Clerk and you did not have permission to send an email out like the "Chain of Command" to all the employees. You are correct, there has been no change in the chain of command. You have taken an oath and you have not upheld that oath. I consider this insubordination.

Emerson admitted to sending the above referenced email to her staff but denied that she needed permission to send her staff an email. She further claimed that the email she sent was done to communicate that there had been no change in policy or reporting structure.

According to Emerson, prior to the above three written reprimands she had never received discipline from Spranger, the prior County Clerk or the County's Office of Human Resources and Labor Relations.

On August 10, 2017, at approximately 10:45 a.m., Spranger approached Emerson and directed her to move all of her personal items out of her office and move to a desk within the court section where Emerson's staff worked. Emerson responded that she would be leaving at 11:00 a.m. for union business and would not be able to make the move. Spranger indicated that she would do it. According to Emerson, it was important for her to have a private office for many reasons including, but not limited to, conferring with her staff over confidential matters, and to keep documents and records within the Law Enforcement Information Network (LEIN) confidential.

On August 11, 2017, Emerson attempted to comply with Spranger's directive and began moving her personal items out of her office. Additionally, she tried to work with the County's Human Resources and Labor Relations Department (HR/LR Department) to secure staff personnel records, including performance evaluations and discipline, that Emerson kept in her office. During that same time, Spranger began taking some of those files and putting them in her own office. Emerson testified that she was also concerned with a locked file cabinet which contained LEIN materials because Spranger was not authorized to access these materials. At some point around noon, Emerson called 911 and requested assistance from the Macomb County Sheriff's department. A Macomb County Deputy arrived on scene at the same point that Spranger was demanding to go through Emerson's personal bag, accusing her of taking court filings. Following that altercation, at approximately 5:00 p.m. that day, the HR/LR Department contacted Emerson by phone and placed her on "non-punitive paid administrative leave" beginning on August 14, 2017.

On August 15, 2017, the County's Human Resources and Labor Relations Department contacted Brdak by phone and placed him on "non-punitive paid administrative" as well.

On August 18, 2017, these same parties appeared before the undersigned in Case No. C17 C-023; Docket No. 17-006263-MERC. Emerson, one of the Union members alleged to have been discriminated against in that case, testified at length. Emerson revealed during her testimony that she had been placed on administrative leave by the HR/LR Department. Respondent's Counsel in that case asked several questions during cross-examination regarding Emerson's leave. Brdak was also present at the hearing but did not testify.

At the conclusion of the hearing I found, on the record, that Spranger had violated Section 10(1)(a) during a January 12, 2017, conversation with Emerson. I indicated at that time that I would be issuing a Decision and Recommended Order regarding my findings.[6]

On August 21, 2017, Spranger sent both Emerson and Brdak letters alleging that each had been absent without leave for three consecutive days. Emerson's letter stated that her employment was terminated as of August 17, 2017; Brdak's employment was terminated as of August 21, 2017.

On October 4, 2017, Emerson was directed by the HR/LR Department to return to work. The HR/LR Department had arranged for Emerson to have a work space outside of the Clerk's office. She was told to do whatever job duties she could from the remote location and that Spranger still considered her terminated.

On October 10, 2017, Brdak attempted to return to work at the direction of the HR/LR Department. At some point there was a confrontation between Spranger and Brdak which resulted in Spranger announcing to all who were present that she had terminated Brdak.[7]

[6] The Decision and Recommended Order in Case No. C17 C-023; Docket No. 17-006263-MERC was issued on September 22, 2017.

[7] The record, as developed, does not indicate Brdak's current status.

Discussion and Conclusions of Law:

Rule 165(1) of the Commission's General Rules, 2002 AACS; 2014 AACS, R 423.165(1) allows a motion seeking summary disposition to be made at "any time before or during the hearing." Rule 423.165(2) lists the various grounds upon which summary disposition of a charge may be granted. Subsection (f) allows dismissal when, "[e]xcept as to the relief sought there is no genuine issue of material fact." R 423.165(2)(d), (f).

Here, Charging Party has presented uncontested and credible testimony and documents in support of its claims against Respondent. Respondent's choice and decision not to present direct testimony or evidence in defense of these claims is within its right. Respondent did claim during its brief argument in response to Charging Party's motion that its filing from earlier in the day serves as "rebuttal statement that offers [the Clerk's] perception of the unfair labor practice [charges]." To the extent that the filing made legal arguments, such have been considered, however to the extent that the filing makes claims of facts contesting the evidence offered at the hearing by Charging Party, such have been given no weight whatsoever because they are not supported by the testimony or evidence presented at the hearing.

Section 10(1)(a) of PERA 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 their rights guaranteed" by PERA. It is well established that a determination of whether an employer's conduct violates Section 10(1)(a) is not based on either the employer' s motive for the proscribed conduct or the employee' s subjective reactions thereto. *City of Greenville,* 2001 MERC Lab Op 55, 58. Instead, the test is whether a reasonable employee would interpret the statement as an express or implied threat. *Id.;* See also *Eaton Co Transp Auth*, 21 MPER 35 (2008). In order to properly make such a determination, both the content and the context of the employer's statement must be examined. *City of Inkster,* 26 MPER 5 (2012); *New Buffalo Bd of Ed,* 2001 MERC Lab Op 47.

Section 10(1)(c) of PERA make it unlawful for a public employer to "[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." In order to establish a *prima facie* case of discrimination under Section 10(1)(c) of the Act, a charging party must show, in addition to an adverse employment action: (1) an employee' s union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee' s protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep' t)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983). However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id* at 74; *City of Grand Rapids (Fire Dept),* 1998 MERC Lab Op 703, 706. This framework is also used to analyze alleged violations of Section 10(1)(d) of PERA, which prohibits public employers from discriminating against a public employee because he or she testified at a hearing or instituted proceedings under the Act. See *Innovative Teaching Solutions, Inc*, 22 MPER 12 (2009).

As stated above, a requisite to the establishment of a Section 10(1)(c) and (d) violation is the existence of an adverse employment action. The Court of Appeals, in *Taylor Sch Dist and Taylor Federation of Teachers, AFT Local 1085 v Nancy Rhatigan and Rebecca Metz*, 318 Mich App 617 (2016), addressed the meaning of the term "adverse employment action" in the context of Section 10(1)(c) of PERA by quoting from *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 311–312 (2003):

> In *Wilcox v Minnesota Mining & Mfg. Co*, 235 Mich App 347, 364, 597 NW 2d 250 (1999), we defined an adverse employment action as an employment decision that is "materially adverse in that it is more than [a] 'mere inconvenience or an alteration of job responsibilities'" and that "there must be some objective basis for demonstrating that the change is adverse because a 'plaintiff's subjective impressions as to the desirability of one position over another" [are] not controlling.'"
>
> Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as "a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."

Ultimately, whether an adverse employment action exists must be determined on a case by case basis. See *Chen v Wayne State Univ*, 284 Mich App 172, 201 (2009).

Charging Party's first allegation of unlawful action under Section 10(1)(a) and (c) of PERA stems from Spranger's August 9, 2017, email to Brdak issuing the "verbal reprimand" in response to Brdak's intention of taking his contractually allocated two hours of union time. Union release time is a mandatory subject of bargaining under PERA. *Central Michigan Univ*, 1994 MERC Lab Op 527, aff'd 217 Mich App 136 (1996). However, Section 9 of the Act does not give employees the right to engage in union business on an employer' s time, with or without compensation. *City of Detroit, Dept of Transportation*, 1990 MERC Lab Op 254, 256. Although a union and an employer may agree to paid or unpaid release time for union officers or members, this is a negotiated benefit and not a right guaranteed by the Act. Accordingly, absent evidence of a discriminatory motive, an employer may legitimately monitor the use of its time for union business, for example, by requiring union officers to seek permission before leaving work to perform union business. *Berrien Co (Riverwood Center)*, 1993 MERC Lab Op 681 (no exceptions); *City of Grand Rapids*, 1980 MERC Lab Op 18 (no exceptions).

In the instant case, the contract is clear – the Unit Chair is allowed up to two hours a day for "the purpose of conducting labor relations related union business to include, but not limited to, investigating grievances referred to the [Chair]." Equally clear is the apparent disdain Spranger displays in her August 9, 2017, email for union time, Brdak's exercise of a contractually provided right to engage in union time, and overall and general animosity towards Brdak's "union business." That this event occurred on the eve of an impending unfair labor practice hearing merely strengthens the notion that Spranger's conduct was motivated by anti-union animus and was discriminatory and/or retaliatory in nature.

While union time is not a right guaranteed by the PERA, in this case, and under these circumstances, it is a right under the contract that was collectively bargained. Furthermore, the stated purpose of that time was to allow bargaining unit members to engage in protected activity. Under the terms of that contract, Spranger does not possess the authority to require Brdak to seek her approval prior to taking the allotted two hours of union time, yet she seeks to reprimand Brdak for exercising his clear right under the contract. Furthermore, given the email's comments with respect to "all this union business" and Spranger's threat to "evaluate" whether Brdak should remain in his position, Spranger's anti-union animus is clear. Accordingly, it is my finding that the August 9, 2017, email constituted a violation of 10(1)(a) of PERA as it very clearly communicates the threat that further "union business" could result in an action against Brdak's position as the Supervisor of Vital Records. Additionally, I find that Spranger's verbal reprimand, given as a result of Brdak's intention to take union time, in order to engage in protected activity, violated of Section 10(1)(c) of the Act.

Charging Party's next allegations relate to the series of three reprimands presented to Emerson on August 10, 2017, as well as Spranger's order that Emerson move her workspace from her office to a desk. During the hearing and on the record, following Charging Party's motion for summary disposition and arguments by the parties, I indicated that I would be recommending dismissal of both of these allegations on the basis that Charging Party had failed to establish Respondent's knowledge of the request for Emerson to be excused for union business as well as on the basis that the order to move from her office to a desk in a communal area was not an adverse employment action. However, upon further reflection. I have now determined that it is reasonable, under the circumstances and uncontested facts provided herein, to draw an inference that Spranger did in fact have notice of the request by way of the August 9, 2017, email requesting Emerson's release for union business. Given the weight of the evidence presented, including Respondent's decision not put forth any direct testimony or evidence, I conclude that Emerson testified credibly regarding the circumstances surrounding the three reprimands and further find that it is reasonable to assume that the basis for Spranger's actions in issuing the reprimands was not for the rather flimsy reasons stated therein, but instead was in response to Emerson's union activity. Furthermore, given the totality of the uncontroverted evidence presented by Charging Party, I find that Spranger's order for Emerson to move her workspace – despite numerous reasons why the Chief Court Clerk would need a private office space – was done to punish and in retaliation for Emerson's union activity. Similar to the Brdak's reprimand, that these reprimands occurred on the eve of the impending unfair labor practice hearing C17 C-023; Docket No. 17-006263-MERC, where Emerson was a main focus, merely strengthens the notion that Spranger's conduct was motivated by anti-union animus. Accordingly, and for the same reasons as set forth with respect to Brdak's reprimands, I find that Respondent issued the three reprimands to Emerson in violation of Section 10(1)(a) and (c).

Lastly, with respect to the termination letters issued by Spranger so close in temporal proximity to the hearing in C17 C-023; Docket No. 17-006263-MERC, given that Respondent did not provide any defense or rationale for issuing such despite both employees being on paid administrative leave, together with above conduct by Spranger, I find that their issuance was retaliatory in nature and therefore violated Sections 10(1)(c) and (d) of the Act.

Furthermore, their issuance clearly sends a message to employees that their participating in or testifying in a Commission proceeding against the Clerk could bring consequences. Accordingly, I find that the termination letters violated Section 10(1)(a) of PERA.

Having considered all arguments as set forth by the parties and for the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER:

Respondent Macomb County Clerk, its officers and agents, are hereby ordered to:

1. Cease and desist from:

    a. Interfering with, restraining, or coercing its employees, including but not limited to Brian Brdak and Lisa Emerson, in the exercise of rights protected by Section 9 of PERA.

    b. Discriminating or retaliating against its employees, including but not limited to Brian Brdak and Lisa Emerson, regarding terms or other conditions of employment, in order to encourage or discourage membership in a labor organization.

    c. Discriminating or retaliating against its employees, including but not limited to Brian Brdak and Lisa Emerson, regarding terms or other conditions of employment because they have given testimony or instituted proceedings under PERA.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

    a. Immediately rescind the August 11, 2017, "verbal reprimand" issued to Brian Brdak and remove the same from his personnel file.

    b. Immediately rescind the August 8, 2017, and the two August 9, 2017, reprimands issued to Lisa Emerson on August 10, 2017, and remove the same from her personnel file.

    c. Immediately rescind the August 21, 2017, termination letter issued to Brian Brdak and remove the same from his personnel file.

    d. Immediately restore Brian Brdak to the position of Supervisor of Vital Records to the extent that such has not already been done by the County's Human Resources and Labor Relations Department.

    e. Immediately rescind the August 21, 2017, termination letter issued to Lisa Emerson and remove the same from her personnel file.

f. Immediately restore Lisa Emerson to the position of Chief Court Clerk, including placement in a private office, to the extent that such has not already been done by the County's Human Resources and Labor Relations Department.

g. Make Brian Brdak and Lisa Emerson whole for any loss, including but not limited to, wages, benefits, etc., either individual suffered as a result of Respondent's unlawful conduct as described above.

h. Post the attached notice signed by Macomb County Clerk Karen Spranger, for a period of thirty (30) consecutive days, to employees in conspicuous places on Respondent's premises, including, but not limited to, all places where notices to employees represented by the International Union, UAW Region 1, Local 412, are normally posted.

i. Place and maintain a copy of both the Decision and Order in this matter and the posting required thereunder in both Brian Brdak's and Lisa Emerson's personnel files for the duration of Karen Spranger's term in office as the Macomb County Clerk, including any successful reelections.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Date: February 15, 2018

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) ON AN UNFAIR LABOR PRACTICE CHARGE FILED BY THE **INTERNATIONAL UNION, UAW REGION 1, LOCAL 412**, THE COMMISSION HAS FOUND THE **MACOMB COUNTY CLERK** TO HAVE COMMITTED UNFAIR LABOR PRACTICES 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:

WE WILL cease and desist from:

1. Interfering with, restraining, or coercing its employees, including but not limited to Brian Brdak and Lisa Emerson, in the exercise of rights protected by Section 9 of PERA.

2. Discriminating or retaliating against its employees, including but not limited to Brian Brdak and Lisa Emerson, regarding terms or other conditions of employment in order to encourage or discourage membership in a labor organization.

3. Discriminating or retaliating against its employees, including but not limited to Brian Brdak and Lisa Emerson, regarding terms or other conditions of employment because they have given testimony or instituted proceedings under PERA.

WE WILL take the following affirmative action to effectuate the purposes of the Act:

1. Immediately rescind the August 11, 2017, "verbal reprimand" issued to Brian Brdak and remove the same from his personnel file.

2. Immediately rescind the August 8, 2017, and the two August 9, 2017, reprimands issued to Lisa Emerson on August 10, 2017, and remove the same from her personnel file.

3. Immediately rescind the August 21, 2017, termination letter issued to Brian Brdak and remove the same from his personnel file.

4. Immediately restore Brian Brdak to the position of Supervisor of Vital Records to the extent that such has not already been done by the County's Human Resources and Labor Relations Department.

5. Immediately rescind the August 21, 2017, termination letter issued to Lisa Emerson and remove the same from her personnel file.

6. Immediately restore Lisa Emerson to the position of Chief Court Clerk, including placement in a private office, to the extent that such has not already been done by the County's Human Resources and Labor Relations Department.

7. Make Brian Brdak and Lisa Emerson whole for any loss, including but not limited to, wages, benefits, etc., either individual suffered as a result of Respondent's unlawful conduct as described above.

8. Place and maintain a copy of both the Decision and Order in this matter and this posting in both Brian Brdak's and Lisa Emerson's personnel files for the duration of Karen Spranger's term in office as the Macomb County Clerk, including any successful reelections.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

MACOMB COUNTY CLERK

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Karen Spranger

This notice must be posted for a period of thirty (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. C17 K-088; Docket No. 17-023634-MERC