

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

In the Matter of:

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

Case No. C03 H-182

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 207,
Labor Organization-Charging Party.

APPEARANCES:

Bruce A. Henderson, Esq., Assistant General Counsel, City of Detroit Law Department, for Respondent

Scheff & Washington, P.C., George B. Washington, Esq., for Charging Party

DECISION AND ORDER

On December 28, 2004, Administrative Law Judge Julia C. Stern issued her decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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 any 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

Nora Lynch, Commission Chairman

Harry W. Bishop, Commission Member

Nino E. Green, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This case was heard at Detroit, Michigan on March 29, 2004, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based upon the entire record, including a post-hearing brief filed by Respondent on May 10, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge :

The American Federation of State, County and Municipal Employees (AFSCME), Local 207 filed this charge against the City of Detroit on September 3, 2003. Charging Party represents a bargaining unit that includes certain employees in Respondent's Department of Water & Sewerage, including service guards. Charging Party alleges that on July 22, 2003, Respondent violated Sections 10(1)(a) and (c) of PERA by disciplining Kathy McCaskill, a service guard,

due to the fact that she attended special conferences between Charging Party and Respondent and engaged in other activity protected by Section 9 of PERA. ¹

Facts:

McCaskill's Union Activities

Kathy McCaskill has been employed by Respondent as a service (security) guard in its Department of Water & Sewerage (the Department) since about October 1996. In July 2003, McCaskill worked the afternoon shift in the department's wastewater division. Her immediate supervisors were Senior Service Guard Terry Summers and Supervising Service Guard Lorenzo Williams.² Jimmy Townsend, who was responsible for all service guards in the Department's western district, was Williams' supervisor. Senior Service Guard Terry Byes was a day shift supervisor in the wastewater division under Townsend.

Pursuant to Article 12 of the collective bargaining agreement between AFSCME and Respondent, AFSCME representatives may request to meet with Respondent representatives outside of the formal grievance procedure to discuss topics related to working conditions. The contract calls these meetings "special conferences." Unit members who do not hold union office may attend special conferences at the union's request. On June 18, 2003, Local 207 President John Riehl requested a special conference to discuss seven issues of concern to service guards. These issues included alleged errors in assigning mandatory overtime and alleged failures to properly record overtime in compliance with the contractual provision requiring equalization of overtime opportunities. McCaskill had been vocal on several of these issues, and Riehl asked her to attend the special conference as a representative of the wastewater division.

The first special conference was held in late June 2003. Local 207 Chief Steward Lekita Thomas, Riehl, and McCaskill attended the conference on behalf of Charging Party. Townsend and Louis Fischione, the Department's director of human resources, represented Respondent. Townsend began the meeting by asking why McCaskill was there. Riehl said that McCaskill was the employee the union had chosen to attend the meeting, and Fischione assured Townsend that McCaskill's presence was proper. McCaskill took an active part in the discussion. McCaskill also attended a second special conference on these issues held on July 9. Townsend discussed these conferences and McCaskill's participation with his supervisory staff, including Byes.

Around the time of the first special conference, McCaskill began making copies of the weekly work schedule posted on the employee bulletin board. Her purpose was to prove that Respondent was showing favoritism in assigning overtime. McCaskill used the Department copy machine located near the bulletin board. McCaskill testified that before June 2003, she and other employees used the copier to copy the work schedules and other things posted on the

¹ Charging Party also alleged that Respondent violated its duty to bargain under Section 10(1) (e) of PERA by refusing to provide Charging Party with certain information. The parties reached a settlement of this issue before the hearing.

² Williams died shortly after the incident that is the subject of this charge.

employee bulletin board. According to McCaskill, the supervisory staff never objected to this copying.

Byes' office is near the copy machine. According to McCaskill, after the second special conference, Byes approached McCaskill three or four times while she was copying the work schedule and told her to stop. McCaskill testified that each time she told Byes that everybody else used the copier and that no one ever said anything to them. According to McCaskill, each time Byes replied that she could not use the copier because she "went to the union with things" and attended special hearings. McCaskill testified that she responded that it was her right to go to the union, and Byes said, "Well, you're going to have problems."

Around this time, but before July 22, Townsend saw McCaskill copying the schedule. He told her that she was not supposed to be copying anything. Townsend asked her why she wanted the schedule. After McCaskill explained, Townsend said something to the effect that the schedule on the board was not accurate because changes were constantly being made to it. McCaskill replied that the schedule changes showed Respondent's favoritism in assigning overtime.

According to Byes, he was present when Townsend told McCaskill not to copy the schedule and once Byes himself caught McCaskill copying the schedule. According to Byes, he told her not to do this because it was against policy and because Townsend had specifically told her not to take the schedule off the wall. Byes testified that he also told McCaskill that if she made a copy of the schedule at the beginning of the week, it would not be the correct schedule because changes would be made during the week. Byes denied telling McCaskill that she could not copy the schedule because she attended special conferences or hearings.

McCaskill's Alleged Insubordination

McCaskill's duties as a service guard include responding to incidents, including accidents and fights, and preparing incident reports. Sometime in 2002 or early 2003, the department began sending its service guards to training classes to encourage them to type their incident reports on a computer. By July 2003, about a quarter of the service guards in the department, including McCaskill, had not yet received computer training. In July 2003, McCaskill filled out her incident reports and turned them in to Williams. Williams or a senior service guard then typed and saved them on the computer.

On Saturday, July 19, 2003, McCaskill was working the day shift on overtime. According to McCaskill, since the day shift supervisor, Senior Service Guard Emma Young, had nothing else for McCaskill to do, Young gave her a statement of facts prepared by an employee and told her to write an incident report on the computer from the statement. It was common for service guards to write incident reports from employee statements on incidents that they had not personally observed. McCaskill told Young that she had not had training and did not know how to use the computer. She also complained that the employee's statement was incomplete. The incident report form in the Department's computer system is the same one used for handwritten reports. However, to prepare an incident report on the Department's computers, an employee must know the password to get into the system and how to retrieve, navigate through, print and

save the report form. Young helped McCaskill with these things and told her to do the best that she could. When McCaskill finished, Young took the report without comment.

Townsend received McCaskill's report later that day. Townsend noted numerous spelling, grammatical, and typing errors, which he marked with a highlighter. According to Townsend, if a service guard prepares an incident report, it is normally his or her responsibility to correct errors in it. Townsend gave the report to Young with instructions to have McCaskill correct it. The report was passed on to Bonita Perry, another senior service guard, to give back to McCaskill to correct. According to McCaskill, when Perry brought the report to her she told Perry that she could not correct the report because she had not had computer training. However, Perry insisted that she had to redo it. Perry finally said that she would leave the matter up to Williams, and left the uncorrected report in Williams' office. According to Byes, Perry reported the incident to him.³ At the beginning of the afternoon shift, McCaskill went to Williams and told him what had happened. Williams told her it was okay, and that he would correct the report.

On Monday, July 21, McCaskill was assigned to a different site. On July 22, Williams did not come to work. When Byes saw McCaskill before the beginning of her shift that day, he retrieved the incident report from Williams' desk, approached McCaskill, and told her she had to redo the report. The two went into Byes' office. According to McCaskill, she explained to Byes that she had tried to do the report even though she had not had the training, but it had come out with a lot of errors. Twice McCaskill said to Byes that she would need the training to do the report right because she did not know how to operate the computer, and twice Byes simply repeated that she had to redo the report. McCaskill then asked him if he would show her how, but Byes said this was Williams' job. According to McCaskill, Byes said that he did not care how she got it done, that she could "kiss somebody, pay somebody or take somebody to lunch." According to McCaskill, after she said for the third time that she could not do it because she did not know how, Byes told her that she was refusing a direct order and that he was going to recommend to Townsend that she receive a three-day suspension for insubordination.

McCaskill testified that after Byes told her that she was going to be suspended, McCaskill asked him why he was recommending that she be disciplined when he could see that she had tried to do the report. She asked him why he had taken the report off Williams' desk, why he was involving himself in the matter since the original assignment had come from Young, and why he was trying to make her do the report when he did not make service guards under his supervision do their own reports. Byes replied that he was giving her the order because the report had to be redone, and because it had been written on his shift. According to McCaskill, he also said that he knew she could do it because he had seen her doing reports on the computer. McCaskill retorted that Young had given her the order, and that Byes did not have anything to do with the incident. Byes said that he did, and again told McCaskill to redo the report.

Byes testified that when he asked McCaskill why she had not corrected the report, McCaskill's first response was that the supervisor who took the employee's statement should not have accepted it. According to Byes, McCaskill then began to talk about other things at work that she disagreed with and that she thought were being done wrong. According to Byes, McCaskill said that she was "tired of all the crap that was going on." Byes recalled that McCaskill said

³ Perry did not testify.

something about that fact that a senior service manager was typing reports for his (Byes') shift. Byes testified that McCaskill also asked him why he was involved. According to Byes, he said that he was ordering her to redo the report because it had been sent back to him for that purpose. Byes denied that McCaskill gave lack of training as the reason for her refusal to do the report, but admitted on cross-examination that McCaskill probably said something at some point about not being able to do the report.

Townsend testified that Byes reported to him that McCaskill had refused to redo the report because she believed that only Young had the authority to give her the order. Townsend talked to Perry, who confirmed that McCaskill had refused to do the report. Townsend then directed Summers to give McCaskill a three-day (one work day) suspension for insubordination.

That same day, the wastewater plant had a bomb scare. Around 5:00 pm, Riehl saw Townsend standing outside the plant and the two men spoke about the incident with McCaskill. Townsend told Riehl that she had been insubordinate, and Riehl said that she had not been trained to do the work she was asked to do. According to Riehl, Townsend then suddenly asked him why McCaskill was going to special conferences. Riehl replied that the union had chosen her because she was knowledgeable. Townsend denied asking Riehl about McCaskill's attendance at the special conferences during this discussion.

McCaskill received her suspension notice at the end of her shift on July 22, 2003.

Discussion and Conclusions of Law:

In cases alleging unlawful discrimination under Sections 10(1)(a) or (c) of PERA, a charging party must first make a prima facie showing sufficient to support the inference that union or protected activity was a "motivating or substantial" factor in the employer's decision to take adverse action against the employee or employees. The elements of a prima facie case of discrimination under Section 10(1)(c) of PERA are: (1) employee union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility towards the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *City of St Clair Shores*, 17 MPER ¶ 27 (2004). Once the prima facie case is met, the burden of going forward then shifts to the employer to demonstrate that the alleged discriminatory action would have occurred even in the absence of protected activity. If the employer balances the employee's prima facie case with credible evidence, the employer's burden of proof is met and the duty of producing further evidence shifts back to the charging party. In most cases, however, the decision ultimately depends on a weighing of the evidence. *Michigan Educational Support Personnel Ass'n v Ewart Pub Schls*, 125 Mich App 71, 74 (1983). See also *Schoolcraft College Assoc of Office Personnel, MESPA v Schoolcraft Comm College*, 156 Mich App 754, 764 (1987); *Detroit Bd of Ed*, 16 MPER ¶ 29 (2003).

In the instant case, Charging Party established both that McCaskill engaged in protected activity and that Respondent had knowledge of that activity. In June and July 2003, McCaskill accompanied Charging Party representatives to two special conferences with Respondent to discuss matters of mutual concern to the service guards in Charging Party's unit. Respondent

supervisors Jimmy Townsend and Terry Byes both knew that McCaskill had attended these conferences.

Charging Party asserts that Townsend's hostility toward McCaskill's attendance at the special conferences is demonstrated by the fact that he questioned her presence at the first conference, and by the fact that he asked Riehl, during their July 22 discussion of McCaskill's suspension, why McCaskill had attended the conferences. I disagree. I find no significance in the fact that Townsend asked why McCaskill was at the conference, especially since he did not raise any further objection to her presence. I credit Riehl's testimony that Townsend spontaneously asked him, during their discussion on July 22 of McCaskill's alleged insubordination, why McCaskill had been at the conferences. According to Riehl, he recalled this because the remark seemed odd in context, and I find it unlikely that Riehl would have deliberately or unconsciously fabricated a remark of such slight consequence. On the other hand, I conclude that Townsend's question, although indicating that McCaskill and the recent special conferences were linked in his mind, did not establish that Townsend was hostile to McCaskill's participation in these meetings.

However, I find that Byes and Townsend's attempts to prohibit McCaskill from making copies of the work schedule for Charging Party, and Byes' threat that she would "have trouble" if she continued to do so, established their animus toward her protected activity. In the special conferences, the parties discussed alleged irregularities in the assignment of overtime. McCaskill testified that after the first special conference, she began copying the work schedule from the employee bulletin board because she believed that the schedules showed how supervisors used favoritism in making assignments. She testified that when Townsend and Byes tried to stop her from copying the work schedules, she explained why she wanted them. According to her testimony, Byes told her that she could not copy the schedules because she "went to the union with things" and attended special hearings/conferences, and that he warned her that if she persisted she would "have trouble." I credit McCaskill's testimony. Both Byes and Townsend testified that the work schedule on the bulletin board was not accurate because it constantly changed. However, although Byes testified that it was against policy for nonmanagement employees to copy the work schedule, neither he nor Townsend explained when this policy first came into being. Nor did Townsend or Byes contradict McCaskill's testimony that before she attended the first conference, supervisors did not object when employees, including McCaskill herself, made copies of the work schedule for their own personal use. I find that the evidence indicates that Townsend and Byes attempted to stop McCaskill from copying the work schedules, and that Byes threatened her, because they did not want these work schedules used in the parties' ongoing discussions over Respondent's assignment practices.

I do not, however, credit McCaskill's testimony regarding her conversation with Byes on July 22. Specifically, I do not credit her testimony that she repeatedly told Byes that she could not redo the incident report because she lacked the necessary skills, or her testimony that she did not give Byes any other reason for refusing to correct the report until after Byes informed her that he would recommend that she be disciplined for insubordination. I note that, according to her own testimony, McCaskill did not want to write the report when Young initially asked her to do it; she complained to Young at that time that the employee's statement of facts was incomplete. Thus, Byes' testimony that the first reason McCaskill gave him for refusing to redo

the report was that the employee's statement should never have been accepted in the first place was partially corroborated by McCaskill's previous testimony. Also, on July 19, McCaskill produced a report on the computer, even though it was full of errors. On July 22, Byes returned the report to her with the corrections that needed to be done clearly marked. According to McCaskill, Byes kept insisting that she redo the report, even after she told him that she could not do it without more training. Although at one point she asked Byes to help her, McCaskill did not attempt to explain to Byes how she had come to do the report on the computer in the first place, or what kind of help she needed. She also did not mention Williams' offer to help her with the report, even after Byes' crude remark showed that he was angry. Byes' recollection of the July 22 incident was considerably less detailed than McCaskill's. However, I find his testimony that her lack of training on the computer was only one, and not the first or primary, reason McCaskill gave him for refusing to redo the incident report to be more believable than McCaskill's testimony that she simply told Byes over and over that she lacked the training to redo the report.

I conclude that Respondent demonstrated, through Byes' credible evidence, that McCaskill would have been disciplined for insubordination on July 22, 2003 even if she had not participated in the special conferences. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge in this case is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Date: _____