

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

In the Matter of:

CITY OF NOVI (FIRE DEPT),
Public Employer-Respondent,

Case No. C05 C-059

-and-

MICHIGAN ASSOCIATION OF FIRE FIGHTERS,
Labor Organization-Charging Party.

APPEARANCES:

Keller Thoma, P.C., by Bruce M. Bagdady, Esq., for the Respondent

Pierce, Duke, Farrell & Tafelski PLC, by M. Catherine Farrell, Esq., for the Charging Party

DECISION AND ORDER

On September 28, 2006, 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

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

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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, this case was heard at Detroit, Michigan on September 8, 2005 and January 25, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before March 31, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Michigan Association of Fire Fighters filed this charge against the City of Novi on March 15, 2005. Charging Party represents a unit of all part-time fire fighters employed by Respondent in its fire department. Charging Party alleges that Respondent violated Sections 10(1)(a) and (c) of PERA in November 2004 by suspending and demoting part-time fire fighter Jerry Holtzman because of his union activities.

Facts:

Respondent employs both full-time and part-time "on-call" fire fighters in its fire department. From 6:00 am to 6:00 pm, Monday through Friday, the department is staffed by full-time fire fighters. After 6:00 pm and on weekends, the department is manned by part-time on-call fire

fighters. Respondent appoints one captain and two lieutenants at each fire station from among the ranks of the part-time on-calls to oversee operations at each of its three fire stations.

Jerry Holtzman was hired as a part-time on-call fire fighter in 1987. Holtzman also works full-time as a certified physician's assistant. Between 1987 and 2003, Holtzman twice applied unsuccessfully for promotion to lieutenant. Holtzman and Dennis Tarrant, the part-time captain at Respondent's Fire Station 2 where Holtzman is assigned, did not like each other. Sometime in 2002, after Tarrant had failed to take action, Holtzman went to Fire Chief Arthur Lenaghan and complained that one of the station's lieutenants had assaulted him. Lenaghan ordered an investigation, and the lieutenant was eventually demoted. On October 3, 2003, Holtzman was promoted to the vacant lieutenant position at Station 2. Tarrant testified that Holtzman was promoted to this position because he was the only qualified applicant and the position had to be filled. In Tarrant's opinion, Holtzman was a "terrible" lieutenant. Tarrant testified that Holtzman did not follow orders well and Tarrant felt that he lacked sufficient commitment to his job to be a fire officer. As examples, Tarrant cited Holtzman's decision to take a new full-time job that required him to work two evenings per week and his reluctance to work both weekend days once a month as Tarrant expected.

Respondent's full-time fire fighters have been represented by the International Association of Fire Fighters (IAFF) since about 1987. In April 2004, Holtzman contacted Charging Party about organizing the part-time on-calls. Holtzman distributed union authorization cards and organized meetings at which Charging Party representatives spoke to the on-calls. Charging Party was certified as the bargaining representative for the on-call fire fighters on July 19, 2004.

Many fire command officers have held union office in the IAFF unit, including Lenaghan before he became chief. Captain Tarrant testified that he believes that it is a conflict of interest for a fire command officer to hold office in the union, and that he stated his opinion publicly at a union meeting shortly before Charging Party held its first election for officers in August 2004. In that election, Holtzman was elected president of Charging Party's local union. Another lieutenant was elected vice-president and the treasurer was a captain. Fire fighter Thomas Greenwald, now a lieutenant, testified that he was present when Tarrant learned of Holtzman's election. According to Greenwald, Tarrant told him, "If [Holtzman] thinks he going to be a lieutenant here [Station 2] and a union president, he's got another think coming." Greenwald was a credible witness with no apparent incentive to lie, and I credit his testimony.

Respondent has a detailed written Internet usage policy that describes prohibited uses of Respondent's computers, including engaging in business activities, playing games, and promoting personal, political or religious beliefs. The policy states that the "download or display of any kind of obscene or sexually inappropriate image or document" is also a violation of Respondent's policy against sexual harassment. Each of Respondent's fire stations has a computer. Part-time on-call fire fighters use the computer at their station to do reports, and to access their work schedules, copies of reports, and information from dispatch. Tarrant testified without contradiction that he told all the part-time on-calls at Station 2 that he did not want them using the computer for other purposes because the computer was not functioning properly. Tarrant also testified without contradiction that on several occasions before the fall of 2004, Tarrant told Holtzman specifically to stop using the station computer for personal business.

On October 21, 2004, Holtzman and seven other part-time on-call fire fighters attended a training session at Station 2. After the session ended, the fire fighters went into the room where the station's computer is located. As a lieutenant, Holtzman receives certain information from the department, including copies of work schedules, at his personal e-mail address. After the training session on October 21, Holtzman accessed his personal e-mail account on the station's computer. He opened several personal e-mails, including one that displayed a series of foreign television commercials. The commercials were funny, and other fire fighters, including Sara Short and Karen Knox, gathered around the computer to watch. One of the commercials showed a man driving a sports car and two female hitchhikers. One of the female hitchhikers wore blue jeans and the other wore high heels and a sexy dress. The driver drove past the woman in blue jeans, splashing her with water from a puddle, and stopped to pick up the other woman. The commercial then showed the first woman with a wet shirt outlining the shape of her breasts. It concluded with the driver leaving the first woman and backing up to pick up the woman with the wet shirt. After leaving the station, Short and Knox discussed the video clip. They agreed that Holtzman should not have shown the video at the station. Short said that since Holtzman was a lieutenant, he should be held to a higher standard of behavior.

Around this same time, a probationary fire fighter described in some detail to Short and Knox what he would like to do sexually to a nurse at a local hospital. In late October, Short and Knox approached Captain Tarrant to complain about the fire fighter's comments. After the two women told Tarrant what the fire fighter had said, Knox asked Short if she wanted to mention Holtzman's video clip as well. According to Tarrant, Short and Knox told him that Holtzman had showed them sexually explicit material on the computer. Short denied that either she or Knox said that the video clip was "sexually explicit." Short's testimony was consistent with her later statements and behavior, and I credit it. Short first testified that she described the video clip to Tarrant. However, Short later testified that she said to Tarrant, "Well, Jerry was showing these e-mails, and one of them was a little on the edge of what you might think is appropriate, and maybe you should let him know that if we are trying to teach these younger fire fighters what is appropriate and inappropriate to have in a business environment then maybe they should set the example as being way above the gray area so there is no question." Short testified that she expected Captain Tarrant to speak to both Holtzman and the other fire fighter about the appropriateness of their conduct but did not expect him to initiate disciplinary proceedings.

Tarrant decided to tell the other fire fighter to apologize to the two women for what Tarrant saw as a vulgar remark. Tarrant concluded, however, that he should bring Holtzman's video clip to his supervisors' attention. On November 1, Tarrant went to Assistant Chief Jeffrey Johnson's office and told him that two employees had come to him and complained that Holtzman had shown a sexually explicit video clip on the computer at the fire station. Chief Lenaghan overheard the conversation, and he told Johnson to conduct an investigation. Later that same day, Holtzman was told to report to Johnson's office with his union representative. Both Holtzman and Johnson taped the interview. According to the transcripts of these tapes, the interview included the following exchanges between Johnson and Holtzman:

A/C Johnson: Um, as I mentioned earlier today Captain Tarrant came to my office at approximately 4:00 this afternoon. He described to me that he had been notified by

several other employees out of Station 2 of allegations that yourself had been using the computer at Station 2 specifically the Internet service or something to that effect, and there was some pictures that were being displayed on there and several other employees including the ones that had made the complaint said that it was offensive to them and that these were explicit type pictures and I'd like you to react to that if you would please.

Holtzman: What were the pictures of?

Johnson: Uh, my understanding is that they were female pictures. This happened approximately 2 weeks ago after training. Sometime around October 21st is the best that I can figure at this point. But again, I am still in the initial stages of the investigation.

Holtzman: Well, two females?

Johnson: Well . . . females. I didn't say two females. I just said...

Holtzman: Females.

Johnson: There were females. I don't know what the pictures were. Can you respond to that?

Holtzman: No. I have no idea what you're talking about.

Johnson: Were you using the Internet and looking at any pictures at all of and displaying them to other employees?

Holtzman: Not females, no. Uh uh. Not that I recall.

Johnson: What about male pictures, uh, any kind of nudity?

Holtzman: No. No nudity. None that I recall.

Johnson: Uh, any pictures at all that would be offensive to other employees?

Holtzman: No. Nothing.

Johnson: You have used the Internet though, right, up at Station 2?

Holtzman: Yes.

Johnson: For what purpose?

Holtzman: To check my mail.

Johnson: Would there have been any emails that would have had some kind of attachments or something like that?

Holtzman: Not – no.

Johnson: Did you share anything on the Internet with any other employee at any time, I mean like in the last couple weeks that you can think of?

Holtzman: I might have . . .

* * *

Holtzman: What accusations were there?

Johnson: The accusations that have been brought forward to me is that you displayed sexually explicit pictures on the Internet at Station 2 that were offensive to other people, other parties, other employees at the station which is a violation of our harassment policy as well as a violation of our Internet policy.

* *

Holtzman: Okay, is that the only allegations there?

Johnson: Yeah, that I know now. I mean I still have I still have to talk to some more other people as well as like I said I have to talk to our labor attorney as well as the Human Resource Department. They were notified today. Um, I'd like to talk to if I can, talk to the other employees. Uh, find out if there were any other witnesses there.

Holtzman: Okay

Johnson. If you're telling me that you don't know anything about it which is what I understood your response to the question then you are denying the allegations.

Holtzman: Yes.

* *

Johnson: Anything else that you can think of that might be helpful to me in trying to figure this out?

Holtzman: No.

After the November 1 meeting, Holtzman was placed on administrative leave. Shortly thereafter, Short was called to a meeting with Tarrant and Johnson and questioned about the video clip. Short described the video to Johnson. Short told Johnson that she was not offended by the video, but that she thought the video was inappropriate for the workplace. She said that she was not

making a complaint. According to Johnson, he was confused about why Short had raised the issue with Tarrant if she did not intend to file a complaint. He told Short that there were serious consequences to filing a false complaint. After this meeting, Short wrote a short summary of what she had told Johnson. Johnson also solicited written statements from Holtzman and from the other fire fighters who attended the October 21 training session. Some did not recall seeing Holtzman showing video clips, and others remembered clips but not the one in question. Those who remember the video described it as Short had. In his written statement Holtzman said that he had no knowledge of “the supposed incident.”

On November 4, Holtzman attended a meeting with his union representative, Johnson, Short and Knox. This meeting was also tape recorded. At the beginning of the meeting, Tarrant was asked how he learned that Holtzman had been showing video clips on the computer. Tarrant said that Knox and Short had come to him and asked him to say something to Holtzman “about him showing something on the computer that was sexually explicit.” Short denied that they had said this. Johnson asked her if she had told Tarrant that the video was offensive. Short said she told Tarrant that it was inappropriate, not offensive. According to the transcript, Short said, “I wanted Dennis to tell Jerry that it was inappropriate and that he shouldn’t do things like that in the future, just so that Jerry didn’t think it was totally ok to go on with that.” Johnson then asked Knox if she had made a complaint. Knox said that she and Short had acted together and they had said that Holtzman’s conduct was inappropriate. Johnson asked them if they understood that when they made statements to Captain Tarrant that something was sexually explicit, that it was a serious complaint. Knox said that the incident had been blown way out of proportion. Johnson then turned to Holtzman and asked him why, on November 1, he had said that he “had no knowledge of this thing.” Holtzman replied that Johnson had asked him if he showed “porno or naked women.” Holtzman said that he still didn’t remember the video clip. Johnson described the video. Holtzman then said that the woman was not naked, that she was on the screen for two seconds and that there was no nudity. Johnson asked him if the content on the video was something that “a lieutenant in the Novi Fire Department should be showing to other employees.” Holtzman said that it was just a joke, and that he didn’t see the problem.

Johnson submitted his report of the incident to Chief Lenaghan on November 10. After reading the report, Lenaghan talked to Tarrant, who told him that he was not satisfied with Holtzman’s performance and described what he felt were Holtzman’s attendance problems. On November 11, 2004, after consulting with Respondent’s human resources department, Lenaghan suspended Holtzman for thirty days and demoted him to fire fighter for: (1) “failing to obey a lawful order,” i.e. disregarding Tarrant’s order not to use the station computer for personal purposes; (2) “misusing fire department equipment,” i.e. City computers; (3) “conduct unbecoming a member of the department,” and (4) “making misleading statements with intent to deceive,” i.e. refusing to admit knowledge of the video clip in his November 1 interview. At the time Holtzman was disciplined, Charging Party and Respondent had not yet reached agreement on a first collective bargaining agreement. Holtzman and Charging Party appealed the decision through Respondent’s internal appeal procedures. Respondent chief operating officer Craig Claver upheld Holtzman’s demotion, but reduced his suspension from thirty to fifteen days.

Discussion and Conclusions of Law:

The elements of a prima facie case of unlawful discrimination under PERA are: (1) 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. *Warren Con Schs*, 18 MPER 63 (2005); *City of St Clair Shores*, 17 MPER 76 (2004); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence that the same action would have taken place even in the absence of the protected conduct, but the ultimate burden of showing unlawful motive remains with the Charging Party. *MESPA v Ewart Public Schools*, 125 Mich App 71, 74 (1982); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 706; *Residential Systems Co*, 1991 MERC Lab Op 394, 405.

Jerry Holtzman engaged in activity protected by Section 9 of PERA when he contacted the Charging Party, distributed union cards, organized union meetings, and ran for and accepted the office of president of the local union. Respondent admitted that it knew of Holtzman's protected activities, but asserts that Charging Party failed to show either that it had animus toward Holtzman's union activities or that this animus caused his discipline.

In April 2004, Tarrant said to fire fighter Greenwald, "If [Holtzman] thinks he going to be a lieutenant here [Station 2] and a union president, he's got another think coming." Tarrant's statement was not merely an expression of his opinion that it was a conflict of interest for a fire command officer to hold union office. The clear implication was that Tarrant, as captain, would take action to ensure that Holtzman would not remain a lieutenant. I find that this statement establishes Tarrant's animosity toward Holtzman's exercise of his right, protected by Section 9 of PERA, to serve as a union officer. Moreover, Tarrant's motive for bringing Holtzman's conduct to his superiors' attention is suspect. The main subject of Short and Knox's complaint was the conduct of another fire fighter, but Tarrant did nothing more than speak to him about the incident. Tarrant also misrepresented the two women fire fighter's complaint when he told Johnson and Lenaghan that Holtzman had shown a sexually explicit video clip on the computer at the fire station. It was clear from the record that Tarrant strongly disliked Holtzman, and that this dislike preceded Holtzman's union activities. While that dislike may have influenced his actions, I find that Tarrant was, at least in part, motivated by his hostility toward Holtzman's protected activities. Tarrant's actions set off a chain of events that ultimately led to Holtzman's discipline. In this sense, Tarrant's hostility toward Holtzman's exercise of his protected rights caused this discipline.

I conclude, however, that the evidence does not demonstrate that Respondent ultimately disciplined Holtzman because of his union or other protected activities. Charging Party argues that Holtzman's discipline was so disproportionate to his offense, and so out of line with the complaints made by the two women fire fighters, that the reasons given by Respondent must have been pretextual. However, Holtzman was not disciplined for showing sexually explicit material on the computer in the fire station. Rather, the investigation of Short and Knox's complaint brought to light the fact that Holtzman was using the station computer to view his personal e-mails, a violation of Tarrant's orders. Holtzman was also deemed by his superiors to have used poor judgment in showing these video clips to his fellow fire fighters. Another element in Respondent's decision was Holtzman's failure to admit during his November 1 interview that he remembered the video clip, although the transcript of this interview suggests that he did recall it. Chief Lenaghan emphasized this element in explaining his decision to impose the discipline, and I am persuaded that if Holtzman

had admitted to Johnson on November 1 that he had shown the clip and described it, the investigation might have gone no further. I conclude that, based on the evidence as a whole, Respondent did not suspend and demote Jerry Holtzman because of his activities protected by Section 9 of the Act. In accord with this finding, 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

Dated: _____