

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

In the Matter of:

CITY OF DOUGLAS,
Public Employer-Respondent,

Case No. C06 B-025

-and-

MICHIGAN AFSCME COUNCIL 25,
Labor-Organization-Charging Party.

APPEARANCES:

Kreis, Enderle, Callander & Hudgins, by Douglas L. Callander, Esq., for the Respondent

Michigan AFSCME Council 25, by Kristen M. Clark, Esq., Staff Counsel, for the Charging Party

DECISION AND ORDER

On May 14, 2007, Administrative Law Judge Julia S. 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. Dardarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

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Kristen M. Clark, Esq., Staff Counsel, Michigan AFSCME Council 25, for the 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, this case was heard at Lansing, Michigan on September 14, 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 November 21, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Michigan AFSCME Council 25 filed this charge against the City of Douglas on February 8, 2006. On June 10, 2005, Charging Party was certified as the collective bargaining agent for a unit of full-time and regular part-time employees of Respondent in its department of public works. Charging Party alleges that on September 12, 2005, Respondent violated Sections 10(1)(a) and (c) of PERA when it discharged Robert Rank, an individual actively involved in Charging Party's organizing campaign, because of Rank's union activities.

Facts:

Background to Rank's Union Activity

Robert Rank was hired by Respondent as a laborer in its department of public works (DPW) in May or June of 1998. At the time of Rank's termination, Tim Gohde, the superintendent of public works, was his supervisor. Rank held the title of assistant superintendent, which meant that he filled in for Gohde when Gohde was not there. The department also included laborers Richard Johnson, Jack Clark, and Glen Alderink.

Rank testified that there was friction between Gohde and him shortly after Gohde was hired in 2000. However, according to Rank, the two men resolved their difficulties after a public discussion between them at a City Council meeting in 2001. Rank denied that there were problems between Gohde and him between 2001 and the fall of 2004. By the date of the hearing, Gohde had left Respondent's employment and was not available to testify. However, Steve Laughner, a member of Respondent's City Council since 2003 and chairperson of its personnel committee (hereinafter personnel committee or the committee) testified that there were ongoing problems between Rank and Gohde dating back at least to the time when Laughner joined the Council. Laughner also testified that in the spring of 2003 or 2004, Rank approached the then-village manager and told her that Gohde, a homosexual, had sexually harassed him. Rank refused Laughner's request to put his complaint in writing, and later told him that he did not want to discuss the issue. Laughner was concerned enough about the complaint to set up a meeting with Rank and Gohde. During this meeting, both men complained bitterly about the other. Laughner told both men that if they had complaints about the other they should put them in writing.

On October 4, 2004, Gohde gave Rank a written verbal warning for driving a department vehicle after he had reported that the brakes were deficient. This was the first time Rank had ever been formally disciplined. On about October 6, Rank met with the acting city manager to complain about Gohde. On November 30, at Rank's request, he met with the personnel committee. There was no testimony regarding the substance of Rank's meetings with the city manager or the personnel committee except that Rank voiced many complaints about Gohde's treatment of him, and the committee told Rank to put his complaints in writing. Sometime between October 6 and the middle of December, Rank presented the personnel committee with two lists of complaints. The first read as follows:

I, Robert Rank have the following concerns:

1. The personal treatment of employees in the department of public works.
2. Issues of disagreement are handled often as personal issues against employees instead of being solved in a professional manner.
3. Many times disagreements appear to be managed by a get-even policy rather than sound management.

4. Lack of poor supervision [sic] by manager over the department.
5. False accusations against fellow employees to other employees and to the general public.
6. I must ask why my written request for vacation has been denied.
7. Employees are disciplined and punished for doing their jobs.

The second document stated:

1. Talking with Jill [Eyre, Respondent's City manager] outside the village hall (September 28, 2004)
2. My vacation (November 5, 2004)
3. Overtime not given to all. Failure to talk with employees for a prolonged period of time (October 30, 2004)
4. Nobody seems to care enough to talk with the department. Or they always have more important things to do. Follow through by personal [sic] committee or manager. (October 6, 2004).
5. I have been accused of trying to get the DPW supervisor fired, trying to get his job. My photo appeared on the front page of local paper, talked with future village manager and for this I have been punished, the men who were with also was [sic] punished. (September 16, 2004 and September 28, 2004).
6. Bringing to the attention of my supervisor the bad brakes on our truck #2 I received my first disciplinary action (November 18, 2004).

On the same day that Rank met with the city manager, Gohde presented Laughner with a written list of thirteen complaints about Rank's work performance. Most of Gohde's complaints were about Rank's alleged misuse of City time and taking overlong breaks. He also asserted that Rank stole returnable cans from the DPW's barrel and was rude and disrespectful toward him. The list both mentioned specific incidents and made general allegations. On November 2, the personnel committee met with Gohde to discuss his complaints about Rank. Gohde went over the complaints listed in his October 6 letter. During this meeting, Laughner told Gohde that he should be documenting these incidents in writing as they occurred.

Union Organization

Another DPW employee, Glen Alderink, also had complaints about Gohde, although he did not bring them to Respondent's attention. Beginning sometime in November 2004, Rank, Jack Clark and Alderink began discussing getting a union to represent the DPW employees. The fourth DPW employee, Richard Johnson, said that he did not like unions and did not want one at the workplace.

In the middle of December, Rank contacted Charging Party. On about December 22, Rank, Alderink and Clark attended a meeting with Charging Party representative Jerome Buchanan where they signed authorization cards. Thereafter, Rank, Alderink, and Clark had several lunchtime discussions about the union in Gohde's presence. Gohde told Rank that he thought that maybe a union would be a good thing.

Rank testified that after he informed Gohde of his interest in the union, Gohde assigned the more difficult tasks to "certain individuals," while being more lenient with others.¹ Rank also testified that Gohde enforced the fifteen-minute break rule for some employees while taking breaks with other employees that lasted for forty-five minutes. According to Alderink, after the employees started talking about a union, Gohde watched him, Rank and Clark very closely to make sure that they did not overstay their breaks and followed the three of them around as they worked. As an example of Gohde's discriminatory treatment, Alderink testified that in December, Gohde refused to let them leave a job in a park to use the restroom.

In early January 2005, Charging Party sent a letter to Respondent requesting that it voluntarily recognize Charging Party as the bargaining representative for its DPW employees. On January 6, 2005, Charging Party filed a petition for representation election with the Commission. Respondent initially disputed Rank's eligibility to be in the unit on the basis that he was the acting supervisor. Charging Party and Respondent eventually agreed to include Rank's position in the bargaining unit, and, in March 2005, entered into a consent election agreement. An election was held by mail ballot. The ballots were counted on May 20, 2005, with three employees voting to be represented by Charging Party and one voting against. Charging Party was certified as the bargaining representative for DPW employees on June 10, 2005. On about July 11, Charging Party representative Buchanan sent Respondent a letter notifying it that Alderink had been elected chapter chairperson and Rank elected alternate chairperson.

Discipline of Rank after the Election

On May 16, 2005, Gohde confronted Rank after supposedly observing him returning late from a break. Rank became angry. Johnson testified that after Gohde left, Rank yelled obscenities about Gohde and called him a "fag." Later that day, Johnson told Gohde what Rank had said. On May 18, Gohde gave Rank a verbal written warning for overstaying his break on May 16. On May 20, Gohde issued Rank a written warning, the next step in Respondent's disciplinary process, for being verbally abusive during their May 16 conversation. The May 20 warning did not accuse Rank of making anti-homosexual slurs. On June 9, Richard Johnson sent Eyre and the Council a written complaint against Rank. In this complaint, Johnson described what Rank had said to him about Gohde on May 16 and cited another incident, occurring about six weeks earlier, during which Rank had also called Gohde a "fag" in Johnson's presence.

Alderink also got a verbal written warning on May 16 for exceeding his break time. On June 6, Alderink received a written warning for bringing a firearm into a City building, an incident that was written up in a local newspaper.

¹ Johnson was apparently the employee Gohde favored.

On Friday, July 29, 2005, DPW employees were busy mowing public areas and cleaning streets in preparation for a weekend festival. On August 5, Gohde issued Rank a second written warning for insubordination allegedly occurring on July 29. The warning came with a three-day suspension to be served from Monday August 8 through Wednesday, August 10. According to the warning, Rank decided to mow an area of park that he had not been assigned, and, as a result, did not complete the assignment Gohde had given him for that day. On August 8, Rank requested a meeting with the personnel committee. In his request, he complained that neither City manager Eyre nor the City Council had taken any action to stop Gohde from harassing him since their last meeting and that his suspension violated Respondent's written disciplinary policies. Eyre arranged a meeting for August 16 during which she and the personnel committee were to meet separately with Alderink, Rank, Clark, Johnson and Gohde, in that order. On August 9, Gohde gave Rank a third written warning. The warning stated that Gohde had observed Rank taking an unauthorized break on August 5. In the warning Gohde recommended that Rank be terminated.

Instead of returning to work on when his three-day suspension was over on August 11, Rank called in sick. Rank's doctor put him on medical leave until August 19. On August 12, Rank phoned the clerk's office to get forms to request an extended leave. He also talked to Gohde and told him he was on sick leave.² On Saturday, August 13, Rank was scheduled to work overtime picking up trash and cleaning bathrooms in the City's public parks. Rank did not show up to do this work. On August 15, Gohde gave Rank a fourth written warning for failing to call him and specifically request that an alternate be scheduled. In the August 15 warning, Gohde stated that he was now making a "strong" recommendation that Rank be terminated.

The personnel committee and Eyre met with all the DPW employees except Alderink on August 16. During these meetings, the personnel committee and Eyre asked each employee in turn for suggestions on how the department could work better together and be more productive. On August 25, Laughner, Eyre, Respondent's mayor Matt Balmer, and Gohde met with Charging Party staff representative Jerome Buchanan, Alderink, and Rank to discuss the disciplinary actions Rank had received since May. The accusations made by Johnson in his June 9 complaint came up during this discussion, and Gohde said that Rank had made similar comments to his face in the past. Gohde made an emotional speech in which he said that he had come to work for Respondent because of its anti-discrimination ordinance, and that he felt that Respondent was not supporting him. Buchanan asked Respondent to rescind the disciplinary actions and suggested that Rank and Gohde try to "bury the hatchet." Laughner or Balmer asked Rank and Gohde if they were willing to do this. Rank said he was, but Gohde threatened to quit if Rank was not fired. Respondent's representatives decided to put Rank's grievance before the whole City Council, and a special meeting was set for September 12. On August 26, Gohde wrote Council announcing his resignation effective October 14. In this letter he accused Respondent of failing to protect him from harassment.

At the September 12 meeting, the Council simultaneously considered Rank's disciplinary actions, Gohde's recommendation that Rank be discharged, and Johnson's complaint against Rank.

² Rank did not return from medical leave on August 19, and had not yet returned to work when he was terminated on September 12.

Prior to the meeting, the Council was given a copy of everything in Rank's personnel file, including Gohde's October 6 list of complaints. Buchanan was present to represent Rank. The Council questioned Johnson, Rank, Alderink and Gohde about the events leading to the disciplinary actions and about Rank's allegedly calling Gohde a "fag." The Council discussed and voted separately on each of the four disciplinary warnings. It decided that the evidence did not show that Gohde had ordered Rank to perform the work that Rank had allegedly refused to do on July 29, and voted to rescind the second written warning. The Council voted to uphold the other three disciplinary actions. The Council then asked Eyre for her recommendation on whether Rank should be discharged as Gohde had recommended. Eyre said that she believed that Rank had performance problems and that his performance was having a negative effect on the whole department. She said she agreed with Gohde that he should be discharged. Buchanan told Council that, in his opinion, the only offense that potentially warranted discharge was the alleged insubordination on July 29, the offense that Council agreed had not occurred. In the subsequent discussion, one council member mentioned that she had personally received complaints from citizens that Rank was not on the job, another commented that Rank seemed to lack pride in his work, a third said that employees had to learn to get along with their bosses, and Laughner commented that the dollars the City had spent on trying to resolve the employees' problems were hard to defend to taxpayers. The Council voted unanimously to accept Eyre's recommendation that Rank be discharged.

Discussion and Conclusions of Law:

In order to establish a prima facie case of discrimination under Section 10(1) (c) of PERA, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union 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. *Waterford Sch Dist*, 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551- 552. Once a prima facie case is established, but only after it 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 Ewart Pub Schs*, 125 Mich App 71, 74 (1983); *Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981).

Rank engaged in activity protected by the Act when he discussed a union with his co-workers, when he contacted Charging Party for assistance in organizing his fellow employees, when he signed an authorization card, when he voted in the Commission election, and when he accepted the office of alternate unit chairperson. I agree with Respondent that there is no evidence in the record that any Respondent agent, including Gohde, knew that Rank made the initial call to Charging Party. However, Rank and Alderink's uncontradicted testimony established that Gohde, at least, knew as early as December 2004 that Rank, as well as Alderink and Clark, were interested in having a union and that Johnson was not. In May 2005, the DPW employees voted three to one to authorize Charging Party to represent them. I find that, after July 11, 2005, when Buchanan notified Respondent that Rank was Charging Party's alternate unit chairperson, all Respondent's representatives knew that Rank was a union supporter.

However, anti-union animus is an essential element of a discrimination charge under PERA, and the record contains no direct evidence of anti-union animus on the part of Respondent. Although

anti-union animus may be proven by indirect or circumstantial evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of unlawful discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *Charter Twp of Plymouth*, 18 MPER 46 (2005); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707.

The timing of Rank's discharge in relation to his union activity is circumstantial evidence that might, under other circumstances, support a finding of anti-union animus. Rank was employed by Respondent for seven years and served as acting supervisor when his supervisor was not present. A union supporter, he was discharged less than four months after Charging Party's election. However, the record also demonstrates that Rank and his supervisor, Gohde, had a history of disputes that predated Rank's union activity and that, in the fall of 2004, their relationship deteriorated again. In October 2004, before Rank and his fellow employees began discussing unions, Gohde disciplined Rank for the first time. Thereafter, both Rank and Gohde approached Respondent's City Council with complaints about the other, and Gohde was told by personnel committee chairman Laughner to document incidents in writing as they occurred. On May 16, 2005, Gohde and Rank had a confrontation over Rank's alleged failure to return on time from a break. Johnson later told Gohde that after this confrontation Rank had yelled obscenities about him and called him a "fag." After this incident, Gohde began issuing the reprimands that eventually lead to Rank's termination. I find that these events, rather than anti-union animus, explain the timing of Rank's disciplinary warnings and Gohde's demand that he be discharged.

Charging Party points out that the pretextual nature of the reasons offered for an alleged discriminatory action may, in the appropriate case, be sufficient to support an inference of animus and discriminatory motivation. See *Volair Contractors, Inc*, 341 NLRB 673 (2004); *Whitesville Mill Service Co*, 307 NLRB 937 (1992). This is not such a case. In November 2004, before Rank's union activity commenced, Gohde complained to the City Council's personnel committee about Rank overstaying his breaks, misusing city time, and being rude and disrespectful to Gohde himself. When Respondent's City Council decided to terminate Rank on September 12, it had before it these complaints, in addition to the reprimands Rank had received from Gohde in May and August. It also had Gohde's allegation that Rank's hostility toward him was based on his sexual orientation, an allegation that Johnson's complaint might support. The issue here is not whether Respondent had just cause to discharge Rank, but whether Respondent terminated Rank because of his union activity. I find that the reasons Respondent gave for terminating Rank were not mere pretext, and that Charging Party failed to show that Respondent's had anti-union animus or hostility toward Rank's protected activities. I conclude, therefore, that Charging Party did not meet its burden of demonstrating that Rank's protected activity was a motivating factor in his termination.

In accord with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____