STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

YPSILANTI COMMUNITY SCHOOLS,
Public Employer-Respondent,

-and-

TEAMSTERS LOCAL 243,
Labor Organization-Charging Party in MERC Case No. 19-H-1710-CE;

-and-

DEANNE FREEMAN,
An Individual Charging Party in MERC Case No. 20-A-0017-CE;

-and-

LESLIE HARRIS,
An Individual Charging Party in MERC Case No. 20-A-0016-CE;
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Roy H. Henley, for Respondent

Soldon McCoy, LLC, by Kyle A. McCoy, for Charging Parties

DECISION AND ORDER

In 2019, the Ypsilanti Community Schools decided to bring their student transportation services, which had for four years been operated by a private contractor, back in house. That summer, the school district staffed its new transportation department by hiring 64 employees who had formerly worked for its contractor, Durham Transportation Services. But the district did not hire all of the employees who had worked on Durham's contract. Among the Durham workers whom it did not hire were Deanne Freeman and Leslie Harris. Freeman and Harris both had served as shop stewards for Teamsters Local 243, the union that represented Durham's employees. They allege that the district's refusal to hire them occurred in retaliation for their union activities while working for Durham.

Freeman, Harris, and Teamsters Local 243 filed these three consolidated charges alleging that the district's action violated Section 10(1)(c) of the Public Employment Relations Act

(PERA), MCL 423.210(1)(c). In a Decision and Recommended Order issued on May 28, 2020,[1] Administrative Law Judge Travis Calderwood concluded that the district had unlawfully retaliated against Freeman and Harris. He accordingly recommended that the Commission order the district to hire them and make them whole for any pay and benefits they lost.

The school district argues that we lack jurisdiction, because Freeman and Harris worked for a private-sector employer at the time of their union activity. It also contends that we lack the power to enter the remedy Judge Calderwood recommended. These arguments disregard PERA's text and are inconsistent with the statute's purpose. Finally, the district contends that Judge Calderwood erred in determining that its refusal to hire Freeman and Harris rested on anti-union animus. But we have repeatedly emphasized that such determinations rest significantly on witness credibility, and we find no adequate basis for overturning Judge Calderwood's credibility judgments here. We thus enter the recommended order as the order of the Commission.

Procedural History

This case involves three consolidated unfair labor practice charges. On August 20, 2019, the Teamsters filed the charge involved in Case No. 19-H-1710-CE. That charge alleged that the school district's refusal to hire Freeman and Harris violated Section 10(1)(a) and (c) of the Act. Because the Durham unit represented by the Teamsters no longer existed after the district took its transportation in house, and the district's transportation workers were represented by the MEA, the Teamsters' counsel feared that the charge filed by the Teamsters might be dismissed for lack of standing. Thus, on January 6, 2020, he filed charges in Case Nos. 20-A-0016-CE and 20-A-0017-CE on behalf of Harris and Freeman respectively, in "an effort, prior to the limitations period running out, to prevent dismissal." All three cases were consolidated and heard on February 10, 2020.

At the beginning of the hearing, Judge Calderwood dismissed the charge filed by the Teamsters. (The union took no exception from that ruling). And because neither Freeman nor Harris was ever actually employed by the district during any period of time relevant to this dispute, he concluded that they were not "public employees" and thus could not proceed under Section 10(1)(a) of PERA. See MCL 423.210(1)(a) (public employer may not "[i]nterfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9"). But he allowed Freeman's and Harris's claims to proceed under Section 10(1)(c), which prohibits public employers from "[d]iscriminat[ing] in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." In his Decision and Recommended Order issued on May 28, 2020, Judge Calderwood concluded that the district refused to hire Freeman and Harris because of Bradley's animus towards their activities as stewards while employed with Durham. He issued a recommended order requiring, *inter alia*, that the district hire

[1] MOAHR Hearing Docket Nos. 19-017207, 20-000587 & 20-000588

Freeman and Harris and make them whole for any economic harm they experienced as a result of the unfair labor practice.

Facts

The Ypsilanti Community Schools maintained its own transportation department until 2015. That year, the school district outsourced the transportation function by entering into a contract with Durham. Durham's bus drivers and monitors were covered by a collective bargaining agreement between the company and Teamsters Local 243. Charging Party Deanne Freeman, a bus monitor, and Charging Party Leslie Harris, a bus driver, served as stewards for the union.

At a meeting on May 20, 2019, the district's Board of Education voted to bring the transportation function back in house. On June 10, the Board voted to hire William Bradley as its Transportation Director to manage the transition. The Board set June 30, 2019, as the deadline for completing the transition. Freeman and Harris attended both the May 20 and the June 10 Board meetings. As was their practice, they wore their drivers' vests adorned with Teamsters stickers, pins, and badges.

In managing the transition on behalf of the school district, Bradley frequently interacted with Jerome Cochran. Cochran, a Safety Supervisor employed by Durham, served as Durham's representative to the district during that period. Around the same time in late May or early June (the record is not clear on the precise date), Cochran was involved in an incident involving Freeman, Harris, and two Teamsters representatives, all of whom sought to pass out authorization cards in the lounge used by Durham employees. Cochran asked the representatives to leave the building. According to Harris, Cochran said that the district's superintendent had informed him that any employee who filled out a Teamsters' authorization card would be fired. Another driver, Angela Gibbs, corroborated Harris's testimony. Both the district's superintendent, Alena Zachery-Ross, and its human resources director, Sue McCarty, denied making any such statement to Cochran. (After the transition, the district hired Cochran as its own employee).

To staff up the district's new transportation department, Bradley (along with another outside consultant) interviewed about 60 people for just under 50 driver and monitor slots. Most of the interviewees had worked in the same jobs for Durham. Bradley then made hiring recommendations to McCarty, the district's HR director. After interviewing Freeman and Harris, Bradley recommended that the district not hire them. At the end of the process, they were among approximately a dozen Durham employees whom the district chose not to hire.

In these proceedings, the district has asserted that its decisions not to hire Freeman and Harris had nothing to do with their union activity. The district says it did not hire Freeman because she had demonstrated an "attendance problem" while working for Durham. As for Harris, the district says that it did not hire her because she made Bradley uncomfortable in her interview by

asking him how he manages a diverse workforce. (Harris is a Black woman; Bradley is a white man).

But there was evidence that undermined these explanations. When Freeman did not receive an assignment to perform transportation runs over the summer of 2019, Gibbs discussed the matter with Bradley. Gibbs testified that Bradley told her that not every Durham employee would be called back to work, and that Freeman and Harris "stir the pot." (Bradley testified he could not recall ever using the phrase "stir the pot.") And, indeed, Bradley had met with Harris regarding a grievance she had filed regarding the route assignments that summer. In late June 2019, Harris filed a grievance against Durham alleging a violation of the company's agreement with the Teamsters. According to the grievance, Durham had improperly left stewards—like Harris—out of the process for making the summer assignments. Harris testified that she met with Bradley about the routes on June 24. She said that during the discussion Bradley told her, "I don't have to hire anyone back, and I don't have to hire you." Harris further testified that at some point Bradley told her, "It's MEA or nothing." (The employees in the new in-house transportation department were part of a bargaining unit represented by the MEA rather than the Teamsters). Bradley testified that he told Harris that her grievance did not have merit and that she needed to take it up with Durham. Bradley denied making the comments regarding hiring that Harris attributed to him.

As for Freeman's asserted attendance problem, Bradley's testimony was hedged and uncertain. At the hearing, counsel directly asked Bradley why he did not recommend Freeman's hire. He answered, "I'm sorry, it taxes my memory here. I believe there was a question brought in about her attendance because we asked everybody the same thing about their attendance." It was only on further questioning that Bradley said definitively that Freeman's attendance was the reason for his recommendation. In particular, he testified that the "sole reason" he did not recommend her was a discrepancy between the number of her absences she reported in her interview and the number of her absences that Durham provided in a report to the interview team. But Bradley also testified that he never consulted Durham's attendance records, nor did Durham even provide a written report of the attendance of the workers who were being considered for positions with the district. Rather, he said, he had simply called Cochran, who gave him an oral report.

As Judge Calderwood pointed out, Bradley apparently did not ask Cochran "whether [Freeman] had ever been disciplined as a result of her attendance." And that would have been a particularly relevant question. As Freeman described her interview with Bradley, she had told him that any absences had been a result of authorized activity in her capacity as a union steward, including contract negotiations and grievance adjustment. She also testified that she had worn her Teamsters vest with union insignia during her interview. As Judge Calderwood also emphasized, the district did not call Cochran as a witness to corroborate Bradley's testimony, even though Cochran was a district employee at the time of the hearing.

Bradley also testified that, at the time he was making his recommendations, he had been "told stories" by Durham management about Freeman and Harris's steward activities. When asked by counsel about the content of those stories, Bradley referred to an incident in which Freeman and Harris had filed a grievance about a broken refrigerator at work. The Durham supervisor "bought a big tub and filled it with ice and put water in it." Freeman and Harris complained that the company was "treating their employees like cattle." "That," Bradley reported, "offended quite a few people."

Discussion

1. Commission Jurisdiction

The district argues that the Commission lacks jurisdiction, because Freeman and Harris were private-sector employees when they engaged in the union activity at issue here. The district is quite right that PERA applies only to public-sector labor relations (as reflected in the statute's title, the "Public Employment Relations Act"). But Freeman and Harris are not challenging a decision made by a private employer. Rather they are challenging a hiring decision made by the school district—which is plainly a public employer. And the district's refusal to hire them violated the plain text of the statute.

Section 10(1)(c) of PERA makes it unlawful for a public employer to "discriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." MCL 423.210(1)(c). Freeman and Harris charge that the district "discriminate[d]" against them "in regard to hire" because of animus towards their activities as union stewards while employed with Durham. It is well established that discriminatory hiring decisions motivated by anti-union animus violate Section 10(1)(c). See, *e.g.*, *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116; 223 NW2d 283 (1974). See also *Radio Officers' Union of Commercial Telegraphers Union, AFL v NLRB*, 347 US 17, 39–40 (1954) (identical language in National Labor Relations Act "include[s] discrimination to discourage participation in union activities as well as to discourage adhesion to union membership"). See generally *Interurban Transit Partnership*, 30 MPER 56 (2017) ("In interpreting PERA, the Michigan Supreme Court and the Commission look to federal precedent on analogous provisions of the National Labor Relations Act ('NLRA') for guidance.").

To be sure, the school district was motivated by conduct in which Freeman and Harris engaged while employed by a private contractor. And it was motivated by animus against participation in the union that represented employees of that contractor, rather than the union that represented the district's own employees. But that makes no difference. The statutory text prohibits public employers from engaging in hiring discrimination based on "membership in *a* labor organization," MCL 423.210(1)(c) (emphasis added)—not based on membership in any particular labor organization. The Legislature's use of the indefinite article demonstrates that the statute prohibits public employers from discriminating based on membership in *any* labor

organization—whether or not it is one that represents, or seeks to represent, that employer's employees. See *S Dearborn Envtl Improvement Assn, Inc v Dept of Envtl Quality*, 502 Mich 349, 368; 917 NW2d 603, 612 (2018) ("'A' is an indefinite article, which is often used to mean 'any'").

Indeed, the language of Section 10(1)(c)—which refers to "membership in a labor organization," without limitation to public-sector labor organizations—contrasts notably with the language of Section 10(1)(a)—which prohibits "[i]nterfere[nce] with, restrain[t], or coerc[ion of] public employees in the exercise of their rights guaranteed in section 9," MCL 423.210(1)(a)—language that is necessarily tied to the rights to engage in concerted activity in the public sector (the only rights created by Section 9). It is "a fundamental principle of statutory construction that '[w]hen the Legislature uses different words, the words are generally intended to connote different meanings.'" *S Dearborn Envtl Improvement Assn*, 502 Mich at 369; 917 NW2d at 613 (citation omitted).

And the difference between the sections makes sense. Section 10(1)(a) is a general provision regarding interference with rights granted by the statute. Section 10(1)(c) specifically addresses (among other things) hiring discrimination. If an employer is motivated by anti-union animus in refusing to hire an individual, the individual's union activity will often have taken place at a previous employer (because many people are hired from outside of an organization). To effectively attack hiring decisions driven by anti-union animus requires prohibiting the new employer from discriminating based on union activity at the applicant's previous employer. That is exactly what Freeman and Harris allege to have happened here.

Established practice under the National Labor Relations Act, to which we often look as a model when construing similar language in PERA, see *Interurban Transit Partnership, supra*, supports application of these principles here. The Supreme Court has made clear that a business that takes over the assets of another has no obligation "to hire all of the employees of the predecessor." *NLRB v Burns Intern Sec Services, Inc*, 406 US 272, 281 n.5 (1972). But, it has said, the new employer will "commit[] a § 8(a)(3) unfair labor practice" if it refuses to hire those workers because of their union activity with the prior employer. *Id.* Again, that is just what Freeman and Harris allege.

Arguing against our jurisdiction, the school district relies on *City of Lansing*, 15 MPER 33019 (2001). But that case is very different. There, a non-union private subcontractor, which was working under a unionized private general contractor, filed unfair labor practice charges against the City for imposing a project labor agreement on it. The subcontractor argued that the project labor agreement unlawfully coerced its employees to join a union. The employer-employee relationship at issue there was purely a private-sector one. It involved whether workers for a private subcontractor would be represented by a union in bargaining with that subcontractor. We refused to entertain the charge, because "we have no jurisdiction under PERA over private employers or employees of private employers." *Id.* The Court of Appeals affirmed, based on its conclusion that state and local entities are not the employers of "the many private sector employees

who work for contractors doing business with the state." *City of Lansing v Carl Schlegel, Inc*, 257 Mich App 627, 633; 669 NW2d 315, 319 (2003).

Here, by contrast, Freeman and Harris specifically applied for employment directly with the school district, which is doubtless a public employer. They thus sought jobs as public employees. Their applications for employment plainly trigger this Commission's jurisdiction. And they allege that the district refused to hire them because of their union membership, conduct that violates the plain text of Section 10(1)(c) of PERA. We have jurisdiction, and *City of Lansing* is simply inapposite.

2. The Remedy Recommended by the ALJ

The district argues that the Commission lacks power to "alter[] the status quo to create public sector jobs for private sector applicants." As with the argument we addressed in the previous section, this argument fails to appreciate the fundamental fact that underlies Freeman's and Harris's claims: They allege that the school district (unquestionably a public employer) improperly denied them jobs working directly for the district (unquestionably public employment). They thus were not "private sector applicants" any more than would be anyone else seeking employment by a public employer. And Section 10(1)(c) of PERA explicitly covers discrimination "in regard to hire," MCL 423.210(1)(c), which necessarily reaches those who seek such employment.

When a public employer unlawfully discriminates in hiring, PERA's remedial provision allows us to order it to hire the affected applicant with back pay. That provision, Section 16(b), specifically directs us to require the employer "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act." MCL 423.216(b). The clearest way to "effectuate the policies of" PERA in a case like this is to place the applicants in the position in which they would have stood had the employer not unlawfully discriminated. And that requires an order that the employer offer to hire them in the same or substantially equivalent jobs with back pay and benefits—precisely what Judge Calderwood recommended.

Indeed, that is just the remedy we ordered for an unlawful refusal to hire in *Hazel Park Harness Raceway, Inc.*, 13 MPER ¶ 31006 (1999). The district notes that *Hazel Park* arose under the Labor and Mediation Act (LMA) rather than PERA, but that makes no difference. The LMA's remedial provision contains identical language to the relevant text of PERA Section 16. See MCL 423.23(2)(b) (LMA remedial provision) (Commission shall order the employer "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act"). To "effectuate the policies of" the statute in a hiring discrimination case under PERA requires the "affirmative action" of instatement with back pay, in just the way that the same "affirmative action" is necessary to "effectuate the policies of" the statute in a hiring discrimination case under the LMA.

The National Labor Relations Act contains virtually identical remedial language. See 29 USC § 160(c) (NLRA remedial provision) (Board shall order the employer "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter"). And the NLRB has approved the remedy of instatement with back pay in hiring discrimination cases under that statute. See *FES*, 331 NLRB 9, 12-14 (2000), supplemental decision 333 NLRB 66, (2001), enf'd 301 F3d 83 (3d Cir 2002). See also *Budget Heating & Cooling, Inc*, 332 NLRB No 132 (2000) and *Phelps Dodge Corp v NLRB*, 313 U.S. 177, 185-186 (1941). Once again, the federal analogy is instructive when we are called upon to construe similar language in PERA. See *Interurban Transit Partnership, supra*.

Candidly acknowledging "a paucity of precedent" to support its position, the district relies on our decision in *University of Michigan*, 15 MPER 33005 (2001). But that was not a hiring discrimination case. Nothing in our *University of Michigan* decision generally rejects the remedy of instatement with back pay. And certainly nothing in that decision states or even suggests that such a remedy is inappropriate in a hiring discrimination case. To the contrary, in *University of Michigan* we specifically said that we must find "the remedy which best satisfies our obligation to ensure that all parties are made whole and provides the most equitable and just relief possible under the circumstances." *Id.* Here, the equitable, just, make-whole remedy is to provide Freeman and Harris an offer of instatement with back pay.

3. The Evidence of Anti-Union Animus

The district argues that there was insufficient evidence to support Judge Calderwood's finding of anti-union animus. As we have recently explained, "[q]uestions of motive rest significantly on the credibility of witnesses." *Grand Rapids Employees Independent Union*, 33 MPER ¶ 41 (2020). And "we have emphasized that 'the ALJ is in the best position to observe and evaluate witness demeanor and judge the credibility of specific witnesses.'" *Grand Rapids Employees Independent Union*, ___ MPER ___ (Nov. 12, 2020) (opinion after remand) (quoting *City of Detroit*, 24 MPER 7 (2011)). Following the precedent of the Michigan courts, "we have stated that we 'will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary.'" *Id* (quoting *City of Detroit*).

Judge Calderwood found that the district had refused to hire Freeman and Harris because of their prior union activity. He rested that finding explicitly on determinations of witness credibility. He said that "[m]uch of the instant matter hinges upon whether Bradley's testimony was consistent and credible." He expressed his opinion that "Bradley's testimony was disjointed, self-serving, and full of gaps." And he ultimately "found Bradley not credible and/or found other witness testimony on the same issue more credible."

In particular, Bradley testified that he had not said that Freeman and Harris "stir the pot," but Gibbs testified that he in fact had used those words in a conversation with her. Judge

Calderwood found Gibbs's testimony more credible than Bradley's on this point. And he found it especially significant "that the statement was made while Gibbs and Bradley were discussing whether Freeman and Harris would be offered positions with the District." He also found it significant that "Bradley himself admitted to having been told stories regarding Charging Parties' activities as stewards." He thus found that "anti-union animus was a motivating factor" in Bradley's decision to recommend that Freeman and Harris not be hired.

As for the district's purported neutral explanations, Judge Calderwood found Bradley not to be credible on those issues, either. Because Bradley never actually checked Freeman's attendance records—and indeed appears to have misrepresented to the district's HR director precisely what he *had* reviewed during the process—Judge Calderwood did "not find Bradley credible with respect to his claim that Freeman either had attendance issues, that Cochran informed him of these alleged issues, or that he relied on the same when making his decision on her non-recommendation for hire." Judge Calderwood also noted that the district could have, but did not, called Cochran to testify as to what Freeman's attendance records *actually* said. He found "the absence of Cochran's testimony, as well as the lack of any actual evidence that Freeman had an attendance issue or even that Bradley was provided such information, both significant and compelling."

Regarding Harris's alleged impudence at her interview, Judge Calderwood found it "significant that Bradley had a difficult time at the hearing articulating with any semblance of specificity, what the questions were that offended him so greatly." Judge Calderwood specifically found Harris's recollection of her questions "demonstrably more credible than Bradley's," and he saw nothing offensive in those questions. Rather, Judge Calderwood found that Bradley's explanation was "pretextual" and that Bradley decided not to recommend Harris for hire because she, "as a steward, had dared to challenge him regarding his authority to view personnel files and that she had filed a grievance" recently.

The district objects to these findings. But its objections at most suggest that Judge Calderwood could have drawn different inferences from the testimony he observed. They do not in any way demonstrate that the inferences Judge Calderwood in fact drew were unreasonable or unwarranted. Much less do they provide the sort of "clear evidence" that is necessary to overturn an ALJ's credibility determination.

Indeed, some of the district's objections are simply beside the point. The district asserts that its "only concern was solving a pupil transportation crisis" and bringing its transit function back in house in the face of "full-blown sabotage" from its former contractor. Even if we grant that this was the district's preeminent motivation in managing the transition process overall, the district makes absolutely no effort to connect that motivation to the specific decisions at issue here—whether to hire Freeman and Harris.[2]

[2] The district does assert that the compressed nature of the transition process suggests that Bradley "may be forgiven for not remembering all details of Charging Parties' shortcomings." Judge Calderwood was certainly entitled to

The district relies principally on highly generic inferences that do not invalidate Judge Calderwood's specific findings. For example, the district asserts that it could not have been motivated by anti-union animus, both because all of the employees in its new transportation department were slated to be represented by an MEA bargaining unit and because Bradley himself had previously served as an AFSCME official. Perhaps these facts might have supported a finding that Bradley and the district lacked the relevant animus, but they could hardly have compelled such a finding. Nothing in PERA requires a showing of animus against *all* unions, or against unions in general. Nor is an individual's past service as a union officer necessarily inconsistent with that individual's having a present animus against a union—particularly a union with which he had *not* previously been affiliated. Judge Calderwood specifically found that Bradley had been motivated by Freeman and Harris's activities as Teamsters shop stewards. Neither the district's contract with the MEA nor Bradley's past work with AFSCME demonstrates that Judge Calderwood erred in that finding.

To similar effect is the district's argument that Judge Calderwood should not have credited the testimony of the two non-party witnesses supporting Freeman and Harris, because both were related to Freeman. Judge Calderwood was certainly entitled to consider this familial relationship as bearing on their credibility, but he was not required to discredit their testimony as a result.

The district also offers innocent interpretations of some of the key testimony on which Judge Calderwood relied. It asserts that Bradley's statement that Freeman and Harris "stir the pot" might simply have been criticizing "the substance of union activity" and thus is in itself "insufficient to be probative of anti-union animus." It asserts that "Bradley's admission that he had heard stories from others about Charging Parties' union activities" can be explained away on the same grounds. It asserts that Bradley's reaction to Harris's summer-route grievance, "without more, is irrelevant to the issue of anti-union animus." But nothing required Judge Calderwood to isolate each of these incidents from each other and from the rest of the testimony in the case. Taking them together and considering his own credibility judgments and the totality of the record, he found that they supported a finding that Bradley was motivated by anti-union animus. Although the record might also have supported a finding in the opposite direction, we see no basis for concluding that Judge Calderwood's finding lacked support.

As for the "treating their employees like cattle" grievance, the district argues that Judge Calderwood misconstrued Bradley's testimony. When Bradley said "[t]hat offended quite a few people," the district asserts, the word "that" referred to management's action of providing a tub filled with ice water—not to Freeman and Harris's action of filing a grievance. He was, in their interpretation, merely saying that quite a few workers were offended by the provision of ice water in lieu of a working refrigerator.

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consider this as a possible explanation for the gaps in Bradley's testimony, but he was hardly required to accept the district's view of the matter.

Again, though, this assertion does not provide a basis for overturning Judge Calderwood's findings. We have reviewed the relevant testimony, and the district's interpretation does not seem to us the most natural one. Rather, it appears from context that Bradley—who, after all, was describing what Durham managers had told him when they shared "stories" about Freeman and Harris's union activities—was saying that quite a few managers were offended at being accused of treating their workers like cattle. Even if we were to grant the premise that the antecedent of "that" is grammatically ambiguous in the relevant sentence, we could not substitute our resolution of that ambiguity for Judge Calderwood's. He "saw the witnesses, and we did not." *Grand Rapids Employees Independent Union*, 33 MPER 41. He was in a far better position than are we to figure out what the meaning of the word "that" is.

Finally, the district asserts that Bradley was rightfully offended by Harris's conduct in her interview. It interprets the record as demonstrating that "Ms. Harris accused Mr. Bradley, an older white male with whom she was barely acquainted, of being unable to deal with people of other racial backgrounds without additional sensitivity training." The district insinuates that such an action was obviously a neutral basis for refusing to hire Harris: "How that could be perceived by Mr. Bradley as insulting requires no elaboration." (True to its word, the district offers no elaboration).

One might say that what is insulting is the suggestion that in a 21st Century workplace an African-American woman should take special care to be deferential to "an older white male." But that is neither here nor there. Bradley and Harris did not provide identical testimony regarding what she said to him. Bradley testified that Harris had asked him two questions during the interview: "One—one was about diversity, how do I work in a diverse—in a diverse atmosphere, and there was a question about how I communicate with people I believe." He said it was "hard to remember" precisely what Harris had said, and that he didn't really understand—at least "[n]ot 100 percent"—what Harris had meant by "diverse," but that the question had made him "[k]ind of uncomfortable." He said, "That was a question if she wanted an answer, she could've come up to me afterwards and then asked me that."

For her part, Harris testified that it was Bradley who asked her whether she "had any suggestions or anything." (As anyone who has been to a job interview can attest, it is standard for interviewers to set aside some time at the end for the interviewee to ask questions and make statements.) In response to Bradley's opening, Harris testified that she "told him ever since I worked for Ypsi I always tried to make a suggestion to supervisors or whomever if they would have ethnic sensitivity course" to improve "communication" across diverse groups in the workforce.

As we have noted, Judge Calderwood found Harris's account of this conversation "demonstrably more credible than Bradley's." He found nothing in her statements plausibly offensive. And, crucially, he found that those statements are not what motivated Bradley to recommend refusing to hire Harris. We see no clear error in Judge Calderwood's determinations.

We explained in our recent *Grand Rapids* opinion that "the ALJ is the finder of fact on credibility questions, and … our review of those questions is limited to cases of clear error. Whether we would have made the same credibility determinations had we heard the witnesses is not the relevant question." *Grand Rapids Employees Independent Union* (decision after remand), *supra*. Judge Calderwood's findings are fully supported by the record.

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

Samuel R. Bagenstos, Commission Chair

Robert S. LaBrant, Commission Member

Tinamarie Pappas, Commission Member

Issued: January 12, 2021

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Thrun Law Firm, P.C., by Roy H. Henley, for the Respondent

Soldon McCoy, LLC, by Kyle A. McCoy, for the Charging Parties

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On August 20, 2019, the Teamsters Local 243 (Union), filed Case No. 19-H-1710-CE with the Michigan Employment Relations Commission (Commission) against the Ypsilanti Community Schools (Respondent or District) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. Case Nos. 20-A-0016-CE and 20-A-0017-CE were both filed on January 6, 2020, by Leslie Harris and Deanne Freeman, respectively. Pursuant to Section 16 of PERA, the charges were assigned to Administrative Law Judge Travis Calderwood for the Michigan Office of Administrative Hearings and Rules, acting on behalf of the

Commission. Pursuant to Rule 164 of the General Rules of the Employment Relations Commission, R 423.164, 2002 AACS; 2014 AACS, the three cases were consolidated.

The parties appeared before the undersigned on February 10, 2020, in Detroit, Michigan. Based upon the entire record, including the transcript of the hearing, the exhibits admitted into the record and the parties' post hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

Unfair Labor Practice Charges and Procedural History:

The Union's initial filing claims the Respondent violated Sections 10(1)(a) and (c) of the Act when it discriminatorily refused to hire two individuals previously employed by a private transportation contractor who had been providing transportation services to the the Respondent, because of their past protected activities while working with that contractor.

The charge was originally set to be heard on September 26, 2019. Upon request of the Union, the hearing was adjourned to October 22, 2019. The October 22, 2019, hearing was adjourned to November 19, 2019, at Respondent's request.

On October 28, 2019, the Respondent filed a motion seeking dismissal of the charge under Rule 165(2)(b), (d), and (f) of the Commission's Rules, R 423.165. On October 30, 2019, my office adjourned the November hearing without date and directed the Union to file a response to the motion; said response was timely filed on November 4, 2019. In an interim order issued on November 15, 2019, I denied the Respondent's motion for summary disposition.

On January 6, 2020, counsel for the Union filed Case Nos. 20-A-0016-CE and 20-A-0017-CE on behalf of Leslie Harris and Deanne Freeman respectively. These two charges repeat the allegations as alleged in 19-H-1710-CE but were filed in the individual names of both Harris and Freeman.[1] All three cases were consolidated and set to be heard on February 10, 2020.

At the beginning of the February 10, 2020, evidentiary hearing it was revealed that the Union was not the authorized bargaining representative for the bargaining unit that encompassed transportation employees working for the Respondent. Rather, the parties agreed that the relevant employees working in transportation roles were part of a unit represented by the Michigan Education Association. As such, I concluded that the unfair labor practice charge as filed by the Teamsters could not go forward. Additionally, because there was no dispute that neither Freeman nor Harris were ever actually employed by the Respondent during any period of time relevant to this dispute, and as such were not public

[1] In an email sent by the Union's counsel at the time of filing, the attorney explained:

> The limited purpose of these is probably no surprise: an effort, prior to the limitations period running out, to prevent dismissal for lack of standing. The charges include no new facts or remedial requests (i.e. no good reason not to join them with the existing charge's proceedings).

employees under PERA, neither could maintain their allegations under Section 10(1)(a) of the Act.[2] Accordingly, I instructed the parties that the only issues remaining under the consolidated charges were the Section 10(1)(c) allegations set forth individually by Freeman and Harris.

Findings of Fact:

Transportation Department Organizational Background

Prior to 2015, the District maintained its own in-house transportation department. Sometime in 2015, the District, seeking to save money by outsourcing its transportation needs, entered into a contract for transportation services with Durham Transportation Services, LP (Durham), a private company. Durham handled all aspects of the District's transportation needs, including employing drivers, monitors, and administrative staff, and all related fleet ownership and maintenance areas.

Durham and the Union were both parties to a collective bargaining agreement effective from 2018 and set to expire in 2021. Bus drivers and monitors were members of the bargaining unit covered under that agreement. Since at least 2018, Leslie Harris, a bus driver, and Deanne Freeman, a bus monitor, served as the Union's two elected stewards. Harris testified that during her time as steward she filed possibly twenty or more grievances. Both Harris and Freeman, like many other employees working for Durham and providing services to the District, had been previously employed directly by the District prior to the 2015 outsourcing.

Sometime in early 2019, the Respondent began to have concerns regarding the quality of service that Durham was providing. The issues regarding transportation continued to get worse and, on April 1, 2019, Respondent's Board of Education (Board) convened a "town hall" meeting where community members discussed and communicated their concerns regarding transportation with the Board. Shortly after the townhall, the Board authorized the issuance of a Request for Proposal (RFP) regarding its transportation needs.

At the May 20, 2019, Board meeting, representatives from the District's transportation consultant, National Bus, presented an update regarding the RFP responses. At that meeting, the consultants recommended that the District bring transportation services back in-house. The Board accepted that recommendation and the process began for the District to again handle its own transportation needs. Because the contract with Durham was set to expire on June 30, 2019, the handover from Durham to the District had to be completed by that date.

While the contract between the District and Durham was not set to expire until June 30, 2019, the record clearly indicates that the contractor was extremely uncooperative, and in some cases actually destructive and/or engaged in direct sabotage, with respect to the

[2] Unlike Section 10(1)(c), which includes under its protection job applicants, Section 10(1)(a) is explicitly applicable to public employees only, which neither Freeman nor Harris were at any time relevant to this proceeding.

District's attempt to bring transportation back under its control. At one point, District Superintendent, Alena Zachery-Ross received a letter from Durham indicating that the contractor was going to cease operations under the contract prior to June 30, 2019. According to Zachery-Ross, the District responded by threatening to impose "financial consequences" if Durham did in fact leave early. Regardless of the preceding threat, there is no question that Durham essentially refused to complete many of its obligations under their contract with the District following the District's decision.

Sometime around this time, Jerome Cochran, a Safety Supervisor working directly for Durham, began to also serve as Durham's representative to the District during the transition. According to witness testimony, this occurred because the prior Durham general manager had left. Other Durham administrative employees in addition to Cochran included Danielle Roberts, Theresa Davis, and Treesa Whitley. Eventually all four would become employed directly by the District.

On June 6, 2019, the District convened a transportation meeting for those individuals then-employed with Durham and who wished to transition their employment to the District. Zachery-Ross and Director of Human Resources, Sue McCarty, ran that meeting and discussed the District's hiring plan. Both Harris and Freeman, along with other members of the Union's bargaining unit, attended the meeting.

At the Board's June 10, 2019, meeting, the Board approved the appointment of William Bradley as the District's Transportation Director.[3] According to Bradley, his purpose as Transportation Director was to "develop, maintain and hire a transportation department capable of delivering 4,500 kids." Bradley had a long history in various transportation roles and had even worked for the District previously in the early 1980s. Bradley admitted that he was familiar with a "select few" of the Durham drivers and/or monitors because of a previous position he held with Willow Run Schools.[4] The record supports a finding that while Bradley was not brought on as the Transportation Director until June 10, 2019, he was present in some fashion prior to this date.

The record indicates that both Harris and Freeman attended the May 20, 2019, and June 10, 2019, Board meetings. Moreover, both testified that they routinely attended Board meetings and would always do so in their driver vests with Teamsters stickers, pins and badges attached. Harris, and possibly Freeman as well, introduced herself to Bradley at the June 10, 2019, Board meeting. This was the first time that Bradley had met either Charging Party. Bradley claimed that he did not know at that time that the two were stewards with the Union. When asked when he found out the two were stewards, Bradley testified that he learned the same "[t]hrough conversation probably shortly after [the June 10, 2019, Board meeting]."

[3] Bradley, while he was the Transportation Director during the time period relevant to this proceeding, was never a direct employee of the District. Rather Bradley's position was a contract position provided through an agreement between the District and a private company, Contract Administration for Responsible Education.

[4] Bradley worked for Willow Run Community Schools from 1984 to 1999. Around that time Willow Run merged with Ypsilanti Community Schools and Bradley left to work with another school district.

Teamsters Authorization Cards

In late May or early June, Harris, Freeman, and two Teamsters representatives, one from Local 243 and one from Local 214, the Teamsters public sector affiliate, were onsite at the premises utilized by the Transportation Department, passing out authorization cards. Shortly thereafter the two Teamsters reps were told to leave the building. Harris claimed that Cochran announced that he had been told by the District's superintendent that any driver or monitor that filled out a card would be fired. Gibbs also claimed that she was present when the Teamster representatives were at the transportation department passing out cards. According to Gibbs, Cochran said that "he was instructed that anybody who signed the papers would be fired." Both Zachery-Ross and McCarty denied ever making such a declaration, with the Superintendent further claiming that such a statement would not have come from any "administrator on [her] team."

Interviews

Interviews for District positions occurred very shortly after Bradley's appointment as Transportation Director. Bradley and Dale Goby, a consultant from National Bus, conducted the interviews. According to McCarty, prior to the interviews occurring, she met with Bradley and Goby to discuss the interview process and even provided them with a list of question and forms to use. Bradley stated that he and Goby asked the same questions of all the applicants.

One of the forms provided to Bradley and Goby was a recommendation form that had a space for the job applicant's name and a numerical score from 0 to 2. A rank of 2 meant the interviewers "strongly" recommended that individual for hiring, a rank of 1 indicated the interviewers thought the candidate should be questioned further before making a hiring decision, while a rank of 0 meant the candidate was not recommended for hiring. The record clearly indicates that while Bradley and Goby did the interviews and submitted their recommendation forms to McCarty, the actual decision to hire was made by McCarty. The record established that McCarty would hire those with a ranking of 2, would conduct follow-ups with those ranked 1, and declined to hire anyone with a ranking of 0. There is no indication that McCarty ever strayed from the recommendations made by Bradley and Goby.

The majority of the candidates interviewed by Bradley and Goby were Durham employees. According to Bradley, there were approximately twelve former Durham employees that were recommended as non-hires, with Freeman and Harris included in that group. Bradley testified that Cochran also provided the interviewers with letters of recommendation but that they never looked at them because they "didn't have time." Bradley also stated that he was not able to look at Durham's personnel files. Additionally, while Bradley initially claimed he used attendance information provided to him by Durham, he later clarified that statement and revealed that he never actually received an "attendance list" in hardcopy form, but rather relied on what Cochran had verbally told him. There is no indication that Bradley ever took any steps to verify the information provided to him by Cochran. Moreover, despite claiming during the hearing that the "attendance list" he

received was simply a word of mouth communication from Cochran, McCarty testified that Bradley had told her at that time that he "was checking the attendance records with Danielle [Roberts]."

Bradley also admitted that some Durham employees shared information with him about other Durham employees. With respect to Freeman, Bradley claimed:

> I know that people were -- there was individuals that were skeptical of her intentions as a steward, but it didn't bother me because I didn't have any reason to believe otherwise.

At the same time as he admitted the above, Bradley denied being offered any information from Durham employees regarding Harris. Despite the previous denial, Bradley at another time during questioning admitted to being told "stories" regarding the "steward activities" of both Freeman and Harris from Cochran and Roberts.[5] According to Bradley, at least one incident had "offended quite a few people."

Freeman Interview

As stated above, Freeman was one of a number of former Durham employees who interviewed for a position with the District and who were not recommended for hiring. Bradley, when asked why he did not recommend Freeman, with some uncertainty, pointed to alleged inconsistencies regarding her attendance while employed by Durham, stating:

> I'm sorry, it taxes my memory here. I believe there was a question brought in about her attendance because we asked everybody the same thing about their attendance.

After more prodding, Bradley testified that he believed there was a discrepancy between the number of absences Freeman indicated she had and the "attendance list" provided by Durham. When asked directly whether he was sure there was an "attendance problem" with Freeman, Bradley simply stated "yes." Further explaining his position with respect to Freeman's alleged attendance problem, Bradley stated:

> She told us that she was absent like a total – a certain amount of days, and then we asked Durham the -- if they would provide us a list of attendance for drivers for the past six months, and hers was exceeded over that.

Despite that claim, there is no indication that Bradley ever took any steps to verify the information provided to him regarding Freeman's attendance. Bradley further testified that while he spoke with Cochran about Freeman's "attendance records" he did not ask whether she had ever been disciplined as a result of her attendance.

[5] Bradley, in describing one of the stories, claims the discussion occurred sometime in July, after Durham had left, and both Cochran and Roberts had already become employees of the District.

Freeman, when testifying about her interview with Bradley and Goby, stated that she wore her driver's vest with Teamsters pins and/or stickers. Regarding the discussion surrounding her attendance, Freeman, in much greater recollection and clarity than Bradley recounted the discussion and stated:

> We discussed that if I have an attendance problem, I told him no. And then I went into telling him that for whole that the attendance had got wiped away, and that I -- when I do miss it would be for my union duties that I had to attend.

Regarding the "union duties" that would have caused her to be absent, Freeman stated she discussed with both interviewers that the duties included contract negotiations, grievances, and arbitration.

Harris Interview

Like Freeman, Harris was also not recommended for hiring by Bradley. According to Bradley, he did not recommend her for hiring because she started asking him questions at the end of the interview which he did not did not like, stating, "she was applying for a job and to sit there and turn around and start questioning me on my job is not what you do in an interview." Regarding what the offensive questions Harris asked of him, Bradley was not very clear on direct examination, instead testifying

> One -- one was about diversity, how do I work in a diverse in a diverse atmosphere, and there was a question about how I communicate with people I believe. I can't -- it's hard to remember. It was eight year -- eight months ago.

On cross-examination, Bradley, when again asked what Harris asked that left him uncomfortable, elaborated somewhat, stating:

> Just something you don't ask a person that you're conducting -- you're being interviewed by. You don't ask them about how they feel about everything else. That was a question if she wanted an answer, she could've come up to me afterwards and then asked me that.

Bradley also stated that Harris asked him "something along the lines about communicating with people."

Harris, who also wore her Teamsters vest to the interview, provided a more detailed account of the interview. Regarding the questions she asked of Bradley, Harris testified:

> He had asked did I have any suggestions or anything, and I told him ever since I worked for [the District] I always tried to make a suggestion to supervisors or whomever if they would have ethnic sensitivity course so that -- because the ages are -- you have 18 year old, you have 20, 30, 40, you have people at retirement ages. So that it would bridge the gap so that you -- you know, some

> people are offended by the word boss or whatever the little idiosyncrasies are. And then that way it could bridge the gap and then you have less -- you have less of a lack of communication between people of different ages and you know, and along those lines.

Harris claimed that neither Bradley nor Goby offered any indication that her comments were improper. Harris went on to state that Bradley told her, during the interview, that he would review the Durham employees' attendance, drug tests, and personnel files as part of the interview process. Harris claims she challenged Bradly on his authority to look at the file without the employee's permission. According to Harris, Bradley in responding to her challenge stated, "[A]ny time someone said that their attendance was okay, then it gave them permission to go into those files…" Bradley, without qualification, denied ever indicating to anyone that he would look at their Durham personnel files.

Conversations with Angela Gibbs and Alexis Freeman

At some point following the interviews, Angela Gibbs, a driver who had previously worked with Bradley and who would go on to be hired by the District, met with him to discuss Freeman. According to Bradley, this interaction occurred sometime prior to him submitting the names for hiring or non-hiring to McCarty. Gibbs testified that she initiated the conversation with Bradley after she learned that Freeman had not received any assignment for summer runs. She claims she approached Bradley and asked about Freeman's status. According to Gibbs, Bradley responded by saying not everybody was getting called back. Following further discussion, Gibbs claims that Bradley explained to her that he had been told that Freeman and Harris "stir the pot." Bradley claimed he could not recall ever using the phrase "stir the pot."

Another driver, Alexis Freeman, the daughter of Charging Party Freeman and niece to Gibbs, claims that she too had a discussion on two separate occasions with Bradley regarding the decision not to hire Freeman and Harris. During the first conversation which occurred sometime in mid-July, the younger Freeman claims that she told Bradley that he should make the decision regarding hiring Harris and her mother based upon their interviews and not their Union duties or what he might have heard about the two. In describing Bradley's reaction, she stated "his response was he didn't make any decisions at first, but he did tell me that Ms. Harris rubbed him the wrong way in his interview." She stated he did not elaborate as to what Harris had done during the interview. She claimed that Charging Party Freeman's attendance was not discussed during that interaction. Bradley admitted that at the time of this conversation a final decision with respect to hiring Harris had already been made.

The second encounter between Alexis Freeman and Bradley occurred sometime in July or August after she had been discussing how upset she was over the fact that neither Harris nor Freeman were hired back with the other transportation employees. Bradley then called her into his office. She went on to describe a portion of that conversation as follows:

> He goes on to tell me there was a list that he got from Jerome Cochran. He never stated that it was written list, but he just said a list of people that weren't

> hired. He asked for a -- he asked him for a letter of recommendation, and they brought him a letter of people they didn't want to hire.

When asked whether Bradley told her if either Charging Party was on that list, she stated that while he never actually stated such, "he insinuated that they were on the list." She went on to claim that Bradley told her that he went to the Administration building to "fight for Ms. Freeman's job because she had a good interview… and they wouldn't budge." Bradley denied making that statement. The younger Freeman also claimed that during this conversation she discussed Charging Party Freeman's activities with the Union, telling him, "that if she did anything that would have rubbed him -- the office staff the wrong way, it was because it was union work." Regarding Charging Party Freeman's attendance, the younger Freeman claimed that Bradley told her that he was not allowed to see Durham's attendance records and that the information he had received was "word of mouth."

Summer Route Grievance

On June 20, 2019, Harris filed a grievance over the scheduling of the summer routes. According to her, summer route assignment was supposed to occur according to seniority under the contract between Durham and the Teamsters and that the stewards were supposed to participate in the process, but that this was not being done. On June 24, 2019, she went into the facility to see the route assignments. Instead she ended up meeting with Bradley. Near the end of the discussion, Harris claims Bradley told her, "I don't have to hire anyone back, and I don't have to hire you." Harris further testified that at some point Bradley told her, "It's MEA or nothing." She then left the meeting. Bradley, during his testimony, described the interaction and stated:

> I brought Ms. Harris into the Durham office with the person that was overseeing Durham employees, informed her that her grievance by the Teamsters was under contract with Durham and not with Ypsilanti Schools, and that her grievance would be -- it didn't have any merit, and that she needed to take it up with Durham.

Bradly denied making the comments regarding hiring that Harris attributed to him.

Credibility Determination and Witness Appearances

Much of the instant matter hinges upon whether Bradley's testimony was consistent and credible. It is the opinion of the undersigned that Bradley's testimony was disjointed, self-serving, and full of gaps. Additionally, while it is true that Bradley was no longer employed by the District at the time of the hearing and that both sides subpoenaed his attendance, Bradley did admit to discussing his testimony with representatives from the Respondent, including McCarty and Respondent's attorney. However, Respondent either chose not to or simply neglected to secure testimony that, in theory, could have corroborated Bradley's many assertions and claims, Accordingly, I found Bradley not credible and/or found other witness testimony on the same issue more credible.

Discussion and Conclusions of Law:

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." While it is indisputable that neither Freeman nor Harris were public employees under PERA at the time of the alleged unlawful acts, the fact remains that Section 10(1)(c) of the Act, by its inclusion of the word "hire", appears to explicitly protect job applicants by making it unlawful for an employer to refuse to hire individuals for the purpose of encouraging or discouraging union activity. Moreover, under PERA, the term "employer" means an entity that has the power and responsibility to, among other things, "select and engage the employee." *Wayne Co Civil Service Comm v Wayne Co Bd of Supervisors*, 22 Mich App 287, 294 (1970), rev'd in part on other grounds 384 Mich 363 (1971). As such, it remains clear to the undersigned that Freeman and Harris, while not public employees during the period of time relevant to their charge, nonetheless, as applicants for employment with a public employer, are protected under Section 10(1)(c) of the Act.

In order to establish a prima facie case of unlawful discrimination under Section 10(1)(c) of the Act, a charging party must show an adverse employment action and the following: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory action. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). Moreover, it is well settled that when a respondent's purported motives for its actions are found to be without merit or credibility, the Commission may properly infer from the totality of the circumstances that the employer was motivated by antiunion animus, even in the absence of direct evidence. *Detroit Public Schools*, 30 MPER 2 (2016).

Regarding the level of evidence required, a charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Michigan Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). An essential element of a discrimination claim under PERA is anti-union animus. Where a charging party has alleged that the employer has taken adverse action that was motivated by anti-union animus, the charging party must demonstrate that protected concerted activity was a motivating or substantial factor in the respondent's decision to take the action about which the charging party has complained. *Schoolcraft College Ass'n of Office Personnel, MESPA v Schoolcraft Cmty College*, 156 Mich App 754, 763 (1986). With respect to an employer, once the burden has shifted, a respondent must do more than merely proffer a legitimate reason for its action. Rather, its claimed reason(s) must be factually supported to avoid an inference that the alleged justification is a pretext. See *Mecosta-Osceola Intermediate School District*, 1992 MERC Lab Op 216.

There can be no dispute that Respondent's failure to hire either Freeman or Harris constituted an adverse employment action. It is also clear to the undersigned that the Charging Parties had engaged in protected activity of which the Bradley was aware. Both Freeman and Harris were stewards for the Teamsters while employed at Durham, a fact that Bradley admitted, albeit be grudgingly, to learning of sometime after assuming the position of Transportation Director and before beginning interviews for the open positions with the District. Moreover, the record is rife with other examples establishing Bradley's knowledge of their status with the Teamsters, including the grievance filed in late June which Bradley would later discuss with Harris.

The Charging Parties have also provided enough evidence to anti-union animus on the part of Bradley and that said animus was a motivating factor that guided his decision to effectively recommend both Freeman and Harris as non-hires. First, while Bradley denied ever using the term "stir the pot", I find the testimony provided by Gibbs asserting that he did in fact use that phrase to describe both Charging Parties credible and discount Bradley's claims otherwise. Adding to the significance of that statement with respect to animus, I note that the statement was made while Gibbs and Bradley were discussing whether Freeman and Harris would be offered positions with the District. Additionally, I find it significant that Bradley himself admitted to having been told stories regarding Charging Parties' activities as stewards by other Durham employees.

Accepting that Charging Parties' have met their initial burden of proof regarding the alleged violation of 10(1)(c) of PERA, the next step is to analyze whether the Respondent provided credible evidence of a lawful motive for Bradley's decision not to recommend the Charging Parties for hiring. Here, with respect to Freeman, the only reason Bradley could point to as to why she was not recommended was in relation to her attendance. Bradley in his initial testimony claimed that he was provided an "attendance list" and at one point even told McCarty that he was "checking attendance records with Danielle [Roberts]." What actually occurred, however, was quite different. Bradley never actually received an attendance list, but rather the record clearly establishes that he relied on what Cochran told him with respect to Freeman's purported attendance issues. Moreover, as revealed by McCarty's testimony, Bradley misrepresented what he was actually reviewing when speaking to her during the process. For these reasons, I do not find Bradley credible with respect to his claim that Freeman either had attendance issues, that Cochran informed him of these alleged issues, or that he relied on the same when making his decision on her non-recommendation for hire.[6] There is no question that Freeman and Bradley discussed her attendance during the interview; however, given that I find Freeman credible with respect to what was discussed, i.e., that she had excused absences and that a portion of her absences

[6] I further note that the Respondent had the luxury of speaking with Bradley regarding his testimony prior to the hearing and could have called Cochran, a current employee, at the hearing or moved to reopen the record following the hearing in order to attempt to bolster and/or corroborate Bradley's testimony. I find the absence of Cochran's testimony, as well as the lack of any actual evidence that Freeman had an attendance issue or even that Bradley was provided such information, both significant and compelling. Our Commission has held that an adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if he may reasonably be assumed to be favorably disposed to the party. *Co of Ionia and 64A Dist Court*, 1999 MERC Lab Op 523.

were based upon her duties as a steward, I find that the attendance issues identified by Bradley were pretextual and that a reasonable inference, on the totality of the evidence, can be made that his decision was based on animus towards absences caused by union activity.[7]

With respect to Harris, Bradley claimed that the steward's questions to him near the end of her interview were what soured him on recommending her for hire. I find it significant that Bradley had a difficult time at the hearing articulating with any semblance of specificity, what the questions were that offended him so greatly.[8] Harris admitted to asking questions of Bradley, however, her recollection of said questions, which I find demonstrably more credible than Bradley's, indicates that the questions were not of sort that anyone in Bradley's position should have found as offensive, as he attempted to claim. Also notable is the fact that Harris, credibly and with detail, testified that not only did Bradley claim he was looking at their personnel files, but that she challenged him on that fact. As such I find Bradley's claimed reasons for his decision to not recommend Harris for employment to be pretextual and that a reasonable inference may be drawn, on the totality of the evidence, that Bradley's decision was instead based on the fact that Harris, as a steward, had dared to challenge him regarding his authority to view personnel files and that she had filed a grievance close in time to Bradley's decision regarding her hiring.

Regarding the appropriate remedy, Charging Parties correctly note that in situations where an employer has been found to have violated Section 10(1)(c), the typical relief under PERA includes a "make whole" order. In this case, in addition to a notice posting, Charging Parties are seeking to have Respondent hire both Freeman and Harris and to pay the back wages the two lost by nature of the Respondent unlawfully refusing to hire them in July of 2019. Respondent argues, in its brief, that the Commission lacks the authority necessary to require it to hire the Charging Parties. According to Respondent, citing to *City of Lansing*, 15 MPER 33019 (2001), "[s]uch use of positive injunctive authority to alter the status quo to benefit private sector employees, and ultimately to protect private sector union activity, neither falls within PERA's purpose, or within [the Commission's] jurisdiction." Respondent's reliance on that case though is misguided. In that case, the Commission was faced with two private sector employers pursuing an unfair labor practice charge against the City of Lansing on behalf of the private employers' own employees who were working for the City on a contract basis. Such a scenario is clearly distinguishable from the situation present herein. In fact, there is Commission precedent supporting the issuance of an order requiring that Charging Parties be hired. In *Hazel Park Harness Raceway*, Case No. C96 C-052, issued on December 21, 2001, the Commission, albeit under PERA's sister statute, the Labor and Mediation Act (LMA), ordered that the employer, after being found to have violated the LMA's prohibition on discrimination with respect to hiring, offer to hire several

[7] I also find significant, if I were to accept Bradley's claim that Cochran did in fact communicate something regarding Freeman's attendance, that Bradley never took any step to verify that information. In this regard, if true, this further supports the idea that Bradley was looking for any excuse to exclude Harris based upon animus towards absences she had incurred in her role as a steward.

[8] Here to, like Freeman's attendance issue, Respondent could have called another witness, Goby, to corroborate and/or bolster's Bradley's claim.

individuals who had been unlawfully denied employment.[9] Moreover, the National Labor Relations Board has long considered offering instatement to an applicant denied employment because of an employer's unlawful discrimination based on union animus to be the appropriate remedy. See *FES*, 331 NLRB 9, 12-14 (2000), supplemental decision 333 NLRB N. 8 (2001), *enf'd* 301 F3d 83 (3d Cir 2002). See also *Budget Heating & Cooling, Inc*, 332 NLRB No 132 (2000).

In the instant case, the record provides overwhelming support for the conclusion that the reason both Harris and Freeman were passed over for employment was because of Bradley's animus towards their activities as stewards while employed with Durham. While both women fell outside the protection of PERA while employed by Durham with respect to unfair labor practices committed by the private employer, the moment they applied for and were being considered for employment by the Respondent, they clearly and unequivocally fell under the protective scope of Section 10(1)(c) of PERA as it related to discriminatory hiring decisions. In the same respect that ordering reinstatement and back pay for an employee unlawfully terminated in violation of Section 10(1)(c) effectuates the purpose of the Act, so to must an applicant, denied employment unlawfully under that same section, be offered employment and be paid back pay in order to effectuate the exact same purpose.

I have carefully considered all other arguments as set forth by the parties in this matter and conclude that they do not warrant any change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by the Teamsters Local 243, Case No. 19-H-1710-CE, is hereby dismissed in its entirety. With respect to the unfair labor practice charges filed by Leslie Harris and Deanne Freeman, Case Nos. 20-A-0016-CE and 20-A-0017-CE respectively, Respondent Ypsilanti Community Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from discriminating against applicants in regard to hiring decisions, because of prior membership in a labor organization or other concerted activities protected by Section 9 of PERA.

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

    a. Within fourteen days of the date of this order, offer to hire Deanne Freeman and Leslie Harris into the jobs for which they applied, or substantially equivalent employment, without prejudice to any rights and privileges previously enjoyed and make them whole for any loss of pay and benefits suffered as a result of the discrimination practiced against

[9] While PERA and the LMA statutes differ in terms of organizational structure, Section 16 of the LMA, the relevant comparable prohibition on an employer's conduct, is identical in nature to Section 10(1)(c) of PERA.

them, less interim earnings, plus interest at the statutory rate from July 1, 2019, through the present.

b. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Date: May 28, 2020

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) ON AN UNFAIR LABOR PRACTICE CHARGE FILED BY **DEANNE FREEMAN AND LESLIE HARRIS**, THE COMMISSION HAS FOUND THE **YPSILANTI COMMUNITY SCHOOLS** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE 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 discriminating against applicants in regard to hiring decisions, because of prior membership in a labor organization or other concerted activities protected by Section 9 of PERA.

WE WILL, in order to effectuate the purposes of the Act, within fourteen days of the date of this order, offer to hire Deanne Freeman and Leslie Harris in the jobs for which they applied, or substantially equivalent employment, without prejudice to any rights and privileges previously enjoyed and make them whole for any loss of pay and benefits suffered as a result of the discrimination practiced against them, less interim earnings, plus interest at the statutory rate from July 1, 2019, through the present.

YPSILANTI COMMUNITY SCHOOLS

By: _____

Title: _____

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 Nos. 19-H-1710-CE, 20-A-0016-CE and 20-A-0017-CE