STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION,
Labor Organization-Respondent,

MERC Case No. CU18 E-009

-and-

TATYANA FORD,
An Individual Charging Party.
_____/

APPEARANCES:

Kalniz, Iorio & Reardon Co., L.P.A., by Fil Iorio, for Respondent

Tatyana Ford, appearing on her own behalf

DECISION AND ORDER

This case involves the 2018 decision of the Grand Rapids Employees Independent Union (which we refer to as GREIU or the Union) to expel Tatyana Ford from its ranks. Ford claims that the Union expelled her in retaliation for filing unfair labor practice charges against it two years earlier in Cases CU16 J-054 and CU16 J-055. In those cases, Ford had alleged, respectively, that GREIU violated provisions of its internal union constitution and breached its duty of fair representation by failing to advance a grievance filed over a one-day suspension she received from her employer. GREIU tells a very different story. It asserts that it expelled her for filing unsubstantiated allegations of embezzlement against Union leadership with the local police.

This is our second time considering Ford's current unfair labor practice charge. In his first ruling on this matter, Administrative Law Judge Travis Calderwood concluded that there was no "relevant and admissible evidence that could support a finding that [Ford's] expulsion was in retaliation for her filing of the prior unfair labor practice charges." Judge Calderwood accordingly recommended that we summarily dismiss the retaliation charge.

In our first ruling, issued on January 8, 2020, we concluded that summary disposition was inappropriate. We concluded that "there was sufficient evidence from which a finder of fact *could* have determined that Ford's expulsion was motivated by her filing of unfair labor practice charges." *Grand Rapids Employees Independent Union*, 33 MPER 41 (2020). But we also "emphasize[d] that we do not believe that a finder of fact was *required* to make such a determination." *Id.* Because "[q]uestions of motive rest significantly on the credibility of witnesses"—particularly "where, as here, reasonable factfinders could draw multiple, conflicting

inferences from the testimony"—we "remand[ed] so that the ALJ can make findings of fact, with a particular focus on witness credibility." *Id.*

In his decision and recommended order on remand,[1] issued on January 22, 2020, Judge Calderwood considered the full hearing record and made factual findings as we had ordered. He found credible the testimony that the Union's internal actions against Ford had been motivated by Ford's taking unsubstantiated embezzlement allegations to the police. The ALJ likewise found credible the testimony that the harsher penalty imposed on Ford as compared to other union members involved in the embezzlement allegations was motivated by the assessment that Ford was the "ringleader" of that effort. The ALJ did not find credible the claim that the Union had been motivated by Ford's prior filing of unfair labor practice charges. Because we find no basis in either law or fact for overturning the ALJ's credibility determinations, we dismiss the current charge.

Facts:[2]

Tatyana Ford works for the City of Grand Rapids. She is a member of a bargaining unit represented by the GREIU. It is fair to say that her relationship with union leadership has not been a smooth one. In October 2016, she filed two unfair labor practice charges against the Union: one for allegedly violating various provisions of the union constitution, the other for failing to take one of her grievances to arbitration. A few months later, Ford filed a complaint with the Wyoming Police Department alleging that six elected officers of the Union had embezzled funds from its treasury. Ford filed that complaint on March 27, 2017, along with three other GREIU members: Lucia Anderson, Rich Troeger, and Mark Anderson. She and Troeger returned to the police with additional information, including, but not limited to, internal union records, on April 19 of that year.

Union leadership learned of the embezzlement complaint on October 2, 2017, when an officer of the Wyoming Police Department reached out to GREIU President Ken Godwin to discuss it. The next day, the Union's Executive Board met to address the matter. At the meeting, Board members identified Ford and Troeger as the people who filed the embezzlement allegations. Claiming that the filing of false embezzlement charges breached her duty to the GREIU, several Board members filed internal Union charges against Ford on October 30. A GREIU Hearing Board dismissed those charges on December 27.

In the meantime, on December 19, 2017, Administrative Law Judge David Peltz issued his ruling on Ford's then-pending unfair labor practice charges in Cases CU16 J-054 and CU16 J-055. He recommended that the charges be dismissed. (We affirmed on May 17, 2018, after the events at issue here had transpired.)

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[1] MOAHR Hearing Docket No. 18-009133

[2] Judge Calderwood's two decisions and recommended orders in this matter contain an extensive summary of the facts as developed at the hearing. We adopt those facts and simply provide, by way of reiteration, the facts necessary to explain our decision.

On February 1, 2018, just over a month later, the GREIU held a general membership meeting. Member-at-Large Al Brock discussed Judge Peltz's decision with the other members. Kevin Hines spoke up. Although there was no transcript of the meeting, Hines apparently used the phrase "acting in malice" or "malicious prosecution" to refer to Ford's prior unfair labor practice charges.

Brock had earlier requested the investigative file from the Wyoming Police Department regarding the embezzlement allegations against the Union. On February 6, 2018, less than a week after the February general meeting, Brock received a partially redacted case report from the Department. That report described in detail the allegations Ford, Troeger, and Lucia and Mark Anderson had made against the Union; the visits that they had made to the police to press those allegations on March 27, April 19, and October 4, 2017; and the various documents they had provided to the investigating officer. The police complaint had alleged that the following union officers might have engaged in embezzlement: Terry Togood, President during the relevant period; Joe Casalina, a prior President; Frank Dietz, a 1st Vice President; Lisa Angus, a 2nd Vice President; Jill Casalina, a Union Secretary, and Brock.

The report also described an October 13 meeting between the investigating officer and Union President Ken Godwin. In that meeting, Godwin said that in February 2017 the Union had established an internal audit committee, chaired by Lucia Anderson, "due to Tatyana's claims." The audit committee "came up with about $600 of unaccounted money." As a result of the findings, Godwin said, the Union had implemented a new process for renting out its hall, in which it would accept rental fees only by PayPal. Following the October 13 meeting, the Wyoming Police Department closed the investigation, because "GREIU has changed their practices in the hope that this will not occur again."

Around February 18, 2018, Brock and Angus brought new internal Union charges against Ford, Troeger, and Mark and Lucia Anderson. Specifically referring to the information received from the Wyoming Police Department, the charges identified February 7, 2018, as the "date of discovery" of the violation of Union rules on which the charges were based.

The Union convened a Hearing Board to consider the charges. It appointed Kevin Hines, Pat Tate and Ted Jensen to serve as the members of that Board. Although Ford received notice that the hearing would take place on March 20, 2018, she did not appear. Following deliberations, the Hearing Board unanimously voted to expel Ford from the Union for life and to expel Troeger, Anderson, and Anderson for three years each while barring them for life from holding Union office. As Hines later explained in the hearing before Judge Calderwood, the Board decided to impose a harsher punishment on Ford than the others because the Board believed that she was "basically behind the effort to take the documents from our union, to provide them to the police, and that [she] accused people, that [she was] the ringleader basically." Although "[o]ther people participated," the Hearing Board concluded that Ford was "the main person" who "falsely accused our members of embezzlement."

On April 18, 2018, the Executive Board upheld the decision to expel Ford from the Union.

Discussion and Conclusions of Law:

In our prior opinion in this case, we described the relevant legal principles as follows (*Grand Rapids Employees Independent Union*, *supra*):

> If the Union expelled Ford for going to the police, it might have breached an ethical norm, the Union's own internal policies, or even a legal duty that lies outside of our jurisdiction. But it did not violate any law that we are charged with enforcing. If the Union expelled Ford for filing unfair labor practice charges, however, it violated the PERA under our decision in *Amalgamated Transit Union, Local 26*, 30 MPER 22 (2016).

Reversing Judge Calderwood's recommendation to grant summary disposition, we concluded that the hearing record "contains sufficient evidence from which a factfinder could infer that the Union's action was motivated by the filing of the unfair labor practice charges." *Id.* In particular, we pointed to the timing of the Union's actions and to the presence of Hines on the Hearing Board that ultimately voted to expel Ford:

> [T]he Union initiated proceedings to discipline Ford shortly after the ALJ decision in her unfair labor practice proceedings—and shortly after a membership meeting in which that ALJ decision was explicitly discussed. At that meeting, Kevin Hines used the phrase "acting in malice" or "malicious prosecution" to refer to those unfair labor practice proceedings. The disciplinary proceedings were initiated less than three weeks after that meeting, and the Union appointed Hines to serve on the hearing board that would preside over them.

Id.

But, we noted, that was not the end of the story. We explained that under the National Labor Relations Board's decision in *Wright Line*, 251 NLRB 1083 (1980)—which employed a burden-shifting approach that we have adopted in our own PERA retaliation cases—"Ford must carry the burden of proving that her prior unfair labor practice charges were a reason that the Union imposed its discipline on her." *Grand Rapids Employees Independent Union*, *supra;* At that point, the Union must have "the opportunity to avoid liability by showing that it would have made the same decision in the absence of the retaliatory motive." *Id.* We concluded that there was sufficient evidence to support the Union's position on each of these questions. We found "ample evidence supporting the Union's position that," rather than expelling her in retaliation for her unfair labor practice charges, "it instead acted because of Ford's taking internal Union documents to the police on (what Union officials believed to be false) embezzlement charges—charges that were ultimately not prosecuted." *Id.* And even if retaliation formed a *part* of the motivation for the Union's action, we determined that "a factfinder could readily conclude that [the Union] would

have made the same decision even if the prior unfair labor practice charges had not been in the mix." *Id. See also, MESPA v. Evart Pub Schools,* 125 Mich App 71, 74 (1983).

In support of this conclusion, we pointed to Hines's testimony at the ALJ hearing "that Ford's decision to bring embezzlement charges to the police had caused serious harm to the Union." *Id.* We quoted Hines's statements "that Ford had 'ruined the reputation' of the 'entire union'. People wanted to leave. People didn't want to go to our union anymore." *Id.* And we quoted his suggestion that Ford's actions "had caused psychological injury to the accused union members who feared that they 'could have went to prison.'" *Id.* Although the Union imposed on Ford a more severe punishment than it imposed on the others who brought the embezzlement charges, we noted that it had imposed quite serious punishments on those other members—"expel[ing] them from the Union for three years and barr[ing] them for life from serving in Union office." *Id.* We said that the imposition of "such severe sanctions on them—and not just on Ford—supports the conclusion that the motivation for the disciplinary proceeding was their going to the police not Ford's prior unfair labor practice charges." *Id.* We also concluded that Hines's testimony that Ford was the "ringleader" of those who brought the embezzlement charges would—if credited by the ALJ—sufficiently explain why the "more severe punishment" she received would have been imposed even absent any retaliatory motive on the Union's part or protected activity on Ford's part. *Id.*

We further note that although the timing of GREIU's expulsion of Ford was suspect, the mere existence of suspicious timing is, standing alone, insufficient to establish that the adverse action was the result of unlawful animus or retaliation. *Univ. of Mich. Health System,* 33 MPER 17 (2019); *Southfield Public Schools, 22 MPER 26* (2009) ("A temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between the protected activity and the adverse action for there to be a violation.") Because conflicting inferences could be drawn from the testimony at the hearing, and Judge Calderwood, in resolving this case via summary disposition, had failed to render factual determinations flowing from those inferences, we remanded for him to "make findings of fact, with a particular focus on witness credibility." *Grand Rapids Employees Independent Union*, *supra.*

On remand, Judge Calderwood followed our instructions to the letter. Reviewing the testimony presented at the hearing before him, Judge Calderwood found "no credible evidence that there was bias against [Ford] based on her prior unfair labor practice charges." [p.5]. He also found "no unlawful disparate treatment" of Ford as compared with "the other three individuals involved with making the allegations to the Wyoming Police." [p. 5]. In making these findings, he relied heavily on his judgments regarding witness credibility. "Given Hines' demeanor and candor," Judge Calderwood found credible Hines's testimony that his statements regarding "malice" or "malicious prosecution" at the Union's general meeting were merely intended to ask whether Ford's charges had been frivolous and did not indicate any intent to retaliate against her because of them. [p. 5]. Judge Calderwood found "particularly credible Hines' claims that at no point during the hearing or the Panel's deliberation was the subject of [Ford's] prior unfair labor practice charges discussed." [p. 5]. Rather, he found, Hines "clearly, credibly, and consistently

testified that it was the panel's unanimous decision that [Ford] appeared to be the 'ringleader' while the other three members charged were simply 'accomplices.'" [p. 5]. And he found that "each of the Union leaders" who appeared before him "consistently and credibly testified that" Ford's "unauthorized delivering of internal Union documents" in connection with ultimately "unsubstantiated" embezzlement allegations constituted "extremely egregious" acts. [p. 5].

In light of these findings, Judge Calderwood concluded that Ford had not met her burden of showing that her unfair labor practice charges had been a motivating factor in her expulsion from the Union. He further stated that even if he were to conclude that Ford *had* met her initial burden, "the testimony provided by Hines, Brock and Angus, clearly and credibly establishes" that Ford's expulsion "was not motivated by an unlawful retaliation in violation of PERA, but was instead motivated by a reaction to [Ford's] alleged spear-heading of the effort to deliver internal Union documents to the Wyoming Police Department without authorization and make embezzlement allegations that ultimately proved in the opinion of the investigators unsubstantiated." [p. 6 n.2].

As the analysis in our prior opinion makes clear, these findings are fully supported by the record. Had Judge Calderwood made the opposite findings regarding witness credibility as it related to the Union's motive, we think those findings would likely have been supported by the record as well. As we held in our prior opinion, "[q]uestions of motive rest significantly on the credibility of witnesses." *Grand Rapids Employees Independent Union*, *supra*. 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." *City of Detroit*, 24 MPER 7 (2011).

The Michigan courts have emphasized the same point. In *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc.*, 393 Mich 116; 223 NW2d 283 (1974), for example, the Michigan Supreme Court overturned one of our decisions as unsupported by substantial evidence where we had rejected the trial examiner's findings regarding anti-union animus. Noting "the unique opportunity of the trial examiner to weigh the testimony of witnesses," the Court refused "to ignore the determination as to credibility of the only decision-maker to hear testimony firsthand and, in effect, credit the contrary determination of the" Commission. *Id.* at 127; 223 NW2d at 289. In *City of Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 554; 517 NW2d 240, 247 (1994), the Court of Appeals similarly overturned one of our decisions for failing to "give due deference to the review conducted by the referee, in particular with respect to the findings of credibility." Following these principles, we have stated that we "will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary." *City of Detroit*, 24 MPER 7, *supra*.

Applying this stringent standard, we conclude that there is no "clear evidence" supporting a basis upon which to reverse Judge Calderwood's credibility determinations, and, accordingly, that there is a lack of evidence upon which to conclude that the Union violated PERA. In light of the analysis in our prior opinion, and Judge Calderwood's specific credibility findings, we affirm his decision on remand.

Our dissenting colleague disagrees. He contends that the record demonstrates that the Union *did* act with the motive to retaliate against Ford for her prior unfair labor practice charges. But our colleague disregards both the applicable standard of review and our prior decision in this matter. As we held in our earlier decision, the record contained "sufficient evidence from which a finder of fact *could* have determined that Ford's expulsion was motivated by her filing of unfair labor practice charges." *Grand Rapids Employees Independent Union*, *supra*. But we specifically emphasized that a finder of fact was not "*required* to make such a determination," and that there was "ample evidence in the record" supporting the Union's position that its expulsion "w[as] motivated by Ford's actions with the local police." *Id.* The record before us today is precisely the same as was the record before us then. We specifically recognized that "this matter turns on witness credibility," and we remanded for Judge Calderwood to make credibility determinations. *Id.* We recognized that "the ALJ saw the witnesses, and we did not." *Id.*

Having joined our earlier decision in this matter requiring Judge Calderwood to make credibility determinations based on the testimony in the record, our dissenting colleague now takes the position that it is for *us* to judge, on a cold transcript, which witnesses were credible. Not only does this shift in position come too late; it also flies in the face of our own prior case law (exemplified by our own *City of Detroit* decision, *supra*), and the case law of the Michigan courts (exemplified by the Court of Appeals' *Detroit Fire Fighters* decision, *supra*, and the Supreme Court's *Detroit Symphony Orchestra* decision, *supra*). Those cases make clear that the ALJ is the finder of fact on credibility questions, and that 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. The question is whether Judge Calderwood had support for the credibility determinations he made. Our earlier opinion concluded that there was adequate evidence to support a finding in *either* direction in this case. Our review of the decision on remand convinces us that we were correct the first time.

We have also considered all other arguments submitted by the Parties and conclude that they would not change the result in this case.[3]

[3] The Union notes, correctly, that Ford's exceptions and brief fail to comply with R 423.176(4) and (5). As we explained in *City of Detroit (Fire Dept)*, No. 19-C-0479-CE (Oct 22, 2020), we have previously considered non-compliant exceptions filed by pro se parties—at least "to the extent we were able to discern the issues on which the excepting party has requested review." Because Ford filed her exceptions without the benefit of counsel, and we entertained her prior appeal in this case without putting her on notice of her noncompliance, we have followed that practice here. But, as we emphasized in our recent *City of Detroit* decision, "in the future we reserve the right to reject exceptions filed by a party represented by legal counsel where the exceptions fail to comply with the requirements of the rule, regardless of whether we are otherwise able to discern the issues on which review is requested." To the extent that we are able to discern the nature of Ford's exceptions—and to the extent that they address issues cognizable under PERA—they appear primarily to take issue with the ALJ's credibility determinations. Accordingly, we focus on those determinations in our opinion.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Samuel R. Bagenstos, Commission Chair

Tinamarie Pappas, Commission Member

Issued: November 12, 2020

Robert L. LaBrant, Commissioner Member, Dissenting,

It is a violation of § 10(2)(a) of PERA for a labor organization or its agents to restrain or coerce public employees in the exercise of the rights guaranteed by § 9 of PERA. Section 9 gives public employees the right to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid or protection, and to negotiate or bargain collectively with their public employers through representatives of their own free choice. In *Amalgamated Transit Union, Local 26*, 30 MPER 22 (2016), we noted that a labor organization that restricts the right of an employee to file a charge, restrains or coerces the employee in the exercise of a § 9 right in violation of § 10(2)(a):

> Section 16 of PERA grants the Commission the exclusive authority to prevent and remedy unfair labor practices and gives any person covered by the Act the right to file an unfair labor practice charge. The right to file a charge is indispensable to the administration of the Act because the Commission cannot initiate its own processes. As such, an individual' s right under § 9 of PERA to give testimony or institute proceedings has long been recognized. *Lake Erie Transportation Commission*, 17 MPER 50 (2004); *Huron County Road Commission*, 1994 MERC Lab Op 407 (no exceptions); *Antrim/Kalkaska Community Mental Health*, 1995 MERC Lab Op 121 (no exceptions). Consequently, a labor organization that resorts to restraint and coercion to restrict the right of an employee to file a charge, restrains or coerces the employee in the exercise of a § 9 right in violation of § 10(2)(a).

In the Order of Remand involved in the present case, *Grand Rapids Employees Independent Union*, 33 MPER 41 (2020), we cited the National Labor Relations Board's decision in *Wright Line, a Division of Wright Line Inc.,* 251 NLRB 1083 (1980) and noted that:

> ...If the Union was motivated by Ford's prior filing of unfair labor practice charges, it violated PERA. If it was motivated by Ford's actions with the local police, it did not violate the statute. If it had mixed motivates, GREIU's liability turns on whether it would have imposed the same discipline if the prior unfair labor practice charges had not been in the mix.

Respondent Grand Rapids Employees Independent Union (Union) contends it expelled Charging Party Tatyana Ford for engaging in conduct that allegedly violated Article VIII, Section 1 and Article XII, Section 3(a)(i) of its Constitution. Charging Party argues that the Union actually expelled her in retaliation for filing prior unfair labor practice charges with the Commission and responded by filing the instant unfair labor practice charge. In her exceptions, Charging Party takes issue with the ALJ's findings of fact and continues to argue that the Union violated § 10(2)(a) of PERA when it expelled her from the Union in retaliation for filing prior unfair labor practice charges with the Commission. I agree.

In order to establish a *prima facie* case of discrimination under PERA, a charging party must show: (1) that an employee engaged in protected activity; (2) that the respondent had knowledge of that activity; (3) 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 allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep ' t)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a *prima facie* case is established, the burden shifts to the respondent to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v* Evart Pub Sch, 125 Mich App 71, 74 (1983); *Detroit Public Schools*, 30 MPER 2 (2016); *Wright Line, a Division of Wright Line, Inc*, 251 NLRB 1083 (1980).

In the present case, Charging Party engaged in activity protected by PERA when she filed charges with the Commission in Case Nos. CU16 J-054 and CU16 J-055. There is no dispute that Respondent knew of this protected activity and discussed the ALJ's written Decision and Recommended Order at a Union meeting held on February 1, 2018. According to the official minutes of the meeting, after the decision was summarized, several members then commented on the decision. One of these comments included a statement by member Kevin Hines that included the phrase "acting in malice" and an observation that such "appears to be the situation here." Hines could not remember if he used "acting in malice" or "malicious prosecution" but did admit that he believed Charging Party's filing of the charges in Case Nos. CU16 J-054 and CU16 J-055 was "a form of that." Other comments were made regarding what it means to be a "member in good standing" and whether that definition should be changed. Member Byron Ingram noted that if a member sues the Union and loses, he and/or she should pay back any costs that were incurred. Similarly, Member Mark Anderson testified to the hostility exhibited by the Union's Executive Board toward Charging Party and how they treated her "differently than anyone else."

The meeting minutes also contain the following statement under "New Business":

> Kevin Hines thanked Al Brock for "bringing it all out." He also stated that moving forward, he would like to see Al and Lisa have some sort of "summit meeting" on how to deal with these types of issues.

Although Hines' testified that he was referring to a "summit" with other unions regarding bargaining issues, the minutes do not reflect that any other unions or bargaining issues were discussed at the February 1 meeting.

Additionally, there is no dispute that, shortly after the February 1 meeting, Respondent brought internal Union charges against Charging Party and inexplicably appointed Kevin Hines, the member who accused her of "acting in malice," to the Hearing Board.

In his Decision and Recommended Order on Remand, the ALJ found "no credible evidence that there was bias against Charging Party based on her prior unfair labor practice charges." With

respect to Hines' statements at the February 1, 2018 meeting and his subsequent inclusion on the panel addressing the charges made against Charging Party, the ALJ noted that:

> ...throughout Hine's testimony regarding his statements at the meeting, he consistently and credibly claimed that he was not an attorney and did not know the definition of the term(s) he admitted to using. Given Hines' demeanor and candor regarding that meeting, I can only conclude that while he did not know at that time the actual and/or legal definition of "malicious prosecution" and/or whether it had any actual relevance to the prior unfair labor practice charges, it appears that he was in fact asking whether Charging Party's prior filings were frivolous and/or meant to simply harass the Union.

Charging Party properly takes exception to the ALJ's finding that there was no credible evidence of "bias against Charging Party based on her prior unfair labor practice charges" and argues that the ALJ made improper credibility determinations.

Although the ALJ did not give page references in his decision, Hines testified regarding this matter at Transcript pages 80, 106, and 108. Ultimately, at Transcript page 109, the ALJ asked him:

...Mr. Hines, did you use the phrase "acting in malice" during the February 1st, 2018 meeting?

THE WITNESS: I believe, sir, it was "malicious prosecution" or acting -- it may have been "acting in malice," but that's the way it was written.

JUDGE CALDERWOOD: Okay. All right. And in what context did you say that phrase?

THE WITNESS: That these types of lawsuits and that, are they a form of that.

JUDGE CALDERWOOD: Which type of lawsuit?

THE WITNESS: I don't know, accusing people of stuff.

JUDGE CALDERWOOD: Which type of lawsuit?

THE WITNESS: I don't know, accusing people of stuff.

JUDGE CALDERWOOD: Okay.

THE WITNESS: I mean, you know, I -- so -- and we were in a general discussion in our union and we're talking, just talking. So no names were mentioned. No one was accused of that. It was more of is this rise to this level?

JUDGE CALDERWOOD: How far af- -- how long -- Mr. Iorio, you can feel free to object, but know that I want the answers to this.

MR. IORIO: Uh-huh (affirmative).

JUDGE CALDERWOOD: How long after Mr. Brock read the decision did you make the comment, "I think it malice" or "malicious prosecution" or any phrase there to?

THE WITNESS: Oh, a minute something, five minutes.

JUDGE CALDERWOOD: When you used it, were you referring to cases -- the cases that Mr. Brock read?

THE WITNESS: Yes.

JUDGE CALDERWOOD: Okay. All right.

Regardless of whether Witness Hines knew the precise legal definition of "malicious prosecution" or "acting in malice" he did exhibit hostility towards Charging Party's actions and a belief that her actions were somehow wrong.

Although the ALJ correctly notes that suspicious timing, in and of itself, is insufficient to establish that an adverse action was the result of animosity toward protected activities, there is no dispute that the Union initiated its expulsion proceedings shortly after a Union membership meeting occurred at which the Decision and Recommended Order issued by ALJ Peltz was read and discussed. Additionally, there is no dispute that Respondent knew, in October 2017, that Charging Party and Rich Troeger made allegations of embezzlement to the Wyoming Police Department or that Respondent filed charges against her shortly thereafter and then dismissed the charges in December 2017. Nonetheless, although Article XIII of the Union's Constitution imposes 30-day time period within which a member may properly be charged, Respondent issued the charges again in February 2018, shortly after the ALJ's decision was distributed to the membership, and more than four months after it discovered that she made the allegations of embezzlement (the record does not reveal when the FOIA request was made which resulted in the response the Union received from the Wyoming Police Department on February 6, 2018—presumably, the request was made shortly before February 6). Given the alleged severity of the offense Charging Party committed by making an allegation of embezzlement, it is hard to understand why the Union waited so long to make a FOIA request and charge her. As noted in *Ebroadburl Realty Corp.,* 330 NLRB 70, 74 (1999), the Board has long held that timing can supply reliable and competent inherent evidence of unlawful motive for the purposes of the *Wright Line* analysis.

Inexplicably, the ALJ noted, at the conclusion of the October 22, 2018 hearing, that Charging Party "created" a prima facia case (Tr. 240), an assertion that cannot be reconciled with his later decision.

Charging Party thus established a *prima facie* case of discrimination under PERA.

Admittedly, Respondent asserts that Charging Party was expelled from the Union for serious acts of misconduct. Although Respondent contends that its Hearing Board found that Charging Party violated Article VIII, Section 1 of its Constitution, Respondent further admits that the sole basis for this finding was the Wyoming Police Department Case Report obtained via its FOIA request and that the Hearing Board had no other records or testimony before it (Tr. 83-84, 85, 90, 91, 118, 133-134). A review of the Case Report (Ex. 12) relied upon by Respondent, however, does not establish that Charging Party acted in the name of the GREIU without the permission of its president or executive board. To the contrary, according to the Report, both Charging Party and Rich Troeger informed Officer Ferguson that they attempted to discuss the alleged embezzlement with Union President Godwin and the Executive Board but neither the President nor Board cared about or would discuss the matter with them. As a result, Troeger, Charging Party, Mark Anderson, and Lucia Anderson went to the Wyoming Police Department as

individuals to report the money they believed was being improperly taken from the Union. Charging Party did not violate Article VIII, Section 1.

Although Respondent also cited Article XII, Section 3 (i) of its Constitution in its February 18, 2018 letter of charge, the Case Report does not establish that Charging Party was guilty of "deliberately engaging in conduct in violation of the responsibility of members toward the GREIU as an institution." According to the Case Report, Union President Godwin, when interviewed by Officer Ferguson, did not dispute the fact that there was a substantial amount of "unaccounted money" or that the GREIU had "no idea where the money went, when it became missing, and who was responsible for the money." Additionally, the Report notes that, as a result of the complaint made by Charging Party and the others, the Union changed the way it handles the rental of its hall, and implemented a requirement that the hall only be rented out via PayPal, "in the hope that this will not occur again." Charging Party's actions thus benefited the Union as an institution and were not contrary to her responsibilities toward it. Consequently, Charging Party did not violate Article XII, Section 3(i), did not engage in conduct prohibited by any of Respondent's rules, and did not impair any legitimate organizational interest of the Respondent. See *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083, 1084, 1091 (1980) (where no legitimate organizational justification for the discipline exists, "there is by strict definition, no dual motive" and the proffered reason for the discipline should be considered pretextual). See also *La Gloria Oil & Gas Co.,* 337 NLRB 1120, 1124 (2002) (if no legitimate business justification for the discharge exists, there is no dual motive, only pretext) and *E End Bus Lines, Inc.,* 366 NLRB No. 180 (2018). Although Respondent arguably could have promulgated a rule prohibiting a member from complaining to the police regarding the theft of union funds, it (understandably) did not do so. See *Scofield v NLRB,* 394 US 423, 430 (1969); *Standish-Sterling Educational Support Personnel Association,* 29 MPER 52 (2016) (unions are free to enforce properly adopted rules that reflect legitimate union interests, impair no policy imbedded in the relevant labor laws, and are reasonably enforced).

Even assuming Charging Party somehow violated the Union's rules, the evidence submitted by Respondent does not explain why Charging Party was expelled indefinitely while the other three members who complained to the Wyoming Police Department were only suspended. In his Decision and Recommended Order on Remand, the ALJ notes that:

> ...Hines, the only member of the panel that testified at the hearing, clearly, credibly, and consistently testified that it was the panel's unanimous decision that Charging Party appeared to be the "ringleader" while the other three members charged were simply "accomplices." Hines credibly testified that his own decision was influenced by his belief, through his reading of the Case Report, that Charging Party was the individual that took the internal documents and records and delivered them to the Wyoming Police Department.

Although the ALJ, at Footnote 2, also cites the testimony provided by Brock and Angus, neither of these individuals were on the Hearing Board, which consisted of Hines, Pat Tate and Ted Jensen (Brock and Angus, however, were two suspects named in the Case Report). Additionally, neither Brock's testimony nor that of Angus establishes that he or she believed

Charging Party was "spearheading" anything or made "embezzlement allegations that ultimately proved in the opinion of the investigators unsubstantiated" (Tr. 182-183, 215).

Hearing Board Member Hines, however, testified (Tr. 93):

JUDGE CALDERWOOD: Can you please articulate explicitly why you chose as a member of the hearing board to expel Ms. Ford indefinitely as opposed to three years? Can you --
THE WITNESS: Yes, sir.
JUDGE CALDERWOOD: Please do.
A. It was felt again that you were basically behind the effort to take the documents from our union, to provide them to the police, and that you accused people, that you were the ringleader basically, and falsely accused our members of embezzlement and that you provided the material for that and were the impetus for it. Other people participated, but you were the main person and for that reason it was felt that what you had done was so serious there was no other -- there was no other thing we could do.

Hines further testified (Tr. 136):

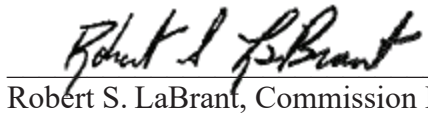
So it was clear to me that you had delivered this. It says that you had delivered these documents to the police with the sole purpose of prosecuting people that did no wrong. I do not even think -- I'm not going to -- it's my opinion. That is why. It was a extremely, extremely serious charge. Never substantiated. No proof. The only proof was that you had taken these documents because the police were in possession of them. And so the entire board, the hearing board, had determined that because of that, because of how serious the charges and what you had done, you are expelled. Expelled. The other people were deemed to be accomplices. But you were the one that secured the documents, delivered the documents. You're stating you believe it was Jill. She could have went to prison. So that's why. So that's your answer, ma'am, why you were expelled.

Although Hearing Board Member Hines testified that he believed Charging Party was the "ringleader" of the group and was also the individual that took the internal documents to the Police Department (Tr. 87, 93, 136), Hines' belief is not consistent with the Case Report (Ex. 12). According to the Report, Officer Ferguson regarded Rich Troeger as the leader of the group and spokesperson for it (see especially, Officer Ferguson's log of the investigation attached to the Report). Consistent with this status, Troeger visited the Department more than Charging Party or any of the other complainants. Additionally, the only individual specifically identified in the Case Report as delivering internal Union documents to the Police Department was Lucia Anderson (the chair of the committee established by Respondent to investigate the allegations of misappropriation of Union funds) on October 4, 2017. On the other dates, the Report does not indicate who delivered what particular document but only that documents were delivered by all four members. Consequently, the Case Report does not establish how Charging Party did anything other than what was done by the other complainants and does not provide any basis for treating her in a disparate manner. The ALJ, in his Decision and Recommended Order on Remand, does nothing to explain the inconsistency between Hines' testimony and the Case Report.

Although I recognize an ALJ is entitled to make credibility determinations and findings of fact, those made by the Administrative Law Judge in this case are a mischaracterization of the record that are not supported by substantial evidence. Charging Party established a *prima facie* case of discrimination under PERA. Although the burden then shifted to the Respondent to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct, Respondent failed to meet its burden.

In *NLRB v Marine & Shipbuilding Workers, Local 22*, 391 U.S. 418, 88 S. Ct. 1717, 20 L. Ed. 2d 706 (1968), the United States Supreme Court held that it was an unfair labor practice for a union to expel a member because he filed an unfair labor practice charge with the NLRB without exhausting internal union remedies. In *Shipbuilding Workers*, the Court noted that any coercion used to discourage, retard, or defeat access to the Board "is beyond the legitimate interests of a labor organization." *Shipbuilding Workers* at 424. See also *Amalgamated Transit Union, Local 26*, 30 MPER 22 (2016); *Graphic Communications Local 22 (Rocky Mountain News*), 338 NLRB 130 (2002); and *Auto Workers Local 212 (Chrysler Corp.*), 257 NLRB 637 (1981), enfd. 690 F.2d 82 (6th Cir. 1982). I agree and therefore must dissent from the majority opinion in this decision.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Robert S. LaBrant, Commission Member

Issued: November 12, 2020

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

In the Matter of:

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION,
Respondent-Labor Organization,

Case No. CU18 E-009
Docket No. 18-009133-MERC

-and-

TATYANA FORD,
An Individual Charging Party.
_____/

APPEARANCES:

Kalniz, Iorio & Reardon Co., L.P.A., by Fil Iorio for the Respondent

Tatyana Ford appearing on her own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON REMAND

On May 1, 2018, Charging Party, Tatyana Ford, filed the above unfair labor practice charge with the Michigan Employment Relations Commission (Commission) against her bargaining representative, the Grand Rapids Employees Independent Union (Respondent or GREIU). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, the charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System, since renamed the Michigan Office of Administrative Hearings and Rules.

The parties appeared before the undersigned on October 22, 2018, for an evidentiary hearing. Following a lengthy hearing in which Charging Party called four witnesses and testified herself in the narrative, I indicated that I was prepared to direct a verdict in favor of Respondent on the basis that Charging Party had failed to present relevant and admissible evidence necessary for the undersigned to conclude that the Respondent's decision to expel her from the Union indefinitely violated the Act. After allowing Charging Party to argue why her charge should not be dismissed, I informed the parties that I would set forth detailed findings of fact, conclusions of law and the reasons for my determination that the charge should be dismissed in the form of a written Decision and Recommended Order. On April 18, 2019, I issued that written decision and recommended order holding that there was no "relevant and admissible evidence that could support a finding that [Charging Party's] expulsion [from the Union] was in retaliation for the filing of the prior unfair labor practices." While my April 18, 2019, order dismissing the charge was captioned "Decision and Recommended Order of Administrative Law Judge on Summary Disposition", such a designation was not entirely accurate, as my actions on the record were not

prompted by a motion for summary disposition but rather were more akin to that of a directed verdict.[1]

On January 8, 2020, the Commission issued an order remanding this proceeding to the undersigned for further action. More specifically, the Commission stated:

> Because this matter turns on witness credibility, we conclude that it is inappropriate to resolve this matter on a motion for summary disposition. Contrary to the ALJ, we conclude that there was sufficient evidence from which a finder of fact could have determined that Ford's expulsion was motivated by her filing of unfair labor practice charges.

The Commission next articulated the competing theories of this case as follows. If the Union expelled Charging Party because she filed prior unfair labor practice proceedings against it, such an action would violate PERA, but if the Union took the action because Charging Party took internal documents to the police, expulsion would not have violated the Act. As such, the Commission went on to state:

> Because we conclude that the record could support findings in either direction on these questions and the ALJ ruled on a motion for summary disposition without making factual findings or credibility determinations, we remand for the ALJ to make factual findings.

Findings of Fact:

Following a lengthy review of the record, including the transcript of the October 22, 2018, hearing and the exhibits admitted thereto, the undersigned restates and adopts herein the "Findings of Fact" as articulated and set forth in my April 18, 2019, Decision and Recommended Order on Summary Disposition. Moreover, to the extent necessary to address the Commission's Order for Remand, I repeat those findings as necessary and/or make the following additional findings of fact.

During a general Union meeting on February 1, 2018, the members present discussed the written Decision and Recommended Order in Case Nos. CU16 J-054 and CU16 J-055, issued recently by ALJ David M Peltz. Charging Party, who had filed those particular unfair labor practice charges, was not in attendance at the meeting. The minutes of that meeting, as admitted into evidence, stated, "Kevin Hines said that there's a phrase called 'acting in malice and it appears to be the situation here.'" Kevin Hines, who at the time of the February 1, 2018, meeting was simply a member of the Union and who held no leadership position therein, admitted at the hearing that he did in fact use the phrase "acting in malice" or "malicious prosecution" during that meeting. Hines, who stated several times during his testimony that he was not an attorney and did not know the definition of the term(s) he had used, made it clear that he was referring to the two unfair labor practice charges. It is important to repeat that Charging

[1] While not customary or explicitly provided for within the rules governing unfair labor practices under PERA, the Commission has recognized that ALJs acting on its behalf have granted directed verdicts in the past. *Grand Rapids Employees Independent Union*, 31 MPER 62 (2018). See also *AFSCME Local 1023*, 6 MPER 24006 (1992) (no exceptions), *Saginaw Transit Authority*, 19 MPER 48 (2006) (no exceptions), and *Carman-Ainsworth Community Schools*, 29 MPER 40 (2015) (no exceptions).

Party was not present at the meeting, and all testimony provided by her at the October 22, 2018, hearing regarding what she believed Hines meant by his statements, was inadmissible and purely speculative in nature.

On February 6, 2018, Al Brock, a Union member and officer, received a copy of a partially redacted Case Report from the Wyoming Police Depart, which detailed embezzlement allegations originally made on March 27, 2017, by Charging Party and three other members of the Union. Those allegations named several current and former Union officers including Brock and Lisa Angus, both of whom testified at the October 22, 2018, hearing. Ultimately the Department, citing no leads, closed the investigation on October 13, 2017.

On or around February 18, 2018, Brock and Angus filed internal charges against Charging Party and the three other individuals alleging, among other things, that those individuals took and provided internal Union documents without authorization to the Police Department as well as acted on behalf of the Union with the Police Department without authority. Both Angus and Brock testified credibly and without contradiction that while they had been made aware in 2017 that the Wyoming Police Department had received allegations of embezzlement and that they suspected that Charging Party might have had a role in the same, it was not until February 6, 2018, that they learned who made the allegations, who the allegations were made against, or that internal Union records had been made available to the Police Department without the Union's consent or knowledge. Brock, when asked why he made the decision to file the charge against Charging Party and the others, testified credibly that, "it was such a blatant, egregious disregard for our [Union] constitution and violation of our [Union] constitution on numerous accounts." Angus, when asked the same question, initially testified that she was "angry" that she had been named as a suspect in the allegations. Angus went on to further claim that Charging Party's actions, specifically in taking and providing the internal Union documents to the Wyoming Police Department, violated the Union's constitution.

Sometime following the filing of the February 18, 2018, internal charge against Charging Party and the others, a three-person panel was established to hear and consider said charge. Hines testified that he received a phone call from Ken Godwin, the Union's President at the time, asking if he would be willing sit on the panel and whether he could be impartial, to which he answered yes to both questions. Hines was joined on the panel by two other members of the Union, none of whom held officer positions at that time.

On March 20, 2018, the panel met to consider the February 18, 2018, charge; Charging Party did not appear at that hearing. Hines testified that he was provided a copy of the Wyoming Police Department's Case Report that had been received in early February of 2018. According to Hines, he could recall that Brock and Angus had with them a stack of documents that were reportedly the documents Charging Party was accused of providing to the Department but that he was not provided them to review. Hines further testified that the panel deliberated for about an hour before rendering its unanimous decision to expel Charging Party indefinitely from the Union; the other three individuals charged were each expelled for a period of three years.

Hines, in explaining his decision-making process as to why Charging Party was expelled indefinitely while the other three accused were expelled for only three years, stated at the hearing the following:

> It was felt again that you [Charging Party] were basically behind the effort to take the documents from our union, to provide them to the police, and that you accused people, that you were the ringleader basically, and falsely accused our members of embezzlement and that you provided the material for that and were the impetus for it. Other people participated, but you were the main person and for that reason it was felt that what you had done was so serious there was no other – there was no other thing we could do.

Throughout these proceedings, Hines credibly testified consistently and repeatedly variations of the above premise referring to Charging Party more than once as the "ringleader" and characterizing the other three members charged with her as "accomplices." Moreover, Hines indicated that his decision was also influenced by his belief, through his reading of the Case Report, that Charging Party was the individual that took the internal documents and records and delivered them to the Wyoming Police Department. Hines credibly claimed that at no point during the hearing or the panel's deliberation did the subject of Charging Party's prior unfair labor practice charges get discussed. Moreover, the Union witnesses who testified at the hearing, in addition to Hines, each consistently testified that the nature of the allegations brought against the Charging Party, i.e., unauthorized delivering of internal Union documents to the Wyoming Police Department in connection to embezzlement allegations that ultimately proved, in the opinion of the investigators, as unsubstantiated, were extremely egregious. Additionally more than one witness commented on how those allegations could have resulted in improper criminal prosecution or otherwise harm the reputations of those individuals identified by the Charging Party.

Discussion and Conclusions of Law:

The undersigned restates and adopts herein the legal standards and Commission precedents articulated and set forth in my earlier Decision and Recommended Order on Summary Disposition issued on April 18, 2019. In particular however, I stress that while animus or a retaliatory motive may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather it follows that the party making the claim must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974).

In support of its decision to remand, the Commission specifically noted several alleged facts and/or allegations that it determined could have supported a finding that Charging Party's expulsion was motivated by her filing of earlier unfair labor practice charges. At the outset, the Commission referenced the timing of the disciplinary action, noting that the Union initiated its proceedings a short time after a Union membership meeting occurred at which a Decision and Recommended Order issued by ALJ Peltz was read and discussed. Of additional importance, the Commission further noted that at that meeting, Union member Kevin Hines, used the phrase or phrases, "acting in malice" or "malicious prosecution" in relation to the prior proceedings. Hines would later be appointed to serve on the panel that considered the charges brought against Charging Party. The Commission also identified the disparity in punishment between Charging Party and the other three charged parties as further evidence that a factfinder could use to infer that Ford's indefinite expulsion was retaliatory in nature.

Addressing Hine's statements at the February 1, 2018, meeting and his subsequent inclusion on the panel addressing the charges made against Charging Party, I first note that throughout Hine's testimony regarding his statements at the meeting, he consistently and credibly claimed that he was not an attorney and did not know the definition of the term(s) he admitted to using. Given Hines' demeanor and candor regarding that meeting, I can only conclude that while he did not know at that time the actual and/or legal definition of "malicious prosecution" and/or whether it had any actual relevance to the prior unfair labor practice charges, it appears that he was in fact asking whether Charging Party's prior filings were frivolous and/or meant to simply harass the Union. I further note that Charging Party provided no direct testimony that Hines, or anyone else at that meeting, actively sought to retaliate against her in any fashion. Additionally, while Hines was eventually asked by the Union President to sit on the panel considering the charges against Charging Party along with two other individuals, there is no direct evidence that Hines was chosen because he harbored any bias towards Charging Party or that he wished to punish her for her prior actions against the Union. Most importantly, I do not find that Hines' testimony exhibited any notion of bias and/or animosity towards Charging Party or her prior activity protected under the Act.

With respect to the Commission's identification of the disparity of punishments levied against Charging Party as opposed to the other three charged individuals, I note that Hines, the only member of the panel that testified at the hearing, clearly, credibly, and consistently testified that it was the panel's unanimous decision that Charging Party appeared to be the "ringleader" while the other three members charged were simply "accomplices." Hines credibly testified that his own decision was influenced by his belief, through his reading of the Case Report, that Charging Party was the individual that took the internal documents and records and delivered them to the Wyoming Police Department. I find particularly credible Hines' claims that at no point during the hearing or the Panel's deliberation was the subject of Charging Party's prior unfair labor practice charges discussed. Moreover, each of the Union witnesses who testified at the hearing, in addition to Hines, consistently and credibly testified that the nature of the allegations brought against the Charging Party, i.e., unauthorized delivering of internal Union documents to the Wyoming Police Department in connection to embezzlement allegations that ultimately proved, in the opinion of the investigators, as unsubstantiated, were extremely egregious.

Having found above no credible evidence that there was bias against Charging Party based on her prior unfair labor practice charges, while also concluding that there was no unlawful disparate treatment of Charging Party relative to her punishment when compared to that of the other three individuals involved with making the allegations to the Wyoming Police, the only remaining issue as identified by the Commission in its remand order is the temporal proximity of the events at issue herein. I note that the Commission, when faced with similar situations involving public employers and public employees, has consistently held that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result of anti-union animus. See *Southfield Pub Sch*, 22 MPER 26 (2009) (A temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation). As such, and in following established Commission precedent, I must hold that the proximity in time between the reading of ALJ Peltz's decision at the February 1, 2018, meeting and the subsequent filing of charges against Charging Party on or around February 18, 2018, standing alone, cannot

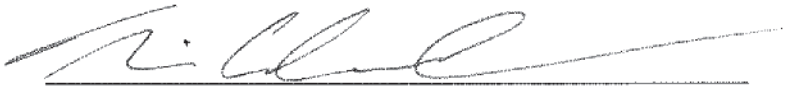
support a finding that the Union's actions violated Charging Party's rights as guaranteed under the Act.[2]

I have considered all other arguments as put forth by the parties as well as the specific direction from the Commission as set forth in their order remanding this case to me, and conclude such does not warrant a change in my findings. As such I recommend that the Commission issue the following order:

Recommended Order

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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

Dated: January 22, 2020

[2] Even if I were to find that the temporal proximity standing alone could establish a prima facie case of discrimination and/or retaliation under the Act, which I do not, and that the burden should then shift to the Union, it would be my finding that the testimony provided by Hines, Brock and Angus, clearly and credibly establishes that the charges levied against Charging Party and the eventual expulsion was not motivated by an unlawful retaliation in violation of PERA, but was instead motivated and driven by a reaction to Charging Party's alleged spear-heading of the effort to deliver internal Union documents to the Wyoming Police Department without authorization and make embezzlement allegations that ultimately proved in the opinion of the investigators unsubstantiated.