

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

**MUSKEGON-OCEANA COMMUNITY ACTION
AGAINST POVERTY, INC.,**
Respondent-Public Employer,

Case No. C97 I-205

-and-

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 586,**
Charging Party-Labor Organization.

APPEARANCES:

Williams, Hughes, Corwin & Sininger, L.L.P., by Theodore N. Williams, Jr., Esq., for the Respondent

McCroskey, Feldman, Cochrane & Brock, P.C., by Darryl R. Cochrane, Esq., for the Charging Party

DECISION AND ORDER

On September 18, 1998, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

COMMISSION

MICHIGAN EMPLOYMENT RELATIONS

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Date: _____

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Theodore N. Williams, Jr., Esq., Williams, Hughes, Corwin & Sininger, LLP, for the Public Employer

Darryl R. Cochrane, Esq., McCroskey, Feldman, Cochrane & Brock, PC, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216, MSA 17.455(16), this matter came on for hearing at Detroit, Michigan, on March 18, 1998, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on September 29, 1997, by the Service Employees International Union, Local 586, alleging that the Muskegon-Oceana Community Action Against Poverty, Inc., had violated Section 10 of PERA. Based upon the record and briefs filed on or before June 15, 1998, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges the following:

Service Employees International Union, Local 586, AFL-CIO represents the employees of the Community Action Against Poverty, following a representation election in September, 1997. Betty

Cheeks, employed by the Community Action Against Poverty as a P.M. teacher, was active in the formation of the Union and was known by the Employer to be active.

On September 17, Ms. Cheeks received two memoranda from her supervisor accusing her of misconduct, and on September 22, 1997 Ms. Cheeks was suspended from her employment with the Community Action Against Poverty. The misconduct Ms. Cheeks was accused of was for minor offenses, resulting from both miscommunication between Ms. Cheeks and her supervisor, and from her supervisor changing and modifying rules and procedures for Ms. Cheeks to follow that were impossible for her to comply with. The suspension from work was completely unwarranted.

In addition, the actions taken by Ms. Cheeks' supervisor in changing the rules and procedures, and the suspension that resulted were retaliation for Ms. Cheeks' union organizing activities.

Ms. Cheeks was subsequently terminated and at hearing the charge was amended to add an allegation of discriminatory discharge.

Facts:

Muskegon-Oceana Community Action Against Poverty (CAAP) provides educational and social services to low-income individuals and families in the two county area. CAAP operates out of twenty centers. Each center is supervised by a head teacher and is staffed by teachers, teacher aides, a cook, bus driver, bus driver aide, and custodian. The Executive Director of the agency is Maxine Lenear, who is hired by and responsible to a Board of Directors composed of citizens from within the community. Doris Carey-Keenan, the Children's Services Director, oversees the Head Start program with a staff of approximately 100 employees. Sherri LaFrance is the Education Services Manager and is responsible for directly supervising the head teachers in the Head Start program. Administrators work out of a central office located in Marquette, Michigan.

Betty Cheeks was first employed by the CAAP in September of 1984 at the Smith-Ryerson Center. Within approximately six months she was assigned the position of head teacher, or a.m. teacher, at that center. The a.m. teacher has a leadership role; in addition to teaching responsibilities, the a.m. teacher is responsible for submitting all paperwork and documentation to the central office. The teachers who work with children in the afternoon, p.m. teachers, have none of those responsibilities.

Cheeks' general performance at CAAP is reflected in correspondence from her supervisors as well as written evaluations. In April of 1994, Cheeks was given a warning letter from

Carey-Keenan regarding several written complaints received about her conduct; the letter indicated that “further incidents or reports of this nature could result in your termination.” On August 10, 1996, another letter was sent to Cheeks regarding her conduct by Carey-Keenan, LaFrance, and Administrative Assistant Alice Frierson. The letter concerned a public argument between Cheeks and a cook and concluded as follows:

This type of explosive behavior will not take place by you or any other staff without disciplinary action, up to and including dismissal. As a supervisor you must set an example for your staff and children as well as other program participants. The defensiveness you display whenever you are being monitored or asked to give an account of a situation will not be tolerated. It will be imperative that future communications with your center staff, program coordinators, and administrators be of a professional quality.

In October 1996, Cheeks was evaluated by La France and Carey-Keenan. Her overall rating was barely satisfactory, with many negative comments such as: “Betty puts minimal effort in the products of her work,” “Does not speak to others she supervises as she expects to be spoken to,” “Most visitors to her center express a tension felt. . . .Center environment displays little warmth or personal touches,” “ Environment at Smith Ryerson is unstable right now.”

On November 6, 1996, Carey-Keenan sent a letter to Cheeks regarding another incident between Cheeks and a staff person and issuing a suspension as follows:

In light of the November 5, 1996 incident between you and Ms. Gilbert, this letter is written to advise that you are hereby suspended without pay effective Wednesday, November 6, 1996 thru Friday, December 20, 1996. You are expected to return to work Thursday, January 2, 1997 according to your designated work schedule. Should there be a change in your schedule you will be notified prior to returning. Upon your anticipated return you will be monitored and expected to conduct yourself accordingly. If this type of conduct occurs again, you will be terminated immediately.

On December 10, 1996, LaFrance wrote to Cheeks regarding materials which Cheeks had removed from the Smith-Ryerson center and taken to her home. LaFrance renewed an earlier request which she had made for their return. She concluded her letter:

Removing this confidential information from the center for any reason other than a home visit, is a violation of M/O CAAP practice and policy. Failure to comply with this request and heeding this warning may require future disciplinary action to be taken against you, up to and including termination.

On January 3, 1997, Carey-Keenan wrote to Cheeks explaining that as a conclusion to the previous disciplinary action taken against her, she would be reassigned to the p.m. class at the Marquette Head Start Center. The November incident was Cheeks' third offense and according to the personnel policies of the agency could have resulted in her termination. However, Carey-Keenan testified that because Cheeks had been with the agency for thirteen or fourteen years, she was instead transferred, in the hope that with a different environment and staff she could continue her employment. Cheeks testified that she was told at the time that if there were any further infractions, she would be terminated. On January 21, 1997, Carey-Keenan and Director Lenear wrote a follow-up letter to Cheeks, discussing her shortcomings and indicating the following:

Placing you in another location under the daily and direct supervision of the Head Teacher is our attempt to give you the support we feel is necessary to ensure that you will meet the requirements and responsibilities expected of you. *Should you fail to develop cohesive and positive relationships with co-workers, persons whom you service or visitors to your class, such action will result in further discipline, up to and including termination.*

Cheeks was then transferred to the Marquette Center as a p.m. teacher, under the supervision of head teacher Paula Irwin. Cheeks filed a grievance after her transfer, pursuant to the agency's personnel policies and procedures. This process included meetings with Carey-Keenan and Lenear, and also with the agency's Board of Directors and the Parent Policy Council.

Shortly after her transfer, in March of 1997, Cheeks contacted James Shelton, President of Local 386, Service Employees International Union (SEIU), to seek information on organizing a union. According to Cheeks, she did so because she felt that there was no way to challenge the fairness of disciplinary actions by the Employer. Cheeks then contacted the head teachers at five of the centers and asked them to talk to their employees to determine if they were interested in union representation. At one of the centers, Lake Shore, she sat down with approximately eight employees to discuss unionization and had them indicate their interest by signing a sheet of paper. According to Cheeks, employees from the various centers contacted her on several occasions to talk about unionization. Cheeks also arranged three union organizing meetings with co-workers at a union hall owned by a local her husband belonged to. According to Cheeks, as a result of her contacts with employees, she found substantial interest in organizing and reported this to

Shelton. SEIU filed a petition in May of 1997 in Case No. R97 E-88 seeking to represent two bargaining units of agency employees: Unit I, all full time and part-time teachers; and Unit II, all full time and part time teacher aides, transportation aides, bus drivers, cooks, cook aides, and custodians. Pursuant to a consent election agreement, a mail ballot election was scheduled for August 18, 1997. Prior to the election the agency scheduled a meeting for those employees who had questions about unionization, making the Employer's attorney available to address any issues raised. The agency also sent a letter to employees responding to issues raised during the union campaign.

During this period of time Cheeks continued to work at the Marquette Center. Head teacher Irwin testified regarding her relationship with Cheeks. Irwin had not been involved in the initial decision to transfer Cheeks. Irwin testified that she thought that it would be a temporary situation since there was a good working team at Marquette and she hoped to continue it. According to Irwin, Cheeks' arrival created a tense, uncomfortable situation with the other staff since she did not help out as much as she could have and did not seem concerned with center activities. Part of LaFrance's responsibilities as Education Services Manager is to observe centers periodically. On February 20, 1997, LaFrance observed staff performance at the Marquette Center, including that of Cheeks. As reflected in her report, she found that generally the classrooms were running well; she also made some suggestions for improvement.

In May of 1997, Irwin performed a written evaluation of Cheeks and made a number of critical comments such as: "Lesson plans are very vague," "Oral communication is sometimes unclear," "Written weekly schedules are not always complete and in the file in a timely manner," "Cooperates to a minimum." On August 26, 1997, Irwin wrote a letter to Carey-Keenan, requesting that Cheeks be reassigned because she was not working out as part of their team, and because Irwin had received complaints from parents about Cheeks. On August 28, after talking to Irwin and other staff members, LaFrance also wrote a letter to Carey-Keenan reflecting her concerns about Cheeks. She discussed Cheeks' lack of progress in improving communications with co-workers and parents; Cheeks' rejection of an offer of additional training in communications; and the increase of overall staff tensions at the Marquette Center. La France concluded that for the sake of other staff and parents, it was her recommendation that Cheeks be terminated. Despite these communications, Cheeks continued her assignment at the Marquette Center in the fall of 1997.

On September 15, 1997, SEIU Local 586 was certified as representative of the agency's employees in the bargaining units described above. Cheeks was subsequently elected to the Union bargaining committee by the employees.

On Wednesday, September 17, 1997, Irwin issued two memos to Cheeks. The memos concerned Cheeks' failure to submit required weekly schedules for the weeks of September 8-12 and September 15-19, and the removal of her personnel file from the Employer's premises. Irwin testified that the weekly schedules were important in order to verify work which took place away from the center, such as home visits or meetings. Irwin also testified that when a personnel file is not on site, the agency is out of compliance with governmental regulations. According to Irwin, she gave the memos to Cheeks in an envelope. Cheeks had a different recollection, testifying that the memos were

placed in a memo book which is open to all employees. The memo book provides a record of instructions or reminders to employees. According to Irwin, it is a step toward the disciplinary procedure. The memo book is formatted with a white original and a yellow copy which remains in the book after the original is given to the employee.

After Cheeks saw the memos, she went to Irwin and asked to talk to her. Cheeks testified that she didn't understand the memos; she felt that Irwin did not need her weekly schedule to verify payroll, and the personnel file had been taken home by mistake because it was mixed in with her other papers. According to Cheeks, she told Irwin that she was going to write a memo back to her because she disagreed with the memos, but she decided that it would be childish. Cheeks testified that she reminded Irwin that she had other ways to verify her schedule. According to Cheeks, she also stated that they were "acting like kids" and that she and Irwin agreed that "at that point we would just go ahead and wipe the slate." Cheeks testified that the next day, Thursday, went smoothly and they worked together well. At the end of the day, since they had agreed to start over, Cheeks threw away the yellow copies of the memos. According to Cheeks, she did not feel that the memos were disciplinary in nature, but were simply reminders. Irwin testified that during their meeting she had agreed with Cheeks that they needed to try harder to work together and to communicate better; however, she never stated that they would erase what had already happened.

On Friday, September 19, 1997, Irwin asked Cheeks what had happened to the yellow copies of the memos. Cheeks responded that since they were starting over, she had thrown them away. Irwin then told Cheeks that she had destroyed property and reported the matter to Sherri LaFrance, her supervisor. LaFrance told Irwin that Cheeks would have to produce the documents or leave. When LaFrance relayed that to Cheeks, Cheeks responded that she wanted to meet with LaFrance and Carey-Keenan. Irwin told her that would be fine, but at that point she needed to leave the center. Irwin documented the incident in writing and turned her report in to the central office. Irwin testified that Cheeks had not talked to her about the Union, and the memo incident had nothing to do with her Union activities. According to Irwin she was not involved in the decision to suspend or terminate Cheeks.

Cheeks was subsequently notified by Carey-Keenan that as of Tuesday, September 27, 1997, her employment was suspended without pay until further notice. On October 8, 1997, Cheeks was sent a letter signed by Doris Carey-Keenan and Maxine Lenear which stated:

Please be advised that effective immediately your employment in the position of Head Start P.M. teacher with Muskegon-Oceana County Community Action Against Poverty, Inc., is terminated. This termination is a result of your removal and destruction of agency property, i.e. copies of disciplinary memos written to you from your supervisor.

LaFrance testified that she talked to Carey-Keenan about the decision to terminate and that she concurred with it. Each of the individuals involved in the decision, including LaFrance, Carey-Keenan, and Lenear, testified that they had no knowledge that Cheeks was involved in SEIU's organization efforts.

Discussion and Conclusions:

The Employer maintains that Cheeks was terminated for repeated violations of agency policies; her union activities were unknown to the Employer and had nothing to do with her discharge. Charging Party alleges that the Employer discharged Cheeks in retaliation for her Union activities and that under the "small plant doctrine" of the National Labor Relations Board (NLRB), management knowledge of Cheeks' role can be inferred. Charging Party also contends that Cheeks was "overcharged" for the memo incident, and there is a lack of credible evidence that she would have been discharged in the absence of protected conduct.

As set forth in numerous Commission decisions, the elements of a prima facie case of discrimination under Section 10(1)(c) of PERA include: 1) employee union or other protected activity; 2) employer knowledge of that activity; 3) union animus or hostility towards the employee's protected rights; 4) suspicious timing or other evidence that protected activity was a motivating cause of the employer's action. *North Central Community Mental Health Services*, 1998 MERC Lab Op _ (7/10/98); *MESPA v Ewart Public Schools*, 125 Mich App 71, 75, *aff'g* 1982 MERC Lab Op 384, 395.

Charging Party has established that Cheeks initiated Union organizational efforts and that this was done in fairly close proximity to her discharge. However, I find that Charging Party has failed to demonstrate that the Employer had knowledge of Cheeks' role as a leader in that effort. Her supervisors testified credibly that, although they knew that the SEIU was seeking to represent agency employees, they were unaware of Cheeks' participation in that effort or her leadership role. I disagree with Charging Party that the small plant doctrine applies under the circumstances of this case. Under the small plant doctrine of the NLRB, adopted by the Commission, employer knowledge of employee union activities may be inferred based on the small size of the employer's plant or operations. Such an inference, however, cannot be drawn "absent supporting evidence indicating that such activities were carried on at such a time or in such a manner that the employer must have noticed them." *Byrnes v Mecosta-Osceola School Dist*, 141 Mich App 500 (1983); *City of Holland*, 1985 MERC Lab Op 1199. Cheeks visited five of the twenty centers and talked to employees. As far as the record reveals, she did not pass out authorization cards, nor did she advertise her Union support by activities such as wearing a Union button or other insignia. Although she did have an informal meeting with employees at Lake Shore, the three Union organizational meetings she arranged were not conducted on the employer's premises but at an outside union hall. Her supervisors worked out of the central office and there is no evidence that they were present at the centers or in a position to observe Cheeks' conversations or contacts.

Further, there is no evidence of union animus on the part of the Employer. The

Employer consented to the representation election held in August. Nothing objectionable has been demonstrated with respect to the meeting held by the Employer prior to that election to answer questions with respect to unionization, or the information letter sent to employees. As far as this record reveals, the Employer remained neutral throughout the process.

As to the Union's claim that the Employer's motivation is suspect because Cheeks was "overcharged" for the destruction of the memos, this argument might have some weight had this been a first offense. However, the record demonstrates clearly that Cheeks had been warned repeatedly regarding her behavior in general, and specifically for violations in the two areas Irwin mentioned in the memos. Several warnings with respect to termination took place before Cheeks' efforts to seek union representation. Cheeks acknowledged in her testimony that in January of 1997 she was warned that further infractions would result in termination.

Based on the above discussion, I find that Charging Party has failed to demonstrate that Cheeks' discharge was motivated by her Union activity. Rather, this appears to be a classic case of a less than satisfactory employee seeking to shield herself from discharge by spearheading an organizational effort. It is therefore recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch
Administrative Law Judge

Dated: _____