

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT BOARD OF EDUCATION,
Respondent-Public Employer,

-and-

DETROIT FEDERATION OF TEACHERS,
Charging Party-Labor Organization,

-and-

CHRISTOPHER ZAVISA,
An Individual Charging Party.

**Case Nos. C97 J-211
& C97 J-223**

APPEARANCES:

Riley & Roumell, by William F. Dennis, Esq., for the Public Employer

Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh, P.C., by Eileen Nowikowski, Esq., for the Labor Organization

Scheff & Washington, P.C., by George B. Washington, Esq., for the Individual Charging Party

DECISION AND ORDER

On September 29, 1998, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Date: _____

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DETROIT FEDERATION OF TEACHERS

Charging Party - Labor Organization

-and-

CHRISTOPHER ZAVISA

Charging Party, An Individual

APPEARANCES:

For Respondent:

Riley & Roumell
By William F. Dennis, Esq.

For Charging Party Labor Organization:

Sachs, Waldman, O'Hare, Helveston,
Bogas & McIntosh, P.C.
By Eileen Nowikowski, Esq.

For Christopher Zavisa:

Scheff & Washington, P.C.
By George B. Washington, Esq.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 et seq, MSA 17.455 et seq, this case was heard in Detroit, Michigan on February 3, 1998, by Roy L. Roulhac, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon an unfair labor practice charge filed by Christopher Zavisa on October 10, 1997, and by the Detroit Federation of Teachers on October 22, 1997. Based upon the record, including post-hearing briefs filed on or before May 20, 1998, I make the following findings of fact, conclusions of law, and issue the following recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charges:

Charging Party Christopher Zavisla filed a charge against Respondent Detroit Board of Education on October 20, 1997. Pertinent parts read:

3. In recent months, Chris Zavisla has exercised his rights to engage in protected activity including ... campaigning for the rejection of the tentative agreement between the Detroit Board of Education and the Detroit Federation of Teachers, objecting to abusive language by an Assistant Principal to meetings of teachers, insisting on the proper provision of supplies to teachers, and objecting to the convening of meetings in violation of the contract...

4. As a result of and in retaliation ... on October 6, 1997, Assistant Principal Mary Kellem appeared without notice in Mr. Zavisla's class and, for the first time in twenty six years, threatened to issue an unsatisfactory evaluation of him for his teaching.

5. On or about October 7, 1997, the principal of Chadsey High School, Mrs. Alexis Rowan, interfered with, restrained and coerced employees in the rights guaranteed under PERA by informing employees and Mr. Zavisla that they would not be allowed to discuss union matters in Mr. Zavisla's room during his 8th period preparation period, as had been done for years in the past.

6. On or about October 7, 1997 ... further interfered with, restrained, and coerced employees including Chris Zavisla, by referring Zavisla for a mandatory psychological exam under the Employee Assistance program for the stated reason that Mr. Zavisla was "disgruntled" and had filed grievances and objected to breaches of the contract by the principal.

The charge filed by the labor organization on October 22, 1997, alleges that Zavisla was directed to attend a mandatory employee assistance program evaluation because of his protected, concerted activity, including, *inter alia*, the pursuit of grievances. Zavisla and the labor organization complain that the Detroit Board of Education has violated MCL 423.210(1)(a) and (e).

Findings of Fact:

Charging Party Christopher Zavisla, a 26 year employee of Respondent Detroit Board of Education, is a member of the Detroit Federation of Teachers, Charging Party. He has been building representative for 14 of the 16 years he has been employed at Chadsey High School. In September 1997, the beginning of the 1997-98 school year, Zavisla was an outspoken opponent of ratification of a tentative agreement between the Board and the Detroit Federation of Teachers. He circulated letters setting forth his position to most of the schools and appeared on radio talk shows and television. Zavisla also met several times with Alexis Rowan, Chadsey High School principal, to

express his concern about the lack of paper and supplies. This issue was the subject of the first three regular teachers' meetings of the semester - the last two Wednesdays in September and the first Wednesday in October. During the meetings, Zavisia and other teachers complained to the Chadsey administration about the lack of paper. In an effort to put an end to complaints about paper-less teaching, principal Alexis Rowan called a teachers' meeting for Friday October 3.

After the meeting was announced over the public address system on the afternoon of October 3, Zavisia went to the principal's office, reminded Rowan that the DFT contract provided for teachers' meetings on Wednesdays rather than Friday, and told her he would file a grievance if the meeting were held. Rowan insisted, however, that the meeting was a curriculum meeting and not a teachers' meeting. As teachers gathered for the meeting Zavisia distributed a document to each teacher informing them that the meeting was "illegal" and a grievance would be filed. During the meeting, questions were asked regarding the lack of paper and supplies. Rowan explained the reasons, offered methods for teachers to use to teach without paper, and individually asked each teacher three times, "Can we put our lack of paper and books and so forth behind us and go on without any more complaints about that?"¹ Zavisia and several other teachers objected to Rowan's efforts. Zavisia answered, "no" each time the question was posed to him. Zavisia testified that he did not understand Rowan's logic and her inability to deliver supplies.

The following Monday, October 6, Rowan directed assistant principal Kellum to observe Zavisia's classroom teaching. Although the contract provides for teacher observation, Kellum's unannounced observation of Zavisia's teaching was the first in his twenty-six years of teaching. Zavisia testified that he did not know of any other teacher who had been subjected to an unannounced observation. After Kellum's observation, she held a meeting with Zavisia who testified that Kellum told him, "it was a good lesson, I was a good teacher, that it was overwhelmingly positive. The exception was that she picked at little things that she felt were inconsistent." The report prepared by Kellum, who was not called as a witness, indicated some minor deficiencies.²

The next morning, Tuesday October 7, Zavisia handed Rowan a grievance protesting the October 3 teachers' meeting.³ Zavisia also distributed a note to each teacher announcing a meeting to discuss the principal's inability to deliver supplies. The meeting was scheduled for the 8th hour, which according to Zavisia, was, "... our normal fashion for the last fourteen years." The notice read:

¹Rowan gave various versions of the precise question she asked during the meeting. However, she acknowledged on cross-examination, that the statement quoted above was the question she asked.

²Objective for class was not on board, some grades not recorded, and certain records not maintained.

³The grievance was resolved at the second step of the grievance procedure. The Friday meeting constituted a breach of the contract.

If you are free, eighth hour today, the union committee requests you attend an important meeting in room 340. Please be there. Your future and your job depends on it.

When Rowan learned of the planned meeting, she summoned Zavisa to her office and told him the meeting violated the contract and he should reschedule it for after school. According to Rowan, Zavisa was uncharacteristically angry, leaned into her and in a tone louder than his normal discourse stated, "You can't tell me what to do, I don't have to do what you tell me, you don't know who you are messing with." Zavisa denied that he stood over and pointed down at Rowan. He testified he told Rowan he would get back with her. Within twenty or thirty minutes, Zavisa distributed a revised memo which rescheduled the union meeting for after school, placed a copy of the notice on Rowan's desk and told her he believed that was what she requested. Shortly thereafter, Zavisa was sent the following memorandum:

You are directed to report to my office at 12:05 pm today, Tuesday, October 7, 1997 to discuss your disruptive behavior in the school building.
Since this may lead to disciplinary action, you are entitled to Union representation.

According to Zavisa, Rowan handed him a hand-written referral to the Employee Assistance Program (EAP)⁴, talked at length about his union activities as building representative; told him the building was hers to run as she saw fit; and his dissatisfaction with the union contract and the ratification controversy had disrupted his behavior and teaching. The referral form indicated Zavisa's job performance had been negatively affected because of the following behaviors:

10-3-97 Prior to a curriculum design meeting during the 8th hour, Mr. Zavisa told the staff and principal the meeting was illegal.⁵

10-7-97 Mr. Zavisa was asked by the principal to change his scheduled D.F.T. meeting until after school hours. He said he would not. He told Mrs. Rowan you don't know what you have gotten into. You can't tell me what to do.

Mr. Zavisa has become so unhappy with the new contract that he is

⁴The EAP evaluates and, if necessary, recommends treatment plans for employees whose job performance is negatively affected by individual, family or substance abuse problems. The referral is mandatory and failure to keep the appointment could result in termination.

⁵During cross-examination, Rowan repeatedly insisted that Zavisa was not referred to EAP because he told staff and the principal that the meeting was illegal although she wrote otherwise on the referral form.

unable to focus on his primary job. Mrs. Kellem [sic] observed and reported some concerns in this semester's work.

Rowan further noted on the form her hope the EAP assessment would answer the following questions: (a) How can Mr. Zavis become a satisfactory functional member of the teaching staff? (b) How can Mr. Zavis learn to control his anger? In explaining what she meant, Rowan testified:

When I asked in the staff meeting, are you able to do these tasks, and will you do them, his answer will be yes. And if it can't be yes, he'll tell me what he needs from me to make it yes. When I talk about his anger I intend that he will not be menacing and leaning over the desk telling me what he is not going to do and issuing unkind comments.

After the meeting, Zavis was suspended, ordered to leave the building immediately, and directed to make himself available by phone or message relay service so he could be informed of his EAP appointment. Rowan also refused Zavis's request to use the telephone to call the Detroit Federation of Teachers to alert them to what had transpired. Subsequently, Zavis was notified to appear at the EAP office on October 14. In the meantime, the Wayne County Circuit Court issued an injunction blocking the referral pending the outcome of the instant unfair labor practice charges. Thereafter, by agreement of the parties, the lawsuit was dismissed, the directed referral rescinded and on October 31, 1997, Zavis returned to work and was paid for the eighteen days he was suspended.

Prior to October 3, 1997, Zavis had never been told that his job performance was unsatisfactory or that he needed to improve. For several years, and as recent as the 1996-97 school year, Zavis had been selected by Rowan as a "master teacher", a designation bestowed on 10 to 12 faculty members responsible for student teacher training. In 1995, assistant principal Cleovis Scott wrote letters of recommendation on Zavis's behalf which described his commitment and dedication to the profession as exemplary. In 1990, Kellum, who was Zavis's department head, nominated him for the, "Newsweek-WDIV Outstanding Teacher Award."

Conclusions of Law:

Charging Parties Zavis and the Detroit Federation of Teachers claim Zavis was retaliated against for engaging in protected, concerted activities when Rowan referred him to the EAP program. Respondent makes two principal arguments. It claims Zavis was not engaged in protected activity on October 7, when he threatened and insulted Rowan after she summoned him to her office to discuss rescheduling an eighth hour Union meeting. Respondent reasons that Zavis's conduct was not protected because it occurred in a one-on-one setting in the principal's office and he was not participating in a grievance step or attempting to file a grievance in accord with contractual procedures. Respondent also asserts that Zavis's referral to the EAP program did not constitute discipline. I find no merit to either of Respondent's defenses.

A determination that an employee is engaged in concerted, protected activity is not dependent

upon whether an employee has filed a grievance or whether the employee's conduct is in connection with a step in the grievance procedure. See *Detroit Board of Education*, 1997 MERC Lab Op 516, 518, and cases there cited. The Commission has granted considerable latitude to employees' verbal statements made in the context of grievance or *other meetings* held to discuss terms and conditions of employment. *City of Kalamazoo*, 1996 MERC Lab Op 556, 570. Clearly, Zavisia was engaged in protected concerted activity when he reported to Rowan's office to discuss the Union meeting he had scheduled to discuss Rowan's apparent inability to deliver paper and supplies, a subject which affected the terms and conditions of their employment. Although Zavisia denied he stood over and pointed at Rowan, even if he did, his conduct was not sufficiently flagrant to remove it from PERA's protection. This is especially true since Zavisia was reacting to Rowan's objection, the first in 14 years, to his scheduling of an eighth hour Union meeting. Moreover, assuming that Zavisia was not engaged in protected concerted activity during his meeting with Rowan on October 7, there is ample evidence on the record, which Respondent does not contest, to establish that Zavisia engaged in other protected, concerted activity which formed the basis for Rowan's unlawful discrimination against him.

Zavisia engaged in protected activity when he, on behalf of other employees, advised Rowan that an eighth hour teachers' meeting she scheduled on October 3 was "illegal". Despite Rowan's testimony that she did not refer Zavisia to the EAP because he told her the staff meeting was "illegal", she plainly wrote on the EAP referral form that Zavisia's act of telling the staff and principal that the October 3 meeting was illegal was one of the behaviors which prompted his referral.

Rowan also acknowledged that she directed Kellum to conduct an unannounced observation of Zavisia's classroom teaching because he failed to acknowledge in an October 3 staff meeting that he would stop complaining and put the lack of paper and supplies behind him. Rowan's testimony on cross-examination makes clear that Zavisia's failure to cooperate was a motivating factor in her decision to refer him to the EAP program. She testified as follows:

Q. And as I understand it, because a teacher of 26 years experience, who you have described as an excellent teacher, said no to your question during the course of the staff meeting, that was the basis for referring him to EAP four days later for the first time in his career?

A. Partially, yes.

Respondent would have this tribunal believe that Zavisia's referral to the EAP did not constitute discipline. This assertion, however, is deflated by Rowan's October 7 memo to Zavisia directing him to report to her office to discuss his alleged disruptive behavior. Rowan specifically wrote that because the meeting may result in discipline, he was entitled to Union representation. There is nothing in the record to suggest that Rowan considered or discussed with Zavisia any action other than the EAP referral. Moreover, the EAP referral coupled with the manner in which Zavisia was suspended (ordered to leave the building immediately and denied use of the telephone) make clear Rowan's intent to punish and humiliate Zavisia. The record establishes that Zavisia had been a model teacher and no questions had ever been raised about his job performance or mental status until

October 3, when he disagreed with Rowan's decision to schedule a Friday staff meeting and her efforts to quell complaints about the lack of paper and supplies. I find not only that Zavis's EAP referral and suspension were discipline, but interference with his rights under Section 9 of PERA and discrimination in violation of Section (10(1)(a) and (c). It is therefore recommended that the Commission issue the order set forth below:

Recommended Order

The Detroit Board of Education, its officers, agents and representatives are hereby ordered to:

1. Cease and desist from discriminating against employees in regards to hire, terms or other conditions of employment and interfering with their right to engage in concerted activity.
2. Cease and desist from referring Zavis or other employees to the EAP program, in whole or in part, because they engaged in concerted protected activity.
3. Remove all references to the EAP referral from Zavis's employment records.
4. Post, for thirty (30) consecutive days, the attached notice in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, THE DETROIT BOARD OF EDUCATION HAS BEEN FOUND GUILTY OF AN UNFAIR LABOR PRACTICE UNDER SECTION 16 OF THE PUBLIC EMPLOYMENT RELATIONS ACT. PURSUANT TO THE ORDER OF THE COMMISSION WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with or otherwise discriminate against employees because of their activities protected by Section 9 of the Public Employment Relations Act.

WE WILL cease and desist for referring Zavisia or other employees to the Employee Assistance Program (EAP) program, in whole or in part, because they engaged in concerted protected activity.

WE WILL remove all references to the EAP referral from Zavisia's employment records.

WE WILL insure that all our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

Detroit Board of Education

By: _____
Name

Dated:

Title

(This notice must remain posted for a period of thirty (30) days. Questions concerning this notice shall be directed to the Michigan Employment Relations Commission, 1200 Sixth Street, 14th Floor, Detroit, Michigan 48226, (313) 256-3540.)