STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF GRAND RAPIDS (FIRE DEPARTMENT),
Respondent-Public Employer,

Case No. C97 C-65

-and-

GRAND RAPIDS FIRE FIGHTERS, LOCAL 366,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF),
Charging Party-Labor Organization.
_____/

APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, LLP, by John Patrick White, Esq., for Respondent

Randall D. Fielstra, Esq., for Charging Party

DECISION AND ORDER

On July 14, 1998, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above case, recommending dismissal of charges alleging that Respondent City of Grand Rapids (Fire Department) refused to promote fire fighter Frank Verburg because of his protected concerted activities in violation of Section 10(1) of the Public Employment Relations Act (PERA), 1947 PA 336, as amended, MCL 423.210; MSA 17.455(10).

Charging Party filed timely exceptions to the Decision and Recommended Order of the Administrative Law Judge on August 6, 1998. Respondent filed a timely brief in support of the Administrative Law Judge's decision on August 21, 1998.

Background**:**

Frank Verburg is a Lieutenant with the City of Grand Rapids Fire Department and a member of a bargaining unit represented by Charging Party Grand Rapids Fire Fighters, Local 366, International Association of Fire Fighters (IAFF). The bargaining unit includes all fire fighters employed by the department, with the exception of the chief. In February of 1994, Verburg was elected president of Local 366. Witnesses describe Verburg as an "aggressive and tenacious" union advocate. As set forth more fully in the Decision and Recommended Order, Verburg has been involved in numerous disputes with management during his tenure as president. Under Verburg's leadership, the Union challenged the department's use of assessment centers for purposes of

evaluating candidates for promotion, actively opposed the relaxation of service requirements, disputed the department's use of letters of instruction, and questioned the safety of a confined training house which was under construction. In addition, the Union instituted an action in Kent County Circuit Court regarding an examining question on a test for promotion which was based on Verburg's conduct.

Verburg was also an outspoken critic of fire chief Albert W. Connors. A letter which Verburg wrote to the city manager questioning the "professional integrity of non-union leadership" in the department promoted an investigation into courses being taught by the chief. In December of 1994, Verburg filed safety observation reports alleging that the department was using defective apparatus and that fire chief Albert W. Connors had failed to use an emergency warning light on the top of his vehicle. When progress was slow in correcting these problems, the Union filed a MIOSHA complaint which resulted in the issuance of violations and media coverage critical of both the City and the chief. At that time, the chief publicly asserted that the Union was "seeking his early retirement." In March of 1995, the City called a meeting to discuss a possible demotion of the chief to fire marshall, a bargaining unit position. Verburg opposed the action on the ground that four members of the unit were potentially in line for that position. Later that year, a private firm was retained to prepare a written critique of the fire department and to evaluate its management. Verburg testified that the firm was hired in response to his activities.

Sometime in 1995, Verburg applied for promotion to the rank of captain, the next highest rank in the department. In order to be eligible for promotion to this rank, an employee must serve two and a half-years as a fire lieutenant and pass a civil service exam with a score of 70 or higher. The first round of promotions for which Verburg was eligible took place in August of 1995. At that time, the procedure called for the senior command staff, consisting of two deputy chiefs, the chief training officer, and six battalion chiefs, to provide written evaluations of each candidate to the chief who, in turn, would make a recommendation to the city manager. Although the chief was not bound by the evaluations, he testified that they were an important factor in the decision-making process. The four candidates who were promoted to captain in 1995 received positive evaluations from all nine members of the senior command staff. Verburg and one other candidate received mixed reviews and were not promoted.

The next round of promotions for which Verburg was eligible occurred in November of 1996. Four lieutenants were on the eligibility list to fill one vacancy. Verburg received 1 "highly recommended" rating, 3 "recommended" ratings and 4 "not recommended" ratings. Five of the eight command staff members who evaluated Verburg questioned his ability to work with supervisors. The lieutenant who received the promotion, Anthony Prusinski, was rated "highly recommended" by 2 of the evaluators and "recommended" by the remainder of the senior command staff. Shortly thereafter, another vacancy occurred. Because there was no consensus amongst the evaluators regarding the remaining candidates, Chief Connors decided to leave the position open until a new pool of candidates became available. The chief appointed Verburg to a long-term acting assignment to fill the vacancy in the interim.

Discussion and Conclusions of Law:

On exception, Charging Party contends that the Administrative Law Judge misstated the burden of proof with regard to the senior command officers who evaluated Verburg. Where it is alleged that a decision is motivated by anti-union animus, the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the employer's decision to terminate the employee. *MESPA v Evart Public Schools*, 125 Mich App 71, 74 (1982). The elements of a prima facie case of discrimination under Sections 10(1)(a) or (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; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. Once the prima facie case is established, the burden shifts to the employer to produce credible evidence that the same action would have taken place even in the absence of the protected conduct. The ultimate burden of proving discrimination, however, remains with the employee. See *Evart*, *supra*; *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9*; Residential Systems*, 1991 MERC Lab Op 394, 405; *University of Michigan*, 1990 MERC Lab Op 272, 288.

In her Decision and Recommended Order, the Administrative Law Judge wrote that it would be "difficult if not impossible" for the Union to prove that the battalion chiefs were motivated by anti-union animus in light of the fact that they were members of the same bargaining unit as Verburg. Viewing this statement in its entirety, we do not believe that the Administrative Law Judge was attempting to set forth the Union's burden of proof. Rather, the Administrative Law Judge was merely commenting on the practical difficulties inherent in establishing anti-union animus or hostility under such circumstances. Although we question whether these difficulties are, in fact, insurmountable, we agree generally that such cases present a unique challenge to the party alleging anti-union discrimination. In so holding, we reject Charging Party's contention that it was improper for the Administrative Law Judge to cite *County of Tuscola*, 1990 MERC Lab Op 815, 821 n 3, in support of this proposition. It is true that *Tuscola* involved an unfair labor practice charge alleging discrimination against a police officer and, thus, did not implicate Section 13 of PERA which places supervisory and nonsupervisory employees of a fire department in the same bargaining unit. However, this is a distinction without a difference. In both cases, however, the alleged victim of discrimination was in the same union as the command officers who voted against him for promotion.

We also agree with the Administrative Law Judge's determination that Charging Party failed to establish a prima facie case of discrimination with regard to the senior command staff. In determining whether an employer has engaged in unlawful activity, the totality of the circumstances surrounding the action must be examined. *Residential Systems*, *supra*, at 406. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the party making the claim must present substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *County of Saginaw*, 1990 MERC Lab Op 775, 780 (no exceptions).

After examining the record, including the transcript and exhibits submitted by the parties, we find no evidence suggesting that the command officers were motivated by anti-union animus or hostility.

The testimony focused on the motivation of five command officers who failed to recommend Verburg for promotion: Deputy Chief Staal, Chief Training Officer Tibbets and Battalion Chiefs Rohloff, Van Dellen and Hickey. Although Rohloff and Van Dellen were involved with disputes with Verburg during the period in question, the record indicates that both officers were members of Local 366 and that the disputes were directly related to Verburg's handling of union matters. For example, animosity developed between Verburg and Rohloff when the Union challenged a request by two lieutenants to relax the service requirements for promotion to captain. After Verburg made a derogatory comment about Rohloff to other fire fighters, Rohloff attempted to have Verburg disciplined. The labor relations department investigated and determined that no discipline would be issued because the incident was an internal union matter unrelated to the fire service. Similarly, Battalion Chief Van Dellen disagreed with Verburg's decision to file a lawsuit which would, in part, have nullified promotions that had already been made. In response, Van Dellen told one of the captains that he viewed the action as a personal attack. However, the witness who made this allegation also testified that Van Dellen had no personal stake in the lawsuit. Moreover, the case was dismissed in February of 1996, approximately eight months before Van Dellen gave Verburg a negative evaluation. To infer that either Roulhoff or Van Dellen were motivated by anti-union animus based on these facts would be to engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, *supra*, 393 Mich at 126. As noted by the Administrative Law Judge, disagreement with the position Verburg took as union president in these matters does not, in and of itself, establish opposition to protected concerted activity in general. To hold otherwise would mean that an employer would be prohibited from objecting, however remotely, to any action taken by a union official. We do not believe that the statute was meant was meant to insulate union officers in this manner.

The evidence was also insufficient to establish that command officers Tibbets, Staal and Hickey discriminated against Verburg in violation of PERA. Charging Party alleges that Tibbets improperly considered Verburg's union activities in making his recommendation to the fire chief. In his evaluation of Verburg, Tibbets advised the chief that the lieutenant was "off the machine often." As noted by the Administrative Law Judge, however, this was a permissible consideration. See *Fitzgerald Public Schools*, 1989 MERC Lab Op 663; *Oakland County Sheriff*, 1985 MERC Lab Op 430. In any event, this comment was ultimately stricken from the rating sheet, and Tibbets told the chief that the deletion would not affect his opinion of Verburg as a candidate for promotion. As proof that command officers Staal and Hickey were motivated by anti-union animus, Charging Party refers to two letters of instruction which were issued to Verburg in 1996. The first letter was issued in January following an inspection of Verburg's station by Staal and Battalion Chief Van Solkema. In the letter, Staal cited the lieutenant for unshined shoes, blackened blaster shields and an unmarked spray bottle. Several months later, Hickey attempted to put a letter of instruction in Verburg's file regarding a defective live vest. However, that letter was withdrawn after the fire chief determined that it was based on a misunderstanding between the parties. Moreover, we find no evidence to support Charging Party's contention that either letter was issued to Verburg in retaliation for his actions as Union president. The record indicates that department has used letters of instruction in the past and that other fire fighters have been cited for similar violations. Furthermore, the evidence clearly establishes that such letters do not constitute discipline. It should also be noted be noted that Staal actually recommended Verburg for promotion in 1996, one year after criticizing him for not

being a "team player." Accordingly, we conclude that Charging Party failed to meet its burden of proving that the command officers were motivated by anti-union animus or hostility.

As to the fire chief, Charging Party alleges that the Administrative Law Judge minimized the impact and seriousness of Verburg's criticisms. In addition, the Union contends that the Administrative Law Judge erred in failing recognize that these criticisms were supported by the City's Labor Relations Department. We disagree. The mere fact that Verburg openly questioned the chief's performance does not prove that Connors responded to that criticism by discriminating against him with regard to promotion. Similarly, the merits of the allegations set forth by Verburg are irrelevant to whether the chief's decision was tainted by anti-union animus. Rather, it is Charging Party's burden to demonstrate that protected activity was a motivating cause of the allegedly discriminatory action. In our opinion, Charging Party failed to meet that burden. The chief testified that he relied heavily on the recommendations of his senior command officers in making the promotion decisions, and he emphasized the importance of selecting candidates with whom all of the senior staff members felt comfortable. It is undisputed that Verburg received negative evaluations in both 1995 and 1996, while the individuals who were promoted to captain during that period were recommended by all of the command officers participating in the process. We agree with the Administrative Law's determination that the remarks attributed to the chief were too vague and ambiguous to establish a prima facie case of discrimination. Most importantly, the evidence suggests that the chief went out of his way to ensure that the process would be fair. Connors consulted with Rohloff and Tibbets to confirm that their evaluations of Verburg based solely on job-related factors. When Tibbets indicated that a statement on his evaluation sheet might have referred to time off due to union business, the chief had the comment excluded. The chief also provided for the removal of the letter of instruction which had been placed in Verburg's file by Hickey. Although the relationship between Verburg and the fire chief was fraught with disagreement and conflict, Charging Party simply failed to show any nexus between Verburg's union activity and the fire chief's decision to recommend other candidates for promotion.

Finally, Charging Party contends that the Administrative Law Judge erred in failing to consider *City of Saginaw*, 1997 MERC Lab Op 414, and *City of Grand Rapids*, 1984 MERC Lab Op 118. In *Saginaw*, we found that the Employer had discharged a fire fighter in retaliation for his protected concerted activity. In that case, however, the fire chief admitted that the fire fighter would not have been targeted for discipline but for his union activities. *Id.* at 419. Here, Charging Party failed to establish, either directly or indirectly, that the discharge was in any way motivated by anti-union animus or hostility. In *Grand Rapids*, we concluded that the City's refusal to promote an employee constituted a violation of PERA. This determination was based, in part, on the fact that one of the supervisors was hostile toward the employee's union activities and that he had prejudiced other supervisors who participated in a group evaluation of the candidates for promotion. Moreover, we found no factual basis on the record to explain why the other candidates received higher ratings. *Id.* at 124. In the instant case, there is no suggestion that the evaluation process was tainted by the chief. To the contrary, it appears that the chief went out of his way to ensure that the process was fair. Accordingly, we find the Union's reliance on these cases to be without merit.

For the reasons stated above, we affirm the findings and conclusions of law of the

Administrative Law Judge.

ORDER

Pursuant to Section 16 of the Act, we hereby adopt and incorporate the Administrative Law Judge's Decision and Recommended Order as our final order in this case and dismiss the charges in their entireties.[1]

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

_____
Harry W. Bishop, Commission Member

Date: _____

[1] Commissioner Ott did not participate in this decision.