

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

MID-MICHIGAN COMMUNITY FIRE DEP'T,
Respondent-Public Employer,

Case No. C00 A-5

-and-

KEN SMITH,
An Individual Charging Party.

APPEARANCES:

Scholten & Fant, P.C., by Ronald A. Bultje, Esq., for Respondent

Gentry Law Offices, P.C., by Kevin S. Gentry, Esq., for Charging Party

DECISION AND ORDER

On March 22, 2001, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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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 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Lansing, Michigan on March 21 and June 8, 2000, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on August 14, 2000, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed on January 19, 2000, by Ken Smith, an individual, against his former employer, the Mid-Michigan Community Fire Department. The charge alleges that Respondent terminated Smith on January 3, 2000 because of Smith's efforts to organize a union among Respondent's fire fighters.

Facts:

Respondent is a fire department created by the City of St.Louis, Michigan, and Pine River, Jasper, and Bethany Townships. It is overseen by a board consisting of representatives from these entities. The chairman of the board is Dennis Collison, St. Louis city manager. Respondent employs approximately 23 fire fighters, including the fire chief. All of Respondent's employees, including the chief, work part-time, on call only. The fire chief is assisted by an assistant fire chief, a captain and a lieutenant. These four positions are referred to by everyone in the department as "the officers." Larry Parsons was chief of the department until January 1, 2000. On that date Richard Apps, who had been the lieutenant, became chief.

Smith started working for Respondent in January 1995. Soon thereafter, Smith began taking courses offered by the State Police's Fire Fighters Training Council (FFTC). Smith took these courses on his own time and paid his own fees. In 1998, Smith became a probationary

instructor for the FFTC, teaching throughout in mid-Michigan. From 1998 to 1999, Smith served as Respondent's training coordinator. Around the middle of 1998, Smith came to the conclusion that Respondent's training program was inadequate, and that lack of training was jeopardizing the safety of the fire fighters. Smith voiced his opinion to Parsons, to the other three officers, and to his fellow fire fighters. When the officers did not respond to his satisfaction, Smith complained that fire fighters had no say in what went on in the department.

In April 1999, Parsons was present on a day Smith was teaching an FFTC class. One of the FFTC instructors complimented Smith to Parsons. Parsons said, in Smith's hearing, "Yes, too bad he's not a fire fighter." After this incident, Smith escalated his criticism of the department in general and Parsons in particular. Smith complained to other fire fighters that Parsons talked to and treated fire fighters poorly. Smith also said that the department lacked structure, and that communication in the department was poor. Smith reached the conclusion that the majority of the fire fighters agreed with him. Sometime between April and September 1998, he said this to the four officers. Meanwhile, fire fighters were reporting to the officers that Smith was complaining about them. Someone told the officers that Smith had said that Parsons should be removed as chief.

Parsons and Jerry Church, the captain, met with Smith sometime in June 1999 to discuss Smith's complaints. Church asked Smith for the names of other fire fighters who shared his views. Smith refused to give him names. After this meeting, Church went to individual fire fighters to ask them if they had any "concerns" about the department. Sometime during the summer of 1999, Church came to Smith's place of business and told Smith that he had talked to more than 90% of the fire fighters. Church said that nobody had any complaints except Fred Clark, another fire fighter, and Smith himself. Church said, "this could lead to you being asked to get off the department." In response, Smith took his own survey. Several fire fighters told Smith that they had told Church that they were dissatisfied with certain things in the department, and other fire fighters told Smith that Church had not spoken to them at all. Smith concluded that Church had lied to him, and he said this to several other fire fighters.

On September 23, 1999, Smith received the following letter, signed by Parsons and the other three officers:

As you are well aware, a difference of opinion has grown between yourself and the current officers of the Mid-Michigan Community Fire Department. While we have an open door policy in which you may voice your opinions, as you have done, the officers will no longer tolerate the continued insubordination to the Chief and Captain, nor your efforts to cause dissension within the department.

Your agenda to undermine the current officer staff with the other firefighters will not be tolerated. An inquiry and investigation by the officers has been made in an attempt to substantiate your claims that there are others on the department who also want to replace the current chief. An effort was made to make contact with the majority of the firefighters and not one was willing to support your claims. The officers have been unable to locate the "large core" of current firefighters who wish for you to replace the current chief.

Divisions in the fire department are not healthy, nor constructive. They create disharmony, and lower morale in a unit, which must be able to depend on each other for their safety. We feel your continuing campaign of insubordination toward the officers has left us with the following decision. This letter is to serve as a letter of reprimand for your actions and you will be placed on probation for one year. After that time your situation will be reviewed.

After receiving this letter, Smith telephoned Joel Felt, organizer for the Michigan

Association of Fire Fighters. Smith asked for information about organizing Respondent's fire fighters. On September 29, Felt sent Smith a letter summarizing the information Felt had given him. Smith discussed the idea of a union with fellow fire fighters Clark and Dave Best. Both Best and Clark thought a union would be a good idea. Smith, however, decided that he would not actively try to organize, at least for the time being.

Between September 23 and the end of December 1999, Smith spoke to Felt occasionally on the phone and talked to "a few" fire fighters about the possibility of a union. Clark also talked about a union. Clark estimated that he had conversations about a union with between eight and ten different fire fighters during this period. Neither Smith nor Clark spoke about the union in the presence of Parsons or any of the other three officers. There is no evidence, direct or circumstantial, that any of the four officers knew that employees were discussing unionizing during this period.

On the morning of December 31, 1999, Parsons and Apps were meeting at the fire station to discuss Apps' taking over as chief when Smith approached them. Smith had recently completed the necessary courses to be certified as a Fire Fighter II, but he needed the chief to sign his application. Apps and Parsons told Smith that neither would sign the form until Smith completed his disciplinary probation. Apps said that after Smith's probation was completed he would "review it." Smith was upset. He told the two men that the signature was just an affirmation that his documentation was complete, but Apps insisted that the signature was a recommendation. The conversation became heated. At some point in the discussion, for reasons that are not clear from the record, Smith and Apps got into an argument about whether Smith, as a probationary instructor, was properly teaching FFTC courses without the presence of a fully certified instructor. Smith called Captain Church, or the assistant chief of the nearby Alma fire department, or both, a liar.¹ Apps may have said that Smith was not skilled at hose-handling. Finally, Apps asked Smith whether he trusted the officers in the department. When Smith did not respond, Apps asked again. After Smith had refused several times to respond to the question, Apps said, "if you don't trust the officers, maybe you need to turn in your gear." Smith left the fire station.

After returning home, Smith telephoned Felt. Smith told Felt that he was going to begin actively trying to organize and that he was not going to try to conceal it any longer. After this call, Felt mailed Smith union authorization cards. Smith did not receive the cards until January 4, after he had been terminated. However, between the afternoon of December 31 and January 3 Smith told approximately eight fire fighters, including Clark and Smith's brother, that Felt was sending him cards.

Parsons and Apps discussed Smith several times during the day on December 31, and again that evening while driving together to and back from Alma. During the drive Parsons and Apps decided that Smith's probation was not affecting his attitude. Based on the lack of respect they felt Smith had shown them earlier that evening, and his refusal to say that he trusted the officers, they concluded that Smith should be terminated. Parsons and Apps agreed, however, that they should first discuss Smith's termination with Collison. They agreed to meet at Collison's office after Apps finished work on Monday, January 3.²

¹Parsons and Apps testified that Smith said that he should never have been put on probation and that it was all the fault of Captain Church, who was a liar. They also testified to a long conversation about a proposed consolidation of Respondent with the Alma fire department. According to Apps, Smith said that the assistant chief of the Alma department had called Apps a "band-aid chief," was planning to take over as chief of the consolidated department, was "evil," and "lied all the time." Smith did not directly affirm or deny this testimony, but he admitted on cross-examination that he had during the meeting called someone a liar.

² Apps and Parsons both testified to the course of events above. For reasons set forth in the discussion section of this decision, I credit their testimony.

On Saturday, January 1, 2000, Apps ran into Richard Prestage, a fire fighter who had just become the lieutenant. Apps told Prestage that he and Parsons had met with Smith on the previous day and that there had been “another problem.” Apps told Prestage and that he and Parsons were going to go and see Collison, but that “basically they had decided to let Smith go.” On Sunday morning, January 2, the department was called out on a rescue run. Apps and Keith McJilton, the assistant chief, drove together to the run. During the drive, Apps told McJilton that he and Parson had an encounter with Smith on December 31. He told McJilton that he and Parson s felt that it was time to terminate Smith, but they were going to have a meeting to discuss it first.

Smith was also at the rescue run on the morning of January 2. After the run Smith and Best talked to a number of fire fighters about the union. Smith told them that he was going to begin distributing cards to petition for a vote to get the union in. One of the fire fighters Smith spoke with was Jerry Brush. Later that same day Brush told his brother-in-law, Randall Davidson, also a fire fighter, what Smith had said. There was a second run on the evening of January 2. After that run Davidson told Apps, McJilton and Prestage that after the earlier run, Smith had been talking to fire fighters about bringing a union into the department.

Apps and Parsons met in Collison’s office on the afternoon of January 3. Apps gave Collison a written summary he had prepared of his confrontation with Smith on December 31. Apps told Collison that he and Parsons believed Smith should be discharged. Collison, who had favored discharging Smith in September instead of putting him on probation, said that he agreed. Apps then told Collison and Parsons that on the prior evening he had learned that Smith was attempting to organize the fire department. Collison and Parsons agreed that this was not a reason to change their decision. Apps immediately drafted a letter to Smith terminating his employment. In the letter Apps said:

. . . It is apparent at this time that there is no change in your attitude of disregard for the officers of the Fire Department and the authority and oversight they are charged by the Fire Board to exercise. Your mistrust of the Officers prevents the development of sound interpersonal relationships that are vital to safe and effective operations in emergency situations. This mistrust will continue to cause suspicions, animosity, anger, division and conflict within the Department. For these reasons your membership on the Mid-Michigan Community Fire Department is hereby terminated, effective immediately.

Per departmental procedures, Smith appealed his dismissal to the four officers, and then to Respondent’s board. Both upheld his termination.

Discussion and Conclusions of Law:

Smith has not alleged in this case that he engaged in activity protected by PERA prior to September 1999, or that his termination was caused in part or in whole by activities other than his union activities. The sole issue in this case, therefore, is whether Smith was terminated because of his union activities between September 23, 1999 and January 3, 2000.³

A prima facie case of unlawful discrimination under Section 10(1)(c) of PERA contains four elements: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee’s protected rights; (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discrimination action. *Rochester School Dist*, 2000 MERC Lab 38, 42. Once the Charging Party

³ Smith’s attorney confirmed this at the hearing, and Charging Party made no effort to argue a broader theory in his brief.

has established a prima facie case, the burden shifts to the Respondent to produce evidence that the employee would have been discharged even in the absence of his or her union or other protected activity. *MESPA v Ewart Public Schools*, 125 Mich App 71, 74 (1982).

Respondent denies that it knew that any union activity was taking place among employees until the evening of January 2 when Davidson told Chief Apps and two other officers about Smith's intention to try and organize the fire fighters. According to Respondent, by this time Apps and ex-chief Parsons had already decided to terminate Smith. There is no evidence contradicting the testimony of Apps and Parsons that they had not heard about any union activity prior to January 2. Respondent is a small employer. However, the small size of an employer's staff does not support an inference that an employer knew of union activities, 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 SD*, 141 Mich 500, 501 (1983), citing *Amryx Industries, Inc v NLRB*, 457 F2d 904 (8th Cir, 1972). See also *MERC v Cafana Cleaners, Inc*, 73 Mich app 752, 759, (1977), rev'g 1975 MERC Lab Op 884.

Smith points out that he was not terminated until January 3, 2000, after Apps had learned of his union activities. However, both Apps and Parsons claim that they decided to terminate Smith on the evening of December 31, 1999. According to Apps and Parsons, they felt that a serious action such as a termination should be discussed first with the chair of Respondent's board. Therefore, they did not notify Smith that he was terminated until they had a chance to meet with Collison, on January 3, and Collison had agreed with their decision. Apps and Parsons deny that learning of Smith's union activities had any influence on their final decision to terminate Smith.

For reasons set forth below, I credit Apps and Parsons that they decided to terminate Smith before they learned of his union activity, and that learning of Smith's union activity did not influence their final decision. First, the evidence demonstrates that Apps and Parsons were seriously upset over Smith's criticisms of the department. Smith was put on probation in September 1999 before he contacted Felt or talked to other employees about a union. Apps and Parsons both believed in September 1999 that Smith was spreading dissatisfaction with their management of the department. On December 31, 1999, they had a heated discussion with Smith which culminated in Smith's refusal to comply with Apps' demand that he say that he "trusted the officers." Apps and Parsons' testimony regarding their reaction to this discussion is consistent with their previous reaction to what they perceived as Smith's lack of respect for authority. I find credible Apps and Parson's testimony that after their meeting with Smith on December 31 they decided that his disrespectful attitude was not going to change. Second, Apps and Parsons' testimony that they decided to terminate Smith on December 31 was supported by the testimony of Prestage and McJilton, who both testified that Apps mentioned his intention to terminate Smith to them between December 31 and January 3, as well as by the testimony of Collison. Finally, I note that the record in this case is devoid of any direct evidence of union animus. Smith argues that the timing of his termination demonstrates that union animus was the reason for his termination. The timing of a discharge can be a significant factor in determining whether the discharge was motivated by the employee's union activity. See, e.g., *City of Saginaw*, 1997 MERC Lab Op 414. Here, however, the timing of Smith's discharge in relation to his union activity is adequately explained by the record. That is, both Parsons and Apps' decision to terminate Smith, and Smith's decision to begin organizing openly, resulted from the same event, their meeting on December 31.

In accord with the findings of fact and discussion and conclusions of law set forth above, I conclude that Charging Party Ken Smith failed to meet his burden of demonstrating that he was terminated by Respondent on January 3, 2000 because of his union activity. Accordingly, I conclude that Respondent did not violate Sections 10(1)(a) and (c) of PERA, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: