STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB TOWNSHIP (FIRE DEPARTMENT),
Respondent-Public Employer,

Case No. C99 L-230

-and-

MICHIGAN ASSOCIATION OF FIRE FIGHTERS,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Anthony, Seibert and Dloski, by Lawrence W. Dloski, Esq., for Respondent

Hoekenga and Associates, by Daniel J. Hoekenga, Esq., for Charging Party

DECISION AND ORDER

On November 20, 2000, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent, Macomb Township, did not discriminate against Michael O'Lear, Sr. or members of his family because of his protected concerted activity as chairperson of Charging Party, Michigan Association of Fire Fighters. The ALJ found that Respondent had not violated Section 10(1)(a)(b)(c) or (d) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a)(b)(c) or (d), as alleged in the charges, and recommended that the charges be dismissed. On December 15, 2000, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On January 25, 2001, Respondent filed a timely answer to Charging Party's exceptions.

Charging Party contends that Respondent discriminated against its chairperson, Sergeant Michael O'Lear, Sr. (Sergeant O'Lear), for his union activities by discharging his son, probationary firefighter Michael O'Lear, Jr. (O'Lear, Jr.), and by terminating the services of his wife as a part-time fire phone operator. Charging Party also contends that a factor in O'Lear, Jr.'s discharge was O'Lear, Jr.'s own protected concerted activity.

Facts:

Charging Party is the exclusive bargaining agent for the paid on-call fire fighters employed by Respondent. Charging Party does not represent Respondent's full-time fire fighters. The collective bargaining agreement relevant to the charge covers the period of July 1, 1998, to June 30, 2001. Under the terms of the collective bargaining agreement, new fire

fighters must serve a two-year probationary period during which they may be discharged with or without cause. Sergeant Michael O'Lear was elected Charging Party's chairperson in November 1998, and held that position throughout the time-period encompassed by the charges.

On June 18, 1999, Macomb Township Supervisor John Brennan, Sergeant O'Lear and suspended fire fighter Thomas Cook met to discuss the grievance filed regarding Cook's suspension. The meeting became rather heated and Brennan made a vulgar reference to firemen. Sergeant O'Lear and Cook left the meeting shortly thereafter.

In June and July 1999, Respondent required bargaining unit members to have masks fitted for use in fire fighting. The employees were required to have the mask fitting done on their own time. On August 2, 1999, Sergeant O'Lear filed a grievance, on Charging Party's behalf, charging that Respondent's failure to pay bargaining unit members for the time spent having the masks fitted was a breach of the collective bargaining agreement.

On August 12, 1999, the fire department chief, Raymond A. Ahonen, questioned Sergeant O'Lear about whether he and another fire fighter, Greg Wiegand, had been smoking on fire apparatus after a fire run. During that conversation, Sergeant O'Lear told Ahonen that he did not recall whether he had been smoking on the date in question. Though Sergeant O'Lear acknowledged the employer's rules against smoking, he never denied that he had been smoking in violation of those rules.

On August 16, 1999, Ahonen issued a reprimand to Sergeant O'Lear for smoking on fire fighting apparatus and gave the reprimand, in a sealed envelope, to O'Lear, Jr. to deliver to his father. (O'Lear, Jr. lived with his father and mother.) The next day, Sergeant O'Lear confronted Ahonen about using his son to deliver the reprimand, claiming that Ahonen could have given it to him directly because he had worked every day since August 12. However, Sergeant O'Lear did not grieve the reprimand.

On August 25, 1999, Brennan sent Sergeant O'Lear a letter informing him that the Township planned to investigate whether he had falsified a grievance filed in January of 1999. Testimony at the grievance arbitration hearing revealed that the grievant, Marcel DeMuynck, had not signed the grievance when Sergeant O'Lear filed it on January 25, 1999. Although the matter was an issue in the grievance arbitration, Respondent did not otherwise pursue the investigation of whether the grievance had been falsified.

On October 16, 1999, Ahonen, O'Lear, Jr., and several other fire fighters attended a fire department training session. Firefighter Anderson stuck a biohazard sticker on O'Lear, Jr.'s back and a few of the firefighters joked about it. Later, while fire fighter John Martin was responding to a question from the visiting instructor, O'Lear, Jr. called Martin a "nerd, dork, and suck ass". On October 21, 1999, Ahonen called O'Lear, Jr. into his office to discuss his behavior at the training meeting and to remind him that he was still on probation. The next day, O'Lear, Jr.'s friend, firefighter Christopher Rojem, also told O'Lear, Jr. that his behavior on the job had been inappropriate and reminded him of his probationary status.

On November 1, 1999, after another training meeting, fire fighter James Theut was required to submit to a breathalyzer. When the breathalyzer showed that Theut had been drinking alcohol, Chief Ahonen asked Theut who had told him it was permissible to drink alcohol before a training meeting. Theut replied that it had been "a union rep." Ahonen then asked if it had been Sergeant O'Lear. Theut told Ahonen that it had not been Sergeant O'Lear, and responded similarly to subsequent inquiries on the matter.

On November 4, 1999, O'Lear Jr. was summoned to Chief Ahonen's office. O'Lear, Jr. was asked about remarks he had allegedly made about Ahonen's mental stability. O'Lear, Jr. told Ahonen that he had heard such comments but did not recall who had made them and had not made them himself. (O'Lear, Jr. testified that fire fighter Warren Happle had commented about Ahonen's mental stability.) Despite, O'Lear, Jr.'s denials, the credible evidence establishes that O'Lear, Jr. told Happle and probationary firefighter John Martin that Ahonen had had prior mental breakdowns and was close to the edge of having another one. O'Lear, Jr. made the comment about Ahonen while at the fire station with Happle and Martin. Chief Ahonen has no history of mental illness and there is no evidence that he was suffering from any mental problems at the time O'Lear, Jr. made the comments.

Sergeant O'Lear was nominated to be re-elected as Union chairperson on November 1, 1999. Sergeant O'Lear was re-elected November 8.

At its regular meeting on November 8, 1999, Respondent's Board of Trustees unanimously approved Chief Ahonen's recommendation to discharge O'Lear, Jr. Ahonen testified that O'Lear Jr. was discharged because of his unacceptable behavior during the training session in which he called a coworker a "nerd, dork and suck ass" and because he told coworkers that Chief Ahonen was mentally unstable. Charging Party filed the charge in this matter on December 8, 1999.

For many years, Respondent had used a system of fire phones installed in the homes of certain firefighters and employed those fire fighters' spouses, including Mrs. O'Lear, Sr., to assist in the dispatch of firefighters. The Township Board and Clerk wanted to replace the fire phones with a central dispatch system. Accordingly, the Township had begun reducing the number of fire phones. When the O'Lears moved from their home on 21 Mile Road to a home on 25 Mile Road, Sergeant O'Lear was told the fire phone would not be moved to their new home because the new home was in a less populous district. By letter dated December 16, 1999, Respondent informed Sergeant and Mrs. O'Lear that the fire phone would not be installed in their new residence.

Discussion And Conclusions Of Law:

Charging Party takes exception to several of the ALJ's findings of fact. We have carefully and thoroughly reviewed the record and for the following reasons find no merit in those exceptions.

Charging Party's first exception asserts, "the ALJ incorrectly states that Sergeant O'Lear falsified 'a January 1999 grievance.'" In fact, the ALJ made no such finding. The ALJ merely acknowledged evidence, offered by Charging Party, that Respondent sent a letter to Sergeant O'Lear informing him that it intended to investigate whether the grievance had been falsified.

At the hearing, it was Charging Party's position that the letter was an indication of anti-union animus. However, the record establishes that at the hearing on this grievance, questions were raised as to the timeliness of the grievance when it was disclosed that the grievant had not signed the grievance at the time it was filed. Thus, Respondent's inquiry into the timeliness of the grievance is not indicative of anti-union animus.

In its second exception, Charging Party contends that the ALJ improperly ignored testimony regarding the events of the October 16, 1999 training session. Instead of mentioning other events that occurred at the training session, the ALJ noted testimony by Chief Ahonen that O'Lear, Jr., a probationary firefighter, called a coworker a "nerd, dork, and suck-ass" while that co-worker was answering the instructor's questions. O'Lear, Jr.'s comments were disrespectful to the instructor because they belittled the value of the training by demeaning the co-worker for his active participation in the training. While there was evidence that other joking occurred at training meetings, there was no evidence that other probationary firefighters engaged in name-calling. Moreover, given the derogatory and personal nature of the insults in question, we believe that such name-calling is more potentially disruptive than the jokes attributed to other firefighters. Given the nature of O'Lear, Jr.'s comments, it was unnecessary for the ALJ to mention the testimony about the other joking that occurred at the training meetings, as it neither excused nor mitigated O'Lear, Jr.'s actions.

Third, Charging Party takes exception to the ALJ's failure to find that "when O'Lear, Jr. was called into Ahonen's office, he asked for union representation but was denied same." Charging Party has offered no authority to support its allegation that the facts, as testified to by either O'Lear, Jr. or Ahonen, establish that O'Lear, Jr. was denied union representation.

Fourth, Charging Party takes issue with what it claims to be the ALJ's finding that at the November 4, 1999 meeting, O'Lear, Jr. was told the names of the persons who accused him of making comments about Ahonen's mental condition. Charging Party has misread the ALJ's Decision and Recommended Order. While the ALJ named the individuals whom Ahonen said reported O'Lear, Jr.'s comments, the ALJ did not state that Ahonen disclosed those names to O'Lear, Jr.

A similar misreading by Charging Party is evident in the fifth exception. Charging Party somehow read the ALJ's findings of fact to indicate that O'Lear, Jr. was terminated solely because of the name-calling incident in the training session. It is clear from the record and from the ALJ's Decision and Recommended Order that the name-calling incident was only one factor in Respondent's decision to discharge O'Lear, Jr. Consistent with the record, the ALJ pointed out that another factor in the decision to discharge O'Lear, Jr. was O'Lear, Jr.'s comments about Ahonen's mental condition.

The remainder of Charging Party's exceptions challenge the legal conclusions of the ALJ. Exceptions six through ten each dispute the ALJ's conclusion that Charging Party failed to establish a prima facie case of discrimination. We find no merit to those exceptions.

Where a Charging Party has alleged that a discharge or other adverse action was motivated by anti-union animus, the burden of proof is on the Charging Party. *Schoolcraft College Ass'n of Office Personnel, MESPA* v *Schoolcraft Community College*, 156 Mich App 754, 763 (1986). It is up to the Charging Party to demonstrate that protected conduct was a motivating or substantial factor in the Respondent's decision to take the action about which Charging Party has complained. *MESPA* v *Evart Pub Schs*, 125 Mich App 71, 73-75 (1983).

To establish a prima facie case, Charging Party must show: (1) employee union or other protected concerted activity; (2) the employer's knowledge of that activity; (3) the employer's union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the employer's actions. *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42; *University of Michigan*, 1990 MERC Lab Op 272, 288. If the Charging Party establishes a prima facie case of discrimination, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of protected conduct. It is then up to Charging Party to show that the reason given by Respondent for the adverse action is a pretext. *MESPA* v *Evart Pub Schs*, at 74. See also *United Auto Workers* v *Sterling Heights*, 176 Mich App 123, 129 (1989).

There is no question that Sergeant O'Lear, engaged in protected concerted activity and that Respondent was aware of that activity. In an effort to show anti-union animus, Charging Party points to several incidents. However, those incidents, whether considered singly or together, do not show hostility towards Sergeant O'Lear for his union activity or towards Charging Party, or unions in general.

Charging Party contends that anti-union animus is shown by the fact that Sergeant O'Lear's meeting with Macomb Township Supervisor John D. Brennan, regarding the Cook suspension grievance, became rather heated. It is not uncommon for grievance conferences to become heated, for persons on either side to lose their tempers, and for harsh words to be exchanged. We have long held that such spontaneous outbursts in this context are protected by PERA. *Baldwin Community Schs*, 1986 MERC Lab Op 513, 524. We have reviewed many cases in which employees have made rude or insulting comments in the context of protected concerted activity. *Regents of the University of Michigan*, 2000 MERC Lab Op 192; *Baldwin Community Schs*, 1986 MERC Lab Op 513; *Unionville-Sebewaing Area Schs*, 1981 MERC

Lab Op 932. However, the principle of protected speech in the context of collective bargaining applies equally to employers. *City of Portage*, 1989 MERC Lab Op 318, 328. Thus, a mere exchange of vulgar words during a grievance meeting or collective bargaining session, without more, will not prompt us to conclude that the employer is acting out of hostility towards the union. See *City of Riverview*, 2001 MERC Lab Op ___ (no exceptions).

Charging Party also points to the incident in which James Theut was questioned by Ahonen and Brennan after a breathalyzer showed he had consumed alcohol before reporting to a training session. Charging Party has implied that Respondent was trying to use Theut's behavior as a means to strike at Sergeant O'Lear, and contends that Respondent insisted that Sergeant O'Lear told Theut it was permissible to drink before training sessions. The evidence in the record does not support Charging Party's assertions. Theut testified that during the meeting, Chief Ahonen asked him who had told him it was permissible to drink alcohol before a training meeting. When Theut replied that it had been "a union rep", Ahonen asked if it had been Sergeant O'Lear. Theut said it was not Sergeant O'Lear. Charging Party's assertions ignore the fact that it was Theut, not Respondent, who indicated that the person on whose advice he relied was affiliated with the union.

Further, Charging Party relies on testimony by Sergeant O'Lear alleging that in January 1999, Brennan said that he did not appreciate Sergeant O'Lear's efforts to organize the Township's four full-time fire fighters. That testimony is rebutted by Brennan's testimony. Inasmuch as Charging Party has the burden of proof on this issue, and the ALJ did not find Sergeant O'Lear to be more credible that Brennan, we must conclude that Charging Party failed to present sufficient evidence to establish that Brennan actually made the alleged comment. Moreover, testimony by Charging Party's own witness, Marcel G. DeMuynck, provides clear evidence of a lack of hostility towards the Union. DeMuynck, a past chairperson of the Union who was also active in the Union's organizing campaign, testified that Respondent never disciplined him. He also testified that no one from the Township resisted the Union's organizing efforts. Thus, we do not believe Respondent acted out of anti-union animus.

In an apparent effort to show that Respondent was using O'Lear, Jr. to strike at his father, Charging Party has pointed to the fact that Ahonen asked O'Lear, Jr. to deliver an envelope containing a reprimand for Sergeant O'Lear. While it would have been preferable for Ahonen to deliver the reprimand to Sergeant O'Lear directly, the record indicates that Ahonen was unable to contact Sergeant O'Lear at the time he was ready to deliver the reprimand. O'Lear, Jr. lived with his father and was able to deliver the envelope containing the reprimand to his father before his father's next scheduled workday. The mere fact that Ahonen used O'Lear, Jr. to deliver the reprimand to his father indicates nothing more than Ahonen's awareness of their living arrangement and Ahonen's willingness to take advantage of that fact for his own convenience.

The reprimand to Sergeant O'Lear was for Sergeant O'Lear's violation of work rules prohibiting smoking on the job. Sergeant O'Lear's statement that he did not recall whether he had been smoking indicates a willingness to disregard the employer's rules. Thus, Ahonen's decision to reprimand Sergeant O'Lear for violation of the prohibition on smoking is

indicative of nothing more than an employer's demand for adherence to its published work rules and in no way evinces anti-union animus. The fact that the reprimand was issued shortly after Sergeant O'Lear filed the mask-fitting grievance appears to be nothing more than coincidence. The timing of an employer's action in relation to the employee's union activity is one factor to be considered in determining motivation. However, close timing by itself does not establish discriminatory motivation. *City of Detroit (Water and Sewerage Dep't)*, 1985 MERC Lab Op 777; *North Dearborn Heights Sch Dist*, 1983 MERC Lab Op 257.

Similarly, we see no connection between the timing of Sergeant O'Lear's re-election as union chairperson and his son's discharge. We further believe, as explained below, that it is evident that Respondent had reasons to discharge O'Lear, Jr. that were totally unrelated to Sergeant O'Lear or his union activity.

The same is true with respect to the timing of the filing of the unfair labor practice charges and the termination of the fire phone in the O'Lear home. The fire phone was removed from the O'Lears' former home when they moved from that home. It was not installed in their new home because Respondent had previously decided to discontinue the fire phone system and because there was already a fire phone in the area to which the O'Lear family moved.

Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Before we can find Respondent's actions had a discriminatory motivation, there must be substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC* v *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42; *University of Michigan*, 1990 MERC Lab Op 242 (no exceptions); *County of Saginaw*, 1990 MERC Lab Op 775, 780 (no exceptions); *Macomb Co Bd of Commissioners*, 1984 MERC Lab Op 961; *Sanilac Community Mental Health Services Bd*, 1981 MERC Lab Op 1024. Here, Charging Party has not presented evidence that establishes animus towards Sergeant O'Lear and his union activities.

Charging Party contends that Respondent's decision to discharge O'Lear, Jr. was also motivated by O'Lear, Jr.'s own protected concerted activity. Although it is undisputed that Sergeant O'Lear engaged in protected concerted activity of which Respondent was aware, O'Lear, Jr.'s activities are another matter. O'Lear, Jr. testified that he was supportive of the Union's mask-fitting pay grievance. However, there is no evidence that Respondent was aware that he supported the grievance. Moreover, the record indicates that more than half of the bargaining unit was supportive of that grievance. We do not believe that support of the grievance was a factor in the younger O'Lear's discharge.

Charging Party also argues that it was O'Lear, Jr.'s comments about Ahonen's mental stability that motivated Respondent to discharge him and that those comments were protected concerted activity. Charging Party takes exception to the ALJ's failure to recognize that as a basis for relief. Indeed, the ALJ did find, in accordance with the record, that O'Lear, Jr.'s statements, that Chief Ahonen had previously had a mental breakdown and was on the verge of another one, were a motivating factor in his discharge. Apparently, finding no merit to the

claim, the ALJ did not comment on Charging Party's assertion that O'Lear, Jr.'s statements about Ahonen's mental stability were protected concerted activity.

O'Lear, Jr.'s statements about the chief's mental stability were false. There is no evidence that O'Lear, Jr. even held a good faith belief that the statements were true. The statements were calculated to undermine Chief Ahonen's authority and the willingness of his subordinates to follow his instructions. O'Lear, Jr. may not use PERA as a shield to hide from the effects of his inappropriate comments about his boss. *Meridian Twp*, 1997 MERC Lab Op 457. See also**,** *Waters* v *Churchill*, 511 US 661 (1994).

Charging Party has failed to show illegal motivation with respect to either O'Lear, Jr.'s discharge or the removal of the fire phone from the O'Lear home. Nor has Charging Party shown a causal nexus between any union activity by Sergeant O'Lear or O'Lear, Jr. and the Respondent's actions. Such a showing must be made to establish a prima facie case of discrimination. *North Central Community Mental Health Services*, 1998 MERC Lab Op 427, 437.

Even if we found a prima facie case of discrimination had been established, we would find no unfair labor practice here, as the evidence establishes that O'Lear, Jr. would have been discharged and the fire phone would have been removed from the O'Lear home even if Sergeant O'Lear and his son had not engaged in protected concerted activity. It was Charging Party's burden to demonstrate that protected conduct was a motivating or substantial factor in Respondent's decisions. *MERC* v *Detroit Symphony Orchestra*, 393 Mich 116 (1974). Charging Party did not meet its burden of proof.

For the reasons set forth above, we find the exceptions of Charging Party to be without merit and adopt the Administrative Law Judge's findings of fact and conclusion of law. Accordingly we find that Respondent did not violate Section 10(1)(a)(b)(c) or (d) of PERA.

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB TOWNSHIP (FIRE DEPARTMENT),
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APPEARANCES:

Anthony, Seibert and Dloski, by Lawrence W. Dloski, Esq., for Respondent

Hoekenga and Associates, by Daniel J. Hoekenga, Esq., for Charging Party

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(10) *et seq*., this case was heard in Detroit, Michigan on March 16, May 22, and June 5, 2000, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. Based upon the record and briefs filed by July 26, 2000, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of PERA:

The Charge:

Charging Party filed an unfair labor practice charge on December 8, 1999, which alleged that Respondent violated Section 10(1)(a)(b)(c) and/or (d) of PERA by threatening, attempting to intimidate and discriminating against Michael O. Lear, Sr. and/or members of his family because of his protected concerted activity as Charging Party's president. In a January 6, 1999, amended charge, Charging Party claimed that Respondent continued to violate PERA by interrogating bargaining unit members about their knowledge and/or support of the Union's charges. Charging Party also claimed that the Employer's December 17, 1999, termination of Mrs. Michael O'Lear, Sr., as a part-time fire phone operator was part of an overall scheme to punish Michael O' Lear, Sr. Respondent filed answers denying the charges on December 21, 1999, and January 20, 2000.

Findings of Fact:

Charging Party Michigan Association of Fire Fighters is the exclusive bargaining agent for paid on-call fire fighters employed by Respondent Macomb Township. The parties' latest collective bargaining agreement covers the period July 1, 1998 to June 30, 2000. It provides that new fire fighters are required to serve a two-year probationary period as at-will employees who may be terminated with or without.

During the six-month period before the unfair labor practice charge was filed, Sergeant Michael O'Lear, Sr., Charging Party's president, filed a grievance claiming that Respondent violated the collective bargaining agreement by failing to pay employees for time spent having masks fitted. The grievance was processed in accordance with provisions set forth in the contract and was eventually upheld by an arbitrator. On August 16, 1999, two weeks after the grievance was filed, Sergeant O'Lear and fire fighter Weigand received written reprimands for smoking on fire apparatus after a fire run. At Chief Ahonen's request, Sergeant O'Lear's reprimand was delivered to him by his son, Michael O'Lear, Jr., a probationary fire fighter, who was hired by Respondent in October 1998. The next day, Sergeant O'Lear confronted Chief Ahonen about directing his son to deliver the reprimand to him since he (Sergeant O'Lear) had worked each date since August 12 when the smoking issue was first discussed. A week later, on August 25, Macomb Township Supervisor John Brennan sent Sergeant O'Lear a letter notifying him that the Township intended to investigate him for falsifying a January 1999 grievance.[1] The investigation was not pursued.

Two months later, on October 21, 1999, O'Lear, Jr. was called into Ahonen's office to discuss his conduct at a training meeting a few days earlier and to remind him that he was still on probation. According to Chief Ahonen, during an October 16 training session, O'Lear'Jr. referred to a colleague who was responding to a question as a "nerd, dork, and suck-a_ _." O'Lear, Jr. testified that he did not remember what he said, but knows he said "dork" because it was "no big deal and it was funny." At about the same time, Christopher Rojem, a Macomb Township deputy sheriff and probationary fire fighter, also talked to O'Lear, Jr. about his behavior. O'Lear, Jr. testified that Rojem told him that he had "heard the way you answered the Chief on the radio the other day; I think you should cool it and just don't forget you are on probation" and not to fight battles for his father, who was not liked.

On November 1, 1999, after a training meeting, fire fighter James Theut was summoned to Chief Ahonen's office to take a breathalyzer test because two people reported that they could smell beer on his breath. After the test, Chief Ahonen called Supervisor Brennan to the office and told him that Theut had just blown a .002. When Theut attempted to correct Chief Ahonen's inflation of the test result, Brennan told him that they were not trying to make an example of him and to keep his mouth shut or he would be prosecuted. Theut, who testified that he had drank beer with his meals

[1]In January 1999, Sergeant O'Lear filed a grievance on fire fighter Marcel DeMuynck's behalf which challenged Respondent's refusal to allow DeMuynck to rescind his request to retire. According to Respondent, testimony adduced during DeMuynck's arbitration hearing established that DeMuynck had not signed the grievance when it was purportedly filed on January 25, 1999.

prior to training throughout his twenty-five year career, rebuffed attempts by Ahonen and Brennan to persuade him say that Sergeant O'Lear had given him permission to drink.

O'Lear, Jr. was again called into Chief Ahonen's office on November 4, 1999. This time, according to Chief Ahonen, O'Lear, Jr. was questioned about statements he allegedly made to three fire fighters - John Martin, Warren Happle, and Tom Hable - about his mental condition. O'Lear, Jr. denied that he ever made any adverse statements about Chief Ahonen. However, probationary fire fighter Martin, called as a witness by Respondent, credibly testified that O'Lear, Jr. said "the Fire Chief, had, on previous occasions, had mental or nervous breakdowns and that right now he's close to the edge of having another one." Martin told Chief Ahonen about O'Lear, Jr.'s statements when he was called to Ahonen's office and asked if anybody had made any comments about the him.

On November 8, 1999, Sergeant O'Lear was re-elected Union chairperson. That evening, during its regular meeting, Respondent's Board of Trustees unanimously approved Chief Raymond Ahonen's recommendation to terminate O'Lear, Jr. Chief Ahonen and Macomb Township Supervisor John D. Brennan testified that O'Lear, Jr. was terminated because of his unacceptable conduct in referring to a colleague during class as a "nerd, dork, and suck-a_ _," and for telling employees that Chief Ahonen was mentally unstable. According to the Chief Ahonen, O'Lear, Jr.'s statements about him were untrue, "plants a seed of discontent that the chief executive officer of the Fire Department can't be trusted," and violated everything they are about.

In a letter dated November 10, Sergeant O'Lear advised Respondent that his son had been discriminated against and terminated because of his (Sergeant O'Lear's) activities as union chairperson, the Township's supervisor and attorney had attempted to file charges against him, and the administration had been dealing with union matters unfairly.

In December 1999, after the instant charge was filed, Respondent notified the O'Lear's that a fire phone which Mrs. O'Lear, Sr. had been paid to answer at their residence on Twenty One Mile Road would not be installed in their new home on Twenty Five Mile Road. Supervisor Brennan testified that the phone was not replaced because the Twenty Five Mile district was the least busy and no phones were being placed in that area. According to Brennan, fire phones were not replaced in fire fighter Yonkowski's home nor in fire fighter Theut's home when he retired.

Conclusions of Law:

The elements of a *prima facie* case of discrimination under PERA include protected concerted activity, employer knowledge, anti-union animus, and suspicious timing or other evidence that the protected activity was a motivating cause of the employer's actions. *University of Michigan*, 1990 MERC Lab Op 272, 288; *Passages Community Services, Inc.,* 1994 MERC Lab Op 1112. The record shows that during the six-month period prior to the date of the instant charge, the Employer knew that Sergeant O'Lear engaged in protected concerted activity by filing a mask fitting grievance.

However, Charging Party presented no evidence of specific animus toward Sergeant O'Lear's union activity, nor any general anti-union animus which would permit a reasonable inference of discrimination against Sergeant O'Lear, or members of his family because of his union activity. Moreover, it offered no support for its sweeping assertion that Supervisor Brennan and Chief Ahonen took umbrage, if not offense, at Sergeant O'Lear's insistence on pursing grievances. The mask fitting grievance was processed in accordance with the collective bargaining agreement and arbitrated. Charging Party's suggestion that Sergeant O'Lear's reprimand for smoking on apparatus, Theut's interrogation about whether Sergeant O'Lear gave him permission to drink before training, and O'Lear, Jr.'s termination as a probationary employee on the same day that Sergeant O'Lear was re-elected Union president, constitute union animus or hostility is baseless. There is nothing on the record to demonstrate that the Employer threatened or took any direct action against Sergeant O'Lear because he filed the mask fitting grievance or engaged in any other protected activity. See *City of Oak Park*, 1995 MERC Lab Op 576, 581, 584.

Since Charging Party has clearly failed to establish a *prima facie* case of discrimination it is unnecessary to address its contention that Respondent's decision to terminate O'Lear, Jr. or remove the fire phone from the O'Lear's home was related to Sergeant O'Lear's protected activity. Compare *Frenchtown Charter Township,* 1998 MERC Lab Op 106, 126. An employer is only required to produce credible evidence of a legal motive for its actions after a charging party establishes a *prima case.* In any event, O'Lear, Jr. was a probationary employee whom Respondent could terminate with or without case. Employer's use of probationary periods to weed out employees that are deemed unsatisfactory is widespread, and absent unlawful motivation under PERA, their discharge will not be reviewed by the Commission. *Genesee County Sheriff Department*, 1990 MERC Lab Op 467

I have carefully considered all other arguments raised by Charging Party and conclude that they do not warrant a change in the result. Rejected are allegations that O'Lear, Jr.'s discharge on the same day as his father's re-election "leaves no doubt that Charging Party has fulfilled each of the elements of a *prima facie* case," and Respondent's decision to terminate Mrs. O'Lear, Sr. as a fire phone operator was "transparently retaliatory" for filing the instant charge. Based on the above discussion, I 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

_____

Roy L. Roulhac
Administrative Law Judge

Dated:_____