STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

14-A JUDICIAL DISTRICT COURT,
Respondent-Public Employer

Case No. C02 E-118

-and-

TEAMSTERS LOCAL 214,
Charging Party-Labor Organization
_____/

APPEARANCES:

Paul Gallagher, Esq., for Respondent

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for Charging Party

DECISION AND ORDER

On September 9, 2003, Administrative Law Judge David M. Peltz 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 actions 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

_____
Nora Lynch, Commission Chairman

_____
Maris Stella Swift, Commission Member

_____
Harry W. Bishop, 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 and 423.216, this case was heard at Detroit, Michigan on August 21, 2002, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing and briefs filed by the parties on or before October 7, 2002, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On May 12, 2002, Charging Party Teamsters Local 214 filed an unfair labor practice charge alleging that Respondent Washtenaw 14-A Judicial District Court retaliated against its members for engaging in protected concerted conduct in violation of Section 10(1)(c) of PERA.[1] Specifically, the charge alleges that the Employer violated the Act by the following conduct:

> On March 2, 2002, the Employer, through its agent Deputy Court Administrator Jennifer Niemer, issued an order prohibiting our members from working weekend/holiday recording duties overtime in retaliation for a letter sent to her on January 29, 2002 protesting the use of non-bargaining unit members performing bargaining unit work.

[1] Although the charge also makes reference to a violation of Section 10(1) (e), the Union indicated at the start of the hearing in this matter that it was no longer alleging a claim of refusal to bargain/removal of unit work.

Findings of Facts:

Background

14-A District Court is a division of the Washtenaw County Trial Court. Charging Party is the exclusive bargaining representative for a unit consisting of nonsupervisory clerical employees of the 14-A District Court, including all senior deputy district court clerks, deputy district court clerks and probation secretaries. The recognition clause of the collective bargaining agreement between the parties specifically excludes senior deputy court reporters and judicial secretary/court recorders from the unit. Teamsters Local 214 also represents a bargaining unit consisting of probation agents and supervisory employees of the 14-A District Court.

Each judge or magistrate of the 14-A District Court is assigned a court reporter or secretary who is responsible for performing court reporting duties and functions for that judge or magistrate during regular weekday hours. Although court reporters/secretaries may volunteer to work holidays and weekends, they are not required to do so. The court reporters/secretaries employed by Respondent are not represented for purposes of collective bargaining.

Members of the clerical unit represented by Charging Party have historically performed court reporting duties when one of the regular court reporters/secretaries is unavailable. For example, bargaining unit member Denise Whitesall became a certified electronic operator in 1985 at the request of then court administrator Nile Ron, who made arrangements for Whitesall to take the test for certification.[2] Thereafter, Whitesall performed court reporting duties during weekdays on an as-needed basis.

Weekend and Holiday Arraignments

Judges and magistrates of the 14-A District Court, along with judges from other divisions of the Washtenaw County Trial Court, are required to preside over criminal arraignments on holidays and weekends. The Washtenaw County Trial Court was faced with a shortage of court recorders to cover such arraignments. In an attempt to rectify this situation, the trial court in 1998 entered into a written agreement with Teamsters Local 214 to allow members of the probation agent/supervisor unit to perform court reporting duties on weekends and holidays. The agreement specified that the probation agents and supervisors who volunteer to perform such work are to receive overtime pay at premium rates for performing the work, and that they are guaranteed a minimum of three hours of pay for each such occurrence.

Following execution of the written agreement, members of the probation agent/supervisor bargaining unit began performing court reporting duties on weekends and holidays. At or around the same time, members of the clerical unit, including Denise Whitesall, also began covering weekend and holiday arraignments for the various divisions of the Washtenaw County Trial Court. Members of the clerical unit were paid time and a half for weekend assignments and double time on holidays.

[2] Certified electronic operators may record legal proceedings, but they are not authorized to make certified transcripts of those proceedings.

Employees who volunteer to perform weekend and holiday arraignment court reporting duties are placed on a schedule which is prepared by deputy trial court administrator Jennifer Niemer and her staff on an annual or biannual basis. These schedules indicate that Denise Whitesall worked as a weekend/holiday court reporter 19 days in 2000 and 20 days in 2001. She was scheduled to perform weekend/holiday court reporting duties 28 times in 2002.

Pamela Pfeifer was a member of the probation agent/supervisor unit until she was demoted to a position in the clerical unit in January of 2002. While in the probation agent/supervisor unit, Pfeifer was scheduled to work as a weekend/holiday court reporter 18 days in 2000 and 20 days in 2001. Pfeifer remained on the 2002 arraignment schedule following her demotion, and she was scheduled to perform weekend/holiday court reporting duties 26 times during that calendar year.

The Alleged Unfair Labor Practice

In early January of 2002, deputy trial court administrator Niemer and at least two other nonbargaining unit members worked overtime at Respondent's Ypsilanti location. Members of Charging Party's bargaining unit believed that the tasks performed by Niemer and the other employees constituted exclusive bargaining unit work. Accordingly, in a letter addressed to Niemer dated January 29, 2002, Frank Weber, the Union's business representative, wrote:

> Several members of our bargaining unit reported to me that from January 9, 2002 to January 16, 2002 you, Tammy Hill, and Colleen Mallory, worked approximately sixty hours performing Teamsters bargaining unit work which should have been performed by our bargaining unit members. This work was performed by non-bargaining unit members while requests of our members to work overtime to deal with the court backlog were ignored. In our opinion, this backlog was primarily caused by a longstanding shortage of budgeted or trained personnel at the Ypsilanti court, and the assignment of a lengthy special report regarding pending cases during the holiday period.
>
> Because our members are fully aware of the importance of the court to keep current in its record keeping and our belief that your solution to the Court's backlog problem was made in good faith, the membership decided not to file a grievance for what we consider a contract violation. We do, however, wish to put you on notice that we will grieve in the future if a similar contract violation should occur.

Niemer received the letter and interpreted it as either a grievance or a "serious threat" that one might be filed in the future. However, she did not contact Charging Party directly to discuss the issues raised in the document. Rather, Niemer testified that she met with the chief judge and the court administrator and, from those conversations, realized that there had been many instances in which employees of the 14-A District Court were performing work which was not formally assigned to them. At the hearing, Niemer testified, "That kind of thing, everybody kind of pitching in, did happen all the time at the court. . . . It happens all the time, so I needed to

draw the lines and clear up the gray areas." According to Niemer's testimony, the court administrator and chief judge instructed her to take action to ensure that Respondent was not violating the bargaining rights of its employees with respect to the delineation of duties and responsibilities.

According to Niemer, one of the areas in which "lines were getting crossed" involved the use of court reporters to process paperwork and perform other duties formally assigned to the clerical staff. Thus, Niemer instructed the court reporters that they were to stop performing clerical duties until further notice. Niemer then examined the weekend/holiday arraignment roster for court reporting and discovered that "everybody [was] doing a little bit of everything." She testified that in order to "tighten up the lines," she made the decision to include only nonbargaining unit court reporters/secretaries on the weekend arraignment schedule. Accordingly, she directed administrative coordinator Tamara Hill to issue a new schedule for weekend/holiday court reporting.

On February 15, 2002, Hill issued a memo via email to employees of the various district courts within the county, including 14-A District Court, stating:

> Due to the recent grievance filed by the Teamsters Union, changes have been made to the weekend/holiday duty roster. Effective March 2, 2002, Teamster Union employees Denise Whitesall and Pamela Pfeifer will no longer be handling weekend/holiday recording duties.

Attached to the memo was a revised weekend/holiday arraignment schedule for the remainder of 2002, which reflected that the dates previously assigned to Whitesall and Pfeifer had been reassigned to nonunit court reporters/secretaries beginning with the weekend of March 16, 2002.

Niemer testified that she received a copy of the memo and the revised 2002 work schedule no later than February 22, 2002, but that she did not read either document at that time. Niemer further testified that she did not dictate to Hill the precise wording of the February 15, 2002 memo, and she denied telling Hill to include a reference to the "recent grievance" within the memo. However, Niemer made no effort to revise the memo after it was distributed, nor did she disavow or disclaim the content or wording of the document at the hearing in this matter. In fact, Niemer testified that Hill acted pursuant to her instructions, and she conceded that the removal of bargaining unit members from the schedule was in response to the January 29, 2002, letter from the Union.

Approximately one week after the memo was issued, Whitesall requested a meeting with Niemer. At the hearing in this matter, Whitesall testified as to what transpired at that meeting:

> I asked [Niemer] if there was anything I could do to remedy that situation, that I was quite surprised by what happened. It was very unexpected, and I was quite upset.

* * *

> She said she understood. I asked her also if I could do a letter or something, you know, if I typed up a Letter of Understanding. She indicated that I would need to talk to my union, and it was regarding the grievance that was filed, and if they would let that go we could probably talk about this situation.

Niemer indicated to Whitesall that the grievance to which she was referring involved a situation at Respondent's Ypsilanti location in which the Employer was using non-union employees to perform overtime work on the weekend.

The Union formally responded to the February 15, 2002 memo in a letter from Weber to Niemer dated March 26, 2002. The letter stated, in pertinent part:

> It is the Union's position that the removal of the overtime opportunity for our members was in retaliation of [sic] the letter sent to Ms. Niemer in our attempt to enforce our contract. As such, we believe that the Court is committing an unfair labor practice. We are, therefore, requesting a special conference on this matter in order to attempt to resolve it prior to us filing a charge.

In April of 2002, Charging Party and Respondent met to discuss the situation concerning weekend/holiday court reporting but, according to Weber's testimony, the Union "didn't get any response from the [Employer]." For that reason, Weber wrote a letter to Respondent's labor relations manager indicating that the Union intended to file an unfair labor practice charge against Respondent. In the letter, which is dated May 9, 2002, Charging Party alleged that Respondent's actions constituted "retaliating against our members because of the Union's attempt to enforce our contract regarding non-union members performing bargaining unit work."

Neither Pfeifer nor Whitesall have been permitted to work as court reporters for weekend and holiday arraignments since March of 2002. Whitesall continues to fill-in for the regular court reporters/secretaries on weekdays, and she did so as recently as one week prior to the hearing in this matter. With respect to these weekday assignments, Whitesall testified that she performs this work at the request of the individual court reporters/secretaries, and that she does not know whether Niemer is aware of her activities in this regard.

Discussion and Conclusions of Law:

Charging Party contends that Respondent violated Section 10(1)(c) of the PERA by discriminating against employees for engaging in protected activity. The elements of a prima facie case of unlawful discrimination under Section 10(1)(c) of PERA are: (1) employee, union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's exercise of his or her protected rights; (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Thereafter, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action(s) would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the union. See *Napoleon Community Schools*, 124 Mich App 398 (1983).

In the instant case, Respondent concedes, and the record overwhelmingly demonstrates, that the first two elements of a prima facie case of unlawful discrimination have been established. In a letter dated January 29, 2002, the Union's business representative wrote to deputy court administrator Niemer complaining about Respondent's use of nonbargaining unit employees to perform bargaining unit work. Although there was some confusion on the part of the Employer whether this letter constituted a formal grievance, there is no question that Respondent was aware of the letter and understood that the Union was attempting to protect its rights under the contract. Respondent contends, however, that there is no evidence in the record proving that it harbored anti-union animus toward Charging Party, or that the removal of unit members from the weekend/holiday arraignment schedule was motivated by the Union's protected activity. I disagree.

The record establishes that members of the clerical unit have performed court reporting duties since as early as 1985, when Whitesall became a certified electronic operator and began filling in for the regular court reporters/secretaries during weekday hours. In fact, it is undisputed that clerical employees such as Whitesall were actually encouraged by Respondent to become certified court reporters so that they could perform this work on a temporary basis. The record further demonstrates that in 1998, Respondent began using members of both the clerical and the probation agent/supervisor units to perform court reporting duties on holidays and weekends. Rosters maintained by the Employer indicate that Whitesall and Pfeifer worked as weekend/holiday court reporters on numerous occasions from 2000 to 2001, and that both individuals were scheduled to continue performing this work in 2002.

All of this abruptly changed in the early part of 2002, almost immediately after the Union sent its January 29, 2002, letter to the Employer. That letter made no reference to weekend/holiday court reporting duties; rather, its subject matter was Respondent's use of nonbargaining unit members to perform bargaining unit work at the court's Ypsilanti location. Nevertheless, without even discussing the letter or the issues raised therein with the Union, the Employer abruptly decided to remove Whitesall and Pfeifer from the weekend/holiday arraignment schedule. That decision was made by Niemer, one of the individuals about whom the Union had complained in its letter. Moreover, Respondent's February 15, 2002, memo announcing the change explicitly stated that bargaining unit members could no longer perform this work "[d]ue to the recent grievance filed by the Union." In addition, Niemer conceded at the hearing in this matter that the removal of bargaining unit members from the schedule was in response to the January 29, 2002, letter from the Union. I find these facts more than sufficient to establish a prima facie case of anti-union discrimination.

Respondent denies that the removal of bargaining unit members from the weekend/holiday arraignment roster was in retaliation for protected activity. It contends that this action was simply intended to "draw lines" and "clear up gray areas" with respect to the delineation of duties and responsibilities at the court, and that the January 29, 2002, letter from the Union merely served to bring the issue to the Employer's attention. The record does not support this assertion.

Whitesall testified that she had a conversation with Niemer shortly after the Employer announced its intention to prohibit bargaining unit members from performing court reporting

duties. Whitesall asked Niemer whether anything could be done to remedy the situation. According to Whitesall's testimony, Niemer indicated that the decision to remove her from the weekend/holiday arraignment roster might be reversed if the Union were willing to drop its grievance. This statement directly contradicts Respondent's asserted justification for making the change. Had Niemer truly believed that using members of the clerical unit to perform court reporting duties was improper, there would have been no reason for her to condition reinstatement of those duties upon withdrawal by the Union of an unrelated grievance or complaint. Whitesall was a credible witness with a good recollection of events, and I credit her unrebutted testimony with respect to this conversation.

Respondent offered little in the way of credible evidence to establish the existence of any legitimate and substantial business justification for the removal of unit members from the weekend/holiday roster. Niemer was the only witness called to testify on the Employer's behalf, and her recall of the events pertinent to this controversy was poor. For example, while Niemer was able to state with certainty that she did not direct Hill to refer to the "grievance" in the memo, Niemer could not remember much else about her instructions to Hill. Similarly, although Niemer claims that she made the decision to take Whitesall and Pfeifer off the schedule after consulting with the court administrator and chief judge, she was able to provide few details regarding those meetings. Niemer also had poor recall of her conversation with Whitesall. While not essential to a finding of a violation in this case, I also draw an adverse inference regarding Respondent's motives from its failure to call the court administrator, the chief judge and Hill to testify in this matter, given that each of these individuals all may reasonably be assumed to be favorably disposed to the Employer. See e.g. *County of Ionia*, 1999 MERC Lab Op 523; *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530. Accordingly, I conclude that Respondent failed to establish that the removal of bargaining unit members from the weekend/holiday work schedule would have occurred even in the absence of protected conduct.

Respondent argues that no violation of Section 10(1)(c) can be found with respect to its removal of Pfeifer from the weekend/holiday work schedule. While not disputing that Pfeifer had been demoted and was working as a clerical employee at the time of the hearing in this matter, Respondent contends in its brief that Charging Party failed to establish that she was a member of the clerical unit "at all times relevant to this case." However, Niemer testified that Pfeifer was demoted to a clerical position sometime in January of 2002. Thus, I find the record sufficient to establish that Pfeifer was a member of the clerical unit when Respondent unlawfully removed her name from the weekend/holiday work schedule on February 15, 2002.

For the above reasons, I conclude that Respondent has discriminated against Charging Party and its members Diane Whitesall and Pamela Pfeifer for their lawful concerted activities in violation of Section 10(1)(c) of PERA. Therefore, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

Respondent Washtenaw 14-A District Court, its officers and agents, are hereby ordered to:

1. Cease and desist from restricting or eliminating overtime court reporting opportunities for members of Teamsters Local 214, the duly certified bargaining agent of its clerical employees, or in any other manner discriminating against its employees because they have engaged in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Make Diane Whitesall and Pamela Pfeifer whole for any loss of pay, plus interest at the statutory rate, for the period of time in which they were prevented from working overtime performing court reporting duties because of Washtenaw 14-A District Court's unlawful activity, beginning in March of 2002.

3. Post the attached notice in a conspicuous place on Respondent's premises for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, WASHTENAW 14-A DISTRICT COURT, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT, has been found to have committed an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT restrict or eliminate overtime court reporting opportunities for members of Teamsters Local 214, the duly certified bargaining agent of its clerical employees, or in any other manner discriminate against its employees because they have engaged in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL make Diane Whitesall and Pamela Pfeifer whole for any loss of pay, plus interest at the statutory rate, for the period of time in which they were prevented from working overtime performing court reporting duties because of Washtenaw 14-A District Court's unlawful activity.

ALL of 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.

WASHTENAW 14-A DISTRICT COURT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.