

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

In the Matter of:

CITY OF ALLEN PARK,
Public Employer-Respondent,

Case No. C02 G-150

-and-

ALLEN PARK FIRE FIGHTERS UNION,
Labor Organization-Charging Party.

APPEARANCES:

Kenneth D. Kruse, Esq., Office of City Attorneys, City of Allen Park for Respondent

Helveston & Helveston, P.C., by Ronald R. Helveston, Esq., for Charging Party

DECISION AND ORDER

On June 11, 2003, Administrative Law Judge Julia Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

Dated: _____

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Kenneth D. Kruse, Esq., Office of City Attorneys, City of Allen Park, for the Respondent

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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 October 29, 2002, 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 or before December 27, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Allen Park Fire Fighters Union filed this charge against the City of Allen Park on July 5, 2002. Charging Party represents a bargaining unit of approximately 30 fire fighting employees, excluding the fire chief, employed by Respondent. The charge alleged that on or about June 27, 2002, Respondent's fire chief violated Section 10(1)(a) of PERA by disciplining a member of Charging Party's unit for asserting his right to refuse to attend an interview that he reasonably believed might lead to disciplinary action without union representation. 1

1 The charge was amended on August 9, 2002, to allege a violation of Section 10(1)(e) of PERA. However, Charging Party withdrew this allegation at the beginning of the hearing.

Facts:

Lieutenant Peter Zammit is a member of Charging Party's bargaining unit. He was the officer in charge of fire suppression services at Respondent's fire station during a shift that ran from 8:00 a.m. on June 27, 2002, to 8:00 a.m. on June 28, 2002. Eight fire fighters, including Lieutenant Zammit, were on duty for that shift. Respondent's policy requires that the fire station be staffed with a minimum of seven fire fighters, including the officer in charge. If staffing falls below this level, the officer in charge calls in a fire fighter on overtime.

At 8:30 a.m. on June 27, a fire fighter on duty, Sergeant Fuciarelli, asked Zammit for time off between 9:00 a.m. and 1:00 p.m. that day. Shortly after Zammit received this request, Deputy Fire Chief Gary Jones came to him and told him to get a fire fighter to take the station's only ladder truck to an outside vendor for service. Zammit explained to Jones that Fuciarelli had requested time off that morning. Both men understood that if a fire fighter left with the truck, the station would fall below the minimum staffing level. Jones told Zammit to have the truck sent out for service after Fuciarelli's return.

Sometime later that morning, Fire Chief Martin DeLoach told Zammit that he wanted all fire fighters to take turns driving the department's new ambulance for at least 20 minutes during the shift; fire fighters who had not driven the ambulance before were to drive it for 30 or 40 minutes. Zammit knew that the ambulance would not be ready to drive until 4:00 or 5:00 p.m. He asked DeLoach, "What happened to our eight to five workday?" DeLoach responded, "Well, how many hours do you get paid on shift?"

At about 12:30 p.m., Fuciarelli called Zammit to say that he could not get back to the station by 1:00. Zammit told Fuciarelli that they needed someone to take the ladder truck to the shop, and that he needed to get back as soon as possible. Zammit asked Fuciarelli how late he would be, and Fuciarelli said a half hour to forty-five minutes. After hanging up the phone, Zammit went to DeLoach's office and told him that Fuciarelli had called in and said he was running late. DeLoach told Zammit that he should have marked Fuciarelli absent without leave (AWOL). DeLoach said that Zammit had made "a bad decision."

The office used by the officer in charge, the deputy chief's office and the chief's office are clustered in a single area of Respondent's fire station. The officer in charge's office is across a hall from the deputy chief's office. Next door to the officer in charge's office is an office occupied by the chief's secretary. The door from the secretary's office to the hall is normally propped open. The fire chief's own office is on the other side of his secretary's office. The door to the chief's office opens into his secretary's office, rather than directly into the hall.

Shortly after 1:00 p.m., Zammit went into his office to do paperwork. Jones entered the office and began criticizing Zammit for authorizing Fuciarelli's additional time off. DeLoach soon joined them. A fire fighter, Sergeant Barstad, also came into the office, although he did not participate in the discussion. Both Jones and DeLoach told Zammit again that he should have marked Fuciarelli AWOL. Zammit defended his decision. Their discussion lasted about 10 minutes. By the end of the discussion, all three men were

speaking in raised voices. From the Fuciarelli matter, the discussion moved to DeLoach's order regarding driving the ambulance. Zammit said that "he still felt uncomfortable having the men drive the ambulance at all hours of the day and night." After Zammit made this remark, DeLoach angrily ordered Zammit to come to his (DeLoach's) office. At the hearing, DeLoach testified that because the conversation was becoming heated, he wanted to talk to Zammit alone behind closed doors about how to schedule time in the future, and about his inappropriate questioning of DeLoach's orders. Zammit replied, "Why don't you just shut the door, and we'll have the meeting right here." DeLoach repeated his order to come to his office. Zammit got up and followed DeLoach out of his office and into the office of the chief's secretary.

When Zammit reached either the door of DeLoach's office (according to Zammit), or the secretary's office (according to DeLoach) he stopped and asked DeLoach if he needed union representation. By that time, DeLoach had already entered his own office. DeLoach told Zammit to come in, sit down, and close the door. According to DeLoach, if Zammit had obeyed his order, he would then have told Zammit that he did not need union representation because he did not intend to discipline him. Zammit, standing outside DeLoach's office, asked again if he needed union representation. DeLoach replied that if Zammit did not come in and close the door, he would send him home. Zammit then said that he now knew he needed union representation, and that he wanted a union representative. DeLoach ordered him to punch out and go home. Zammit complied.

Zammit was paid for the rest of his shift. On about June 29, Zammit was called to Jones' office and questioned, in the presence of a union representative, about events on the afternoon of June 27. On July 22, 2002, Zammit received a written warning for refusing to obey DeLoach's order to come into his office. Zammit also received a one-day suspension, to be served only if he committed a second act of insubordination within a one-year period. According to the terms of the warning, the warning was to remain in Zammit's personnel file until at least June 27, 2003, and could be used as the basis for further discipline during that period. After June 27, 2003, the warning would be removed from the file on Zammit's request if no further violations had occurred during this period.

Discussion and Conclusions of Law:

In *University of Michigan*, 1977 MERC Lab Op 496, the Commission adopted the rule set forth in *NLRB v Weingarten*, 429 US 251 (1976), that an employee has the right to have a union representative present when interviewed by his employer when the employee reasonably believes that the interview may lead to discipline. "Reasonable belief" is measured by objective standards under all the circumstances of the case. *Quality Mfg Co*, 195 NLRB 197 at 198 (1972); *Weingarten*, at 258. The employee must invoke the right by requesting union representation. The employer then may grant the request, present the employee with the option of continuing the interview without representation or foregoing the interview altogether, or deny the request and terminate the interview. *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984); *New Jersey Bell Tel. Co.*, 300 NLRB 42 (1990). An employee who reasonably believes that discipline may result from a meeting may refuse to participate in the meeting without union representation, and an employer who disciplines the employee for refusing to attend the meeting under such circumstances violates Section 10(1)(a) of PERA. *Wayne-Westland EA v Wayne-Westland C.S.*, 176 Mich App 361 (1989), *aff'g* 1987 MERC Lab Op 624. See also *Charter Twp. of Clinton*, 1995 MERC Lab Op 415.

On the afternoon of June 27, 2003, Zammit, DeLoach and Jones engaged in a heated discussion about Zammit's decision not to mark Sergeant Fuciarelli as AWOL. After Zammit criticized DeLoach's order that all fire fighters drive the ambulance, DeLoach ordered Zammit into his office. DeLoach admitted that he wanted to talk to Zammit in private about scheduling time off, and about Zammit's questioning of his orders. DeLoach did not explain the purpose of the meeting to Zammit, nor did DeLoach assure Zammit that the meeting was not disciplinary in nature. Cf., *City of Detroit (Human Rights Dept)*, 2000 MERC Lab Op 302 (employee had reasonable expectation that discipline might result from a meeting with her employer until the employer assured her, before the meeting, that the meeting would not be disciplinary in nature.) In the absence of any statements by DeLoach to the contrary, I conclude that Zammit reasonably believed in these circumstances that he was about to be questioned about his supervisory judgment and his attitude toward authority, and also that what he said at that meeting might lead to discipline.

According to DeLoach, if Zammit had obeyed his order to come into his office and shut the door, DeLoach would have then assured Zammit that he did not intend to discipline him. However, Zammit had already asked DeLoach if he needed union representation when DeLoach ordered him to come into his office and shut the door; DeLoach did not respond to the question. After DeLoach's order, Zammit repeated his question. He again got no response. I conclude that, under these circumstances, Zammit could reasonably have construed DeLoach's repetition of his order as a refusal of his request for union representation. I find that Zammit acted within his rights in refusing to enter DeLoach's office, close the door, and sit down.

Respondent relies on two NLRB decisions, *Roadway Express, Inc.*, 246 NLRB 1127 (1979), and *Joseph F. Whelan Co., Inc.*, 273 NLRB 340 (1984). In both of these cases, the NLRB held that employees did not have the right to refuse their employer's order to leave their work area and come to the employer's office unless they were accompanied by a union representative. As the NLRB noted in *Roadway*, "the varying alternatives involved in *Weingarten* do not readily lend themselves to discussion on the plant floor, particularly if there is any kind of disturbance in process." *supra*, at 1127-1128. However, in *Sun Petroleum Products, Co.*, 257 NLRB 450 (1981), the NLRB, reversing the decision of its ALJ based on *Roadway Express*, held that an employee did not forfeit his *Weingarten* rights when he obeyed his employer's order to leave the shop floor, but refused to enter his supervisor's office without a union representative, remaining instead in an office adjoining his supervisor's. The NLRB distinguished *Roadway* on the basis that in *Sun Petroleum*, the employee did not attempt to compel the employer to conduct its business in the shop area or undermine its right to maintain order in its operations. In the instant case, Zammit obeyed DeLoach's order to leave the unit commander's office. Zammit followed DeLoach into the secretary's office, which served as an anteroom to DeLoach's office, although he refused to enter DeLoach's office itself. I conclude that the facts in this case are similar to those in *Sun Petroleum*, and that Zammit did not forfeit his right to union representation by refusing DeLoach's order to come into DeLoach's office and shut the door.

For reasons set forth above, I conclude that Respondent violated Peter Zammit's *Weingarten* rights when, on July 22, 2002, it issued him a written warning for insubordination for refusing to enter the fire chief's office and shut the door without the presence of a union representative. I recommend that the

Commission issue the following order:

RECOMMENDED ORDER

Respondent City of Allen Park, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with employees' rights under Section 10(1)(a) of PERA to the presence of a union representative at interviews which the employees reasonably believe may lead to discipline.
2. Remove from the file of Lieutenant Peter Zammit the written warning issued to him on July 22, 2002 for refusing to participate in an interview with Fire Chief Martin DeLoach on June 27, 2002 without a union representative. Also remove from Zammit's file any subsequent discipline imposed on Zammit based in whole or in part on the July 22 written warning, and make him whole for any loss of pay he may have suffered as a result of the subsequent discipline.
3. Post the attached notice to employees in conspicuous places on the Respondent's premises, including all locations where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of Allen Park has been found to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with employees' rights under Section 10(1)(a) of PERA to the presence of a union representative at interviews which the employees reasonably believe may lead to discipline.

WE WILL remove from the file of Lieutenant Peter Zammit the written warning issued to him on July 22, 2002 for refusing to participate in an interview with Fire Chief Martin DeLoach on June 27, 2002 without a union representative present. We will also remove from Zammit's file any subsequent discipline imposed on Zammit based in whole or in part on the July 22 written warning, and make him whole for any loss of pay he may have suffered as a result of the subsequent discipline.

CITY OF ALLEN PARK

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/Bureau of Employment Relations, Cadillac Place, 3026 W. Grand Blvd., Suite 2-750, PO Box 02988, Detroit, MI 48202-2988. Phone: (313) 456-3510.