STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ST. CLAIR SHORES,
Public Employer-Respondent,

Case No. C00 K-201

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 1015,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Lange & Cholak, P.C., by Craig W. Lange, Esq., for the Respondent

Miller Cohen, P.C., by Eric Franke, Esq., for the Charging Party

DECISION AND ORDER

On December 6, 2002, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent City of St. Clair Shores violated Sections 10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) and (c) by retaliating against the union steward for his protected activities in filing grievances.[1] The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On January 29, 2003, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. Charging Party was granted an extension to file a response to the exceptions, and its timely brief in support of the ALJ's Decision and Recommended Order was filed on March 12, 2003.

Respondent's exceptions allege that the ALJ erred in finding that the Employer's decision to limit the union steward's work time spent in investigating grievances was motivated by union animus. We have carefully reviewed Respondent's exceptions in the light of the entire record and, for the reasons set forth below, we find that the exceptions have merit.

The facts of this case were accurately set forth in the ALJ's Decision and Recommended Order and will only be summarized here. Charging Party represents a bargaining unit of

[1] The ALJ found no merit to Charging Party's claims that Respondent unlawfully denied the union steward's sick or vacation pay and that Respondent violated its duty to bargain over union release time. Charging Party did not except to these findings.

Respondent's salaried and hourly non-supervisory employees. Ronald Demski was hired by the City in July of 1991 as a mechanic in the motor pool, and became the Union's chief steward in May of 1999. One of his responsibilities as steward was to investigate grievances filed by bargaining unit members. Shortly after he became steward, he was told by Mike Lozon, the acting superintendent of the department of public works (DPW) at the time, to "do what [Demski] had to do to file grievances." From May of 1999 to November of 2000, Demski was allowed wide latitude to investigate grievances. The amount of time that Demski spent investigating grievances varied, ranging from a few hours to several days. Demski was paid for this time.

In October 1999, Donald Hubler became superintendent of the DPW. Shortly thereafter, Hubler had a conversation with Demski during which Demski offered to help Hubler do what he needed to get done. According to Demski, Hubler said: "I don't need you and I don't need the Union." Nothing specific was said during this conversation regarding Demski's ability to investigate grievances during work time, and Demski continued to do so.

Sometime around April 2000, Demski participated in a grievance arbitration, attended by Personnel Director/Assistant City Manager Linda Paladino. Prior to the arbitration, Paladino contacted Demski and attempted to persuade him to drop the grievance. When pressured for a reason why he would not do so, Demski compared his situation to that of a schoolchild who was being bullied. He made a statement to Paladino to the effect that "unless I turn around and give you a black eye, you're going to keep slapping me in the head." As a result of the exchange, Demski later received the following memorandum from Paladino:[2]

> As discussed on Monday, April 17, with your Union Board members present, I am concerned about your aggressive behavior and use of physically threatening/hostile ambiguous language. This memorandum is not discipline; rather it is a written consultation of appropriate language in the workplace.
>
> In today's society using physically threatening terminology toward individuals at work, causes a safety concern. Even if ambiguous, aggressive hostile terms have no place in today's workplace. Symbolic references to physical abuse such as giving "a black eye" or "going to get you" combined with ambiguous terminology like "you haven't heard the last of this" or "this is not over" is threatening.
>
> As Union Steward and an employee of the City of St. Clair Shores, I ask that you discontinue your use of such hostile phrases and utilize non-threatening terms to express yourself in the future.
>
> This memorandum is also being sent to your Union President as a written expression of concern for your conduct.

[2] The ALJ summarized this memo in her Decision and Recommended Order. However, because her finding of union animus was based in part on this memo, we quote it in full.

On November 2, 2000, an election took place between AFSCME and another labor organization, in which AFSCME prevailed. On November 7, 2000, Demski requested that his supervisor, Roger Sesnie, provide him with three to five days off to investigate grievances. Because this was an unusual request and he was uncertain how to respond, Sesnie contacted Hubler, who in turn called Linda Paladino to discuss the matter. Hubler and Paladino reviewed two documents for guidance. The first was the parties' collective bargaining agreement, which states in Article 11:

> Stewards may be allowed to investigate and present grievances to the employer during working hours and without loss of time or pay provided they notify their supervisor and their absence from work does not unreasonably interfere with the efficient operation of the employer.

In addition, Hubler and Paladino reviewed a memo dated October 31, 1996, from Sesnie to all motor pool employees, which reads in part:

> Unless a problem arises about disciplinary actions or pre-approved meetings, no union business shall be conducted from 7:00 a.m. till 3:00 p.m. Miscellaneous union business may be conducted from 3:00 p.m. till 3:30 p.m.

Hubler and Paladino discussed the effect that Demski's proposed three to five day absence would have on the motor pool. Hubler believed that Demski's absence would be too long because the fall season was approaching, and the motor pool vehicles needed to be prepared for salting, street sweeping, and snowplowing activities. Hubler and Paladino decided that Demski would be given between 2:30 - 3:30 p.m. each day to work on grievances, plus possible additional time if it became available. The new arrangement provided Demski with an extra half hour per day. Hubler informed Demski of their decision on November 7, 2000.

Demski felt that the hour of work time between 2:30 and 3:30 p.m. provided by the Employer was insufficient and made it impossible to investigate grievances effectively. He believed this did not give him enough time to clean up, gather materials, find a place to work, and call AFSCME representatives for assistance, and limited his ability to function as a union steward.

The Union filed its unfair labor practice charge in this matter alleging that the restrictions placed on Demski violated Sections 10(1)(a) and (c) of PERA because Respondent was motivated by a desire to retaliate against him for his diligent pursuit of grievances. The ALJ agreed, concluding that by its actions, Respondent violated Sections 10(1)(a) and (c) of PERA.

Discussion and Conclusions of Law:

In *Napoleon Community Schs*, 1982 MERC Lab Op 14, the Commission adopted the test formulated by the National Labor Relations Board in *Wright Line, Division of Wright Line, Inc*, 251 NLRB 1083 (1980), *enf'd*, 662 F2d 899 (CA 1, 1981), *cert den*, 455 US 989 (1982) for determining employer motivation when discriminatory action is alleged. *City of Detroit (Housing Dep't)*, 1989 MERC Lab Op 547 *aff'd*, unpublished opinion of the Court of Appeals,

decided February 13, 1991 (Docket No. 119519); *Walled Lake Community Schools*, 1985 MERC Lab Op 575; *City of Menominee*, 1982 MERC Lab Op 1420; *Detroit Bd of Ed*, 1982 MERC Lab Op 593. Under the *Wright Line* test, the charging party must first make a *prima facie* showing sufficient to support the inference that union or protected activity was a "motivating or substantial factor" in the employer's decision to take action adverse to an employee, despite the existence of other factors supporting the employer's actions. Once the *prima facie* case is met, the burden of going forward then shifts to the employer to demonstrate that the alleged discriminatory action would have occurred even in the absence of protected activity. However, the full burden of proving that the protected activity was a "but for" cause remains with the charging party. See *City of Saginaw*, 1997 MERC Lab Op 414, 419.

The elements of a *prima facie* case of discrimination under Section 10(1)(c) of PERA are: (1) employee union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility towards the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. E.g., *City of Saginaw*, 1997 MERC Lab Op at 419.

Clearly, the first two elements are present here, as Demski was the union steward and his activities well known to the Employer. We find, however, that Charging Party has not met its burden of establishing that union animus was a motivating factor in the Employer's decision regarding release time. Union animus may be proven by indirect evidence, however mere suspicion or surmise will not suffice. Rather, the party making the claim must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707.

The ALJ based a finding of union animus on Hubler's statement to Demski in October of 1999 and Personnel Director Paladino's April 2000 memorandum. Hubler's remark was made a year before the November 2000 decision regarding Demski's time off to investigate grievances. Hubler's remark, although blunt and ill-advised, appears to be simply an expression of his opinion that the union was not necessary. Employer statements do not automatically rise to the level of union animus merely because they criticize or express a negative view of unions. *Swartz Creek Community Schs*, 1989 MERC Lab Op 264, 276. See also *City of Ferndale*, 1998 MERC Lab Op 274, 278; *City of Detroit*, 1989 MERC Lab Op 1127; *City of Ishpeming*, 1985 MERC Lab Op 687 *aff'd in part, rev'd in part*, 155 Mich App 501. It is difficult to construe the remark as an implied threat against union activity, or as retaliation in response to any specific union activity. See *New Haven Community Schools*, 1990 MERC Lab Op 167. However, even if found to indicate union animus, we find Hubler's remark too remote to be a motivating factor in the Employer's action structuring Demski's grievance handling time. Our finding is supported by the fact that after the comment was made, Demski successfully processed numerous grievances on behalf of unit members and neither Hubler nor anyone else on behalf of the Employer sought to impede his union activity. Demski's documented success in processing grievances after Hubler's remark also further weakens a reading of the remark as a threat to impede Demski's protected activities.

The ALJ also based a finding of union animus on the memo from Paladino to Demski regarding his use of offensive language and frequent allusions to war and physical conflict.

Although the ALJ saw this memo as a response to Demski's protected activity of processing grievances, there is nothing in the memo per se that indicates union animus. On reviewing the memorandum in its entirety, we find that it reflects Paladino's legitimate expression of concern for language that she believed had crossed the line from an appropriate yet animated tone to an inappropriate threatening or hostile one. The basis of this concern is well supported by the record, such as the ALJ's finding that Demski frequently used allusions to war or other types of physical conflict during grievance discussions. Neither the memo itself nor the circumstances of its issuance support the finding that it was issued out of hostility towards Demski's protected activities, or in order to stifle his grievance processing activities in the future. See *Detroit Pub Sch*, 1989 MERC Lab Op 509. It therefore fails to establish anti-union animus on the part of the Employer.

We conclude that Charging Party failed to meet its initial burden of establishing that Demski's union activity was one of the motivating factors in denying his request for extra days off for investigating grievances. Since Charging Party has failed to establish a *prima facie* case, the burden does not shift to the Employer and we need not further examine the Employer's reasons for its decision. *City of Detroit (Housing Dep't).*

For the reasons set forth above, we find that Respondent did not violate Sections 10(1)(a) and (c) of PERA and accordingly issue the Order set forth below.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch, Commission Chairman

_____

Harry Bishop, Commission Member

_____

Maris Stella Swift, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of St. Clair Shores 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 retaliate against Ronald Demski for his activities as steward for AFSCME Local 1015 by prohibiting him from investigating grievances on work time except between the hours of 2:30 and 3:30 p.m.

WE WILL rescind the directive issued to Demski on or about November 7, 2000 regarding union release time and permit Demski, upon his request and in accord with the terms of the collective bargaining agreement, to investigate grievances during work time at times other than 2:30 to 3:30 p.m.

CITY OF ST. CLAIR SHORES

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, 3026 W. Grand Blvd., Suite 2-750, PO Box 02988, Detroit, Michigan 48202-2988. Telephone: (313) 456-3510.

STATE OF MICHIGAN
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AMERICAN FEDERATION OF STATE, COUNTY,
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LOCAL 1015,
Labor Organization-Charging Party
_____/

APPEARANCES:

Lange & Cholak, P.C., by Craig W. Lange, Esq., for the Respondent

Miller Cohen, P.C., by Eric Franke, Esq.

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 January 30, March 30, and June 25, 2001, 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 October 23, 2001, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

AFSCME Council 25 and Local 1015 filed this charge against the City of St. Clair Shores on November 27, 2000. Charging Party represents a bargaining unit of salaried and hourly nonsupervisory employees of the Respondent. Ronald Demski is chief steward for this unit. Charging Party alleges that on or about November 7, 2000, Respondent imposed new restrictions on Demski's investigation of grievances during work time. It asserts that Respondent placed these restrictions on Demski to retaliate against him for filing grievances, in violation of Sections 10(1)(a) and (c) of PERA. Charging Party also alleges that these restrictions constituted an

unlawful unilateral change in Respondent's union release time policy. In addition, Charging Party alleges that on or about November 11, 2000, Respondent unlawfully discriminated against Demski by denying him sick and vacation pay.

Facts:

Respondent has employed Ronald Demski as a mechanic in its motor pool since 1991. Demski's regular hours are 7:00 a.m. to 3:30 p.m., Monday through Friday. In November 2000, Demski's immediate supervisor was Roger Sesnie. Sesnie reported to Donald Hubler. Hubler is director of both the department of public works (DPW), including the motor pool, and the water department.

Demski became chief steward on May 29, 1999. Demski is responsible for handling grievances for all hourly employees outside the water department.

Article 11 of the parties' collective bargaining agreement reads:

> Stewards may be allowed to investigate and present grievances to the employer during working hours and without loss of time or pay provided they notify their supervisor and their absence from work does not unreasonably interfere with the efficient operation of the employer.

Shortly after Demski became chief steward, Mike Lozon, then director of the DPW, told Demski to "do what (Demski) had to do to file grievances." After that conversation, Demski left the motor pool whenever he felt it was necessary to investigate grievances, file paperwork, attend grievance meetings, go to the library, visit AFSCME Council 25's offices to obtain advice, or do anything else he felt was related to handling grievances. If Demski intended to leave the motor pool, and Sesnie was present, Demski told Sesnie where he was going. If, as was frequently the case, Sesnie was not in the motor pool, Demski told another employee. Sometimes Demski simply left. Neither Lozon nor Sesnie objected to the time Demski was spending on grievances. Demski was paid for all the time he spent on union business during the workday.

In October 1999, Hubler took over the directorship of the DPW in addition to his duties in the water department. Shortly after Hubler replaced Lozon, Hubler told Demski that he (Hubler) was the supervisor now, and that there would no longer be any need for Demski to file grievances. Hubler said, "I don't need you and I don't need the union." Demski continued, however, to leave the motor pool to investigate grievances whenever he decided this was necessary, and he continued to be paid for his time.

Between May 1999 and November 2, 2000, Demski handled between 12 and 14 grievances. Some of the grievances took only an hour or two. Demski spent days investigating other grievances. Demski once spent an entire workday off the Respondent's premises investigating a grievance. At least once, Demski spent an entire workday at AFSCME Council 25's office. The most time-consuming of Demski's grievances took six days to investigate. Demski spent two entire workdays away from the motor pool on that grievance. However, the

time Demski spent investigating grievances was generally spread over days or weeks. Demski never spent two entire days in a row working on grievances.

Of the 12 to 14 grievances Demski handled prior to November 2, 2000, nine were resolved by a settlement in the grievant's favor. In most of these, the grievance was settled without the need for a written grievance. Charging Party took one of these grievances to arbitration, and the arbitrator reduced the discipline given to the grievant. The parties were awaiting an arbitrator's decision on another of these grievances at the close of the hearing on this unfair labor practice charge.

One of the arbitration hearings took place in March or April 2000. On the day before the arbitration hearing, Personnel Director/Assistant City Manager Linda Paladino attempted to persuade Demski to drop the grievance. Explaining why he would not, Demski said that his relationship with Paladino was like that of kids in school. He told Paladino, "I would be walking down the street, and every time you would slap me in the head. And unless I turn around and give you a black eye, you're going to keep on slapping me in the head." On April 20, 2000, Paladino wrote a memo to Demski complaining about his use of inappropriate language. Paladino mentioned Demski's reference to "giving (her) a black eye." Paladino also complained that Demski had said in a grievance discussion that he "was going to get" Respondent, and that he had remarked, "You haven't heard the last of this," and "this is not over," during other grievance discussions. Paladino did not accuse Demski of using inappropriate language outside of grievance discussions, and Demski was not disciplined.

After the arbitration award reducing the grievant's discipline, Demski told Hubler that he was going to show Respondent's city council documentation of how much time had been spent on grievances that Charging Party had won or had settled in the grievant's favor. Shortly thereafter, Demski also told Hubler that Demski was going to write grievances on anything he could. Demski would then, he told Hubler, total up the time spent on these grievances and use these figures to show city council how much time Respondent's supervisors were wasting.

In the fall of 2000, another labor organization filed a petition with the Commission seeking to represent Charging Party's bargaining unit. An election was scheduled for November 2, 2000, with both unions on the ballot. On November 1, Demski put in a request for two hours of vacation time for the following day. Demski spent this time observing the counting of the ballots. Charging Party successfully retained its status as the bargaining representative in the election. The following day, November 3, Demski called in sick. He also called in sick on Monday, November 6. Demski returned to work on Tuesday, November 7.

Sometime between November 2 and November 7, ten bargaining unit members approached Demski and asked to file grievances. On the morning of November 7, Demski told Sesnie that he was going to need three days off to work on grievances "because it was set aside for me to meet with whomever I needed (to meet with) at Council 25." Sesnie did not respond, but immediately went to Hubler. Sesnie repeated what Demski had said, except that he told Hubler that Demski wanted five days off. Hubler asked Sesnie if Sesnie was aware of any previous requests "like that." Sesnie said that he wasn't, although he told Hubler that Demski had done some grievance investigation off site.

Hubler described his actions following his conversation with Sesnie as follows. Hubler immediately contacted Paladino. Neither was certain initially how to respond to what they saw as a request for an unusually large amount of time off for union business. Hubler and Paladino reviewed the collective bargaining agreement, including Article 11. Paladino and Hubler also reviewed the motor pool's current workload. Hubler felt that there was a lot of work to be done. They discussed the fact that it was fall, and Respondent had to prepare its equipment for street sweeping, snow plowing and salting. Hubler's opinion was that Demski's absence from the motor pool for five days would have a significant impact on the ability of the motor pool to complete its work. Hubler and Paladino also discussed a memorandum written by Sesnie to all motor pool employees dated October 31, 1996. The memo was titled "lunch period, rest period, personal phone calls and copy machine." It included this statement:

> Unless a problem arises about disciplinary actions or pre-approved meetings, no union business shall be conducted from 7:00 a.m. till 3:00 p.m. Miscellaneous union business may be conducted from 3:00 p.m. till 3:30 p.m.

Hubler had seen this memo shortly after it was written, when Hubler was director of the water department. Sesnie had asked him to make sure that water department employees did not come to the motor pool to conduct union business except between 3:00 p.m. and 3:30 p.m. After Hubler took over supervision of the DPW in October 1999, he instructed all his supervisors that it was their obligation to track what their employees were doing on a day-to-day basis. There was no indication in the record, however, that Hubler had looked at the October 31, 1996 memo between taking over as DPW director and November 7, 2000.

Paladino and Hubler decided that Demski should be allowed to work on union business from 2:30 to 3:30 p.m. every day, with more time allowed if it "became available."

After talking to Paladino, Hubler went to the motor pool to talk to Demski. Demski told Hubler that he had asked for three days off, not five, but he could not be sure how much time he would need – it could be more than three days, or it could be less. Demski said that he "had a lot of issues." Hubler told Demski that the amount of time Demski had requested was a problem because of the work that needed to be done. Hubler told Demski that he could use the time between 2:30 pm. and 3:30 p.m. to work on grievance investigations. Hubler said he would give Demski more time in the future if it became available.

On November 13, Demski reviewed his timecards for the previous two weeks before they were to be submitted for processing. Demski noticed that Sesnie had written, "Not pre-approved" on his request for vacation time on November 2 and on his request for sick leave for November 3 and 6. The parties' contract states that use of vacation days, one or more days at a time, is subject to the pre-approval of the employee's supervisor. Demski had often asked for a few hours of vacation time on the day it was to be taken, and Sesnie had approved these requests. Since Sesnie was on vacation on November 13, Demski took his timecards to Robert Osaer, who was

substituting for Sesnie.[3] Osaer agreed with Demski that the leave should have been approved. He told Demski to make up new timecards, and Demski was paid for all the vacation and sick time he had requested.

On November 14, Demski met with Paladino and Hubler to discuss some grievances. He explained to them that after the election on November 2, between ten and 14 individuals had asked him to file grievances. Thereafter, Hubler told Osaer that if Demski was caught up on his work he could give Demski more time to investigate grievances. Later that week or early the following week, Osaer told Demski that he could use some time that day to investigate grievances. However, more work came in, and Demski was not allowed to leave. The same thing happened the following week. The record does not indicate that Osaer ever actually permitted Demski to investigate grievances except between 2:30 and 3:30 p.m.

After November 7, Demski tried to use the hour between 2:30 and 3:30 to investigate grievances. However, Demski was not able to get cleaned up and also investigate the grievances he wanted to file between 2:30 and 3:30 p.m. Also, Demski was not able to reach the Council 25 representatives he needed to talk to by phoning only in the late afternoon. Demski began using the time between 2:30 and 3:30 p.m. to write out grievances. Between November 7, 2000 and January 31, 2001 Demski filed 14 or 15 grievances. After the first few, he did not attempt to investigate the grievances he filed and/or seek the advice of AFSCME representatives regarding them.

On January 22, 2001, Demski met with Paladino to discuss some of these grievances. He told Paladino that he could not answer any of her questions about these grievances because he had not had time to investigate them. Paladino then arranged for Demski to have a full day on February 7, and one half day on February 9 to meet with employees regarding one grievance.

Discussion and Conclusions of Law:

Charging Party alleges that Respondent retaliated against Demski by denying him sick pay for November 3 and November 6, 2000, and two hours of vacation pay for November 2, 2000. There is no basis for this claim. The record established that Respondent paid Demski the sick and vacation pay he requested, and that Demski received the money in his regular check for the period in which the leave was taken.

Charging Party also alleges that Respondent violated its duty to bargain by unilaterally altering its policy regarding union release time on November 7, 2000. I disagree. An employer has no statutory duty under PERA to pay union representatives for time spent conducting union business during work time. *City of Detroit(DPW),* 2001 MERC Lab Op 73; *City of Birmingham,* 1974 MERC Lab Op 642; *City of Detroit (General Hospital),* 1968 MERC Lab Op 378. Union release time is a mandatory subject of bargaining under PERA. *Central Michigan Univ.*, 1994 MERC Lab Op 527. An employer can fulfill its statutory obligation to bargain, however, by bargaining about a mandatory subject and memorializing resolution of that subject in a collective

[3] Sesnie went on an extended leave after his vacation. Osaer became Demski's immediate supervisor.

bargaining agreement. In that case, the matter is "covered by" the agreement. *Port Huron Education Association v Port Huron Area School District*, 452 Mich 309, 317-318 (1996). Unambiguous contract language will control unless there is a past practice contrary to that language which is so widely acknowledged and mutually accepted that it has created an amendment to the contract. s*upra,* at 329. Here, Article 11 of the parties' contract covers steward release time. Thus, that subject is clearly "covered by" the contract. Moreover, Article 11 unambiguously permits Respondent to place some limits on a steward's performance of union business on work time. The fact that Respondent rarely denied requests for release time and/or allowed a steward to conduct union business without specifically requesting time off does not establish that the parties intended to modify their contract to give stewards the right to unlimited release time. I find that Respondent satisfied its obligation to bargain over the question of steward release time by agreeing to Article 11 of the collective bargaining agreement.

Charging Party also alleges that the restrictions placed on Demski on November 7, 2000 violated Sections 10(1) (a) and (c) of PERA because Respondent was motivated by a desire to retaliate against Demski for his diligent pursuit of grievances. A finding that an employer had no duty to bargain over a particular action does not preclude a finding that the action violated Section 10(1)(c) of PERA. See, e.g., *Parchment School District*, 2000 MERC Lab Op 110, and fns. 4 and 5 therein. For reasons set forth below, I agree with Charging Party that the specific restrictions placed on Demski on November 7, 2000 violated Sections 10(1)(a) and (c) of the Act.

Demski became chief steward in May 1999. During the following 16 months, he processed between 12 and 14 grievances. One of these grievances was taken to arbitration, resulting in a partial victory for Charging Party. Another was scheduled for arbitration. Most of Demski's grievances, however, were settled in the early stages of the grievance procedure on terms favorable to the grievant. I find that Demski pursued contract violations with an unusual militancy. One consequence of this militancy was Demski's frequent use of allusions to war or other types of physical conflict during grievances discussions.

I conclude that two incidents demonstrate Respondent's animus toward Demski's protected activities. First, shortly after Hubler took over supervision of the DPW, he told Demski that there was no need for him to file grievances, that Hubler "didn't need him (Demski), and didn't need the union." Even though Hubler testified extensively in this case, he did not deny making these remarks. Respondent argues that because Hubler did not threaten Demski, his remarks are not evidence of animus toward Demski or the union. However, the National Labor Relations Board (NLRB) has consistently held that a statement may be evidence of anti- animus even though it does not constitute an unlawful threat or other independent violation of Section 8(a)(1) of the National Labor Relations Act, 29 USC §150, et seq. *Sunrise Health Care Corp.* 334 NLRB No. 11 (2001); *Gencorp,* 294 NLRB 717 (1989); *General Battery Corp.,* 241 NLRB 1166 (1979). Moreover, Demski's protected activities also annoyed Paladino, as evidenced by her memo dated April 20, 2000, criticizing his use of language when dealing with grievances.

In determining motivation, the circumstances as whole must be taken into consideration. *Residential Systems, Inc.*, 1991 MERC Lab Op 394. Here, Demski told Sesnie on November 7, 2000, that he needed three or five days off to spend meeting with AFSCME Council 25

representatives at the AFSCME office. Demski had been paid for time spent meeting with AFSCME representatives in the past, and had spent other time on union business away from the motor pool. Sesnie had not been closely monitoring Demski use of release time. However, a request to spend five, or three, days off the premises meeting with AFSCME representatives was unusual. Sesnie went to his supervisor, Hubler, and Hubler went to Paladino. Hubler and Paladino discussed Demski's request for, as they believed, five days off to spend on union business. They agreed it was unusual. They reviewed Article 11 of the contract, which gave Respondent the clear right to deny a steward's request to engage in union business during work time if his or her absence would unreasonably interfere with Respondent's operations. They discussed the amount of work that needed to be done in the motor pool, which Hubler saw as considerable. However, Hubler and Paladino did not inform Demski that he couldn't take five days off for union business because of the workload in the motor pool. Instead, Hubler and Paladino resurrected Sesnie's October 31, 1996 memo to motor pool employees. Demski was not a steward at the time that this memo was written. There is no evidence that a steward worked in the motor pool in 1996, or that the 1996 memo was intended to apply to stewards. Hubler didn't know, and didn't ask Sesnie, whether Sesnie had been restricting Demski to conducting union business between 3:00 and 3:30 p.m. Nevertheless, Hubler and Paladino concluded that Demski should be restricted to investigating grievances at the end of the day, although they agreed to give him an additional half hour, from 2:30 to 3:00 p.m.

Under the new policy imposed by Hubler and Paladino, Demski was apparently allowed to conduct union business from 2:30 to 3:30 p.m. every day. Even allowing Demski time to clean up from his mechanic's job, he could have performed a significant amount of work in the motor pool during these five hours per week. What Demski could not do when restricted to investigating grievances between 2:30 and 3:30 p.m. was what he needed to do to investigate them effectively. That is, he could write grievances, but he could not locate and talk to grievants and witnesses, and he could not get advice from AFSCME representatives. Hubler and Osaer told Demski that if the workload allowed, he would be allowed additional time to work on grievances. This, however, was an empty promise. Since there was always work to do, the only time Demski was actually allowed to investigate grievances outside of the 2:30 to 3:30 time period was in February 2001, after Paladino discovered that Demski was continuing to file grievances but wasn't investigating them. As a result, he couldn't discuss or settle them.

Based on the record as a whole, I find that on November 7, 2000, Hubler and Paladino were annoyed by the number of grievances Demski had filed and by his belligerent style. I find that they decided to restrict Demski to working on grievances between 2:30 and 3:30 p.m. to retaliate against Demski for his activities as steward, and to hinder him as much as possible from filing future grievances. I conclude that the reason given for this restriction - the workload in the motor pool - was a pretext. I base this, in part, on the fact that Hubler and Paladino were apparently willing to allow Demski to be away from his job on union business at least five hours per week, but only during a set time which was inconvenient for investigating and/or researching grievances. In sum, I conclude that the Respondent's only reason for telling Demski that he could investigate grievances only between 2:30 and 3:30 p.m. was Demski's protected activity.

In accord with the findings of fact and conclusions of law set forth above, I conclude that on or about November 7, 2000, Respondent announced that Charging Party's chief

steward Ronald Demski could perform union business only between 2:30 and 3:30 p.m. each day in order to retaliate against Demski for filing grievances and limit his ability to successfully prosecute grievances in the future. I conclude that by this action Respondent violated Sections 10(1) (a) and (c) of PERA. I find no merit to Charging Party's claim that Respondent unlawfully denied Demski sick or vacation pay in November 2000, and I find that Respondent did not violate its duty to bargain over union release time. I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Respondent, its officers and agents, are hereby ordered to:

1. Cease and desist from retaliating against Ronald Demski for his activities as steward for AFSCME Local 1015 by prohibiting him from investigating grievances on work time except between the hours of 2:30 and 3:30 p.m.

2. Rescind the directive issued to Demski on or about November 7, 2000 regarding union release time and permit Demski, upon his request and in accord with the terms of the collective bargaining agreement, to investigate grievances during work time at times other than 2:30 to 3:30 p.m.

3. Post the attached notice to employees in conspicuous places on Respondent's premises for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____