STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

RIVER ROUGE SCHOOL DISTRICT,
Respondent-Public Employer,

Case No. C02 B-034

-and-

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

_____/

APPEARANCES:

Logan, Huchla & Wycoff, P.C., by Charles E. Wycoff, Esq., for Respondent

Miller Cohen, P.C., by Robert E. Donald, Esq., Bruce A. Miller, Esq. (On Brief) and Eric I. Frankie, Esq. (On Brief) for Charging Party

DECISION AND ORDER

On May 28, 2004, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

_____
Nino E. Green, 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 January 10, 2003, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before April 3, 2003, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On February 8, 2002, Charging Party, American Federation of State, County & Municipal Employees, Council 25 (AFSCME), filed an unfair labor practice charge against Respondent, River Rouge School District. The charge, as clarified in a more definite statement filed by AFSCME on May 2, 2002,

alleges that the Respondent school district violated Section 10 of PERA by suspending Union member Donald Lozon for engaging in protected concerted activity.

Findings of Fact:

Background

Donald Lozon has worked for River Rouge School District since 1980 and has been a full-time employee of the district since 1986. He is a member of a bargaining unit represented by Charging Party and has previously held various leadership positions within the Local. In 2001, the Employer promoted several Union officers to positions outside of the unit. Thereafter, Lozon, the only remaining unit employee with Union leadership experience, became president of the Local.

Lozon acknowledges that 2001 was a "difficult" year. Lozon lost his job as building leader in 2001 after the school district decided to eliminate that position. Lozon was reassigned to a custodian position, but for a brief period of time the Employer allowed him to work as a maintenance employee, a higher-rated position, as an accommodation. Lozon then requested that his position be changed back to custodian. The Employer complied with that request, but Lozon was unhappy with the building to which he was assigned and filed a grievance concerning that issue. As a result of these changes, Lozon's work schedule and hours varied greatly throughout the course of 2001.

In the summer of 2001, Lozon applied for the newly-created position of building foreman. In September or October, the school district notified Lozon that he had not been selected for the foreman position. In response, Lozon sent the following letter to the superintendent concerning the district's decision:

> I am very hurt by the actions of you and the board. We have known each other [sic] for a very long time. You coached me in both basketball and football and I thought you knew what kind of person I am. I have taken this loss to heart and am very disappointed. It is important to know what you think of me and by all things of late not much. I am going to give my self [sic] some time and think of what is next. I don't know why [supervisor] Roy Keen is so important to you. Some one [sic] who thinks so little of you. You have given so much[.] If I continue putting so much thought into this I am going to go nuts[.]

Lozon also had several personal issues arise during the course of 2001. In October, Lozon's father died following an illness. Lozon himself was diabetic, and his disease became uncontrollable for a period of time due to complications with his insulin. The condition, which Lozon described as debilitating, caused him to feel tired and ill. For these reasons, Lozon missed approximately 32 days of work during the period July 2, 2001 to November 12, 2001.

The Grievance Hearing

On November 27, 2001, representatives of the Union and the Employer met for the purpose of resolving a grievance filed earlier that summer by the Local. Lozon was the chief representative for the

Union at the hearing. Also in attendance were the Union's vice president David Cannon, its chief steward, three school board members, the board's secretary, and Lozon's supervisor, Roy Keen.

During the course of the hearing, Lozon and Keen became involved in a heated discussion concerning the grievance. Both men grew animated and raised their voices. At one point, one of the board members commented that the matter seemed to have become personal. The discussion culminated with Lozon standing up and pounding his fist on the desk. Thereafter, the hearing was adjourned for a brief recess. The parties reconvened several minutes later and the meeting concluded without incident.

Two days later, Lozon sent a letter to the membership of the Local concerning what had occurred during the grievance hearing. The letter stated:

> I attended a grievance hearing 11-27-01. I was in a scuffle with management about the issue at hand. I had worked midnights and had not sle[pt] all night an[d] my judgement [sic] was not at its best. My feelings toward Roy [Keen] and management came out with all the emotion within me. I fear this was not the right time or place and I will try to control my self [sic] in the future. My best eff[o]rt and int[e]rest are [always] with the union. There are those who feel that we should lay down and take what ever [sic] management will give us but they are [already taking] management jobs and have [their] own interest. Please I only wish the best for each and everyone to earn a living. My feelings are person[a]l and I wish to do the best job I can for the union.

The Paycheck Incident

Around the time of the grievance hearing, Lozon began working the midnight shift. Typically, the school district distributes paychecks to midnight shift employees on Thursday afternoons. Lozon expected to receive his first paycheck as a midnight shift employee on Thursday, November 29, 2001. For some reason, however, the check did not arrive that day. Immediately upon completing his shift the following morning, Lozon drove to the high school and went to the office of the school district's chief financial director, Marie Miller.

When Miller arrived for work at 7:45 a.m., she found Lozon waiting in her outer office. Lozon told her that he had not received his check and that he felt Keen was trying to prevent him from getting paid. Miller testified that Lozon was agitated and visibly shaking, and that his voice became increasingly loud as they talked. Miller felt threatened and believed that she might be in danger. Miller testified that Lozon did not calm down until she admonished him for yelling, at which time Lozon apologized and blamed his behavior on having worked all night. Immediately following the meeting, Miller drafted a memo to the superintendent summarizing her account of the incident. On or about that same day, Lozon wrote a letter to the superintendent alleging that he was being treated differently than other employees and accusing Keen of conspiring to prevent him from getting paid.

At the hearing, Lozon conceded that some people might have considered his tone during the incident with Miller to be loud due to his "booming voice." However, he denied that he became animated or that Miller ever had to rebuke him for his conduct.

I credit Miller's testimony concerning the November 30, 2001, incident. Miller was a credible witness with an excellent recall of the events underlying this dispute. Moreover, her account of the paycheck incident was substantially similar to the description contained in the memo which she prepared for the superintendent immediately following the event and well in advance of the filing of the instant charge.

Administrative Leave

As a result of the incidents described above, members of the administration grew concerned about Lozon's conduct. At the hearing in this matter, Miller described her thoughts at the time:

> Both the [Superintendent] and myself have known Mr. Lozon for a long time. The behavior moods that we had been seeing, and the behavior that we had been seeing from October did not seem to be typical behavior for Mr. Lozon.
>
> He normally was pretty calm; might get angry about something, but you could usually talk to him, reason things out and calm [him] down. In terms of any union activities, you know, there may be an agitated voice, but it was never perceived as personal.
>
> In my conversation with the Superintendent, he had . . . been made aware of instances where Mr. Lozon believed that no matter what – what occurred . . . that basically everything was happening to him or about him because of Mr. Keen; that it wasn't the normal course.
>
> And there was basically no reasoning. There was a change in his personality. He was not coming to work. We were aware that . . . there was the death of his father . . . and he had a hard time with that. . . . . We were also aware that he was a diabetic, and so the concern was that, was that the problem?
>
> * * *
>
> My concern at that point that day with this check incident was that he was not able to control the situation; that he, you know, for lack of a better term . . . was losing it that day.

The administration decided to call a meeting with Lozon in attempt to determine the source of the problem. The meeting was held on or about December 5, 2001. In attendance were Miller, the superintendent, the school district's legal representative, Lozon and two representatives from the Union. Lozon arrived for the meeting in an agitated and hostile state, and he initially refused to speak on his own behalf or answer any questions about his behavior.

Immediately following the meeting, the superintendent decided to place Lozon on administrative leave pending the completion of a fitness for duty (FFD) evaluation as provided for under the Americans with Disabilities Act. The school district notified Lozon of this employment action in a letter dated December 5, 2001. The letter stated, in pertinent part:

> In recent weeks, the members of the board of education and administrative staff expressed several concerns relative to your behavior and conduct. To some extent, recent correspondence by you to the district reflects the reasons for those concerns. Your conduct has prompted a meeting with you to explore the circumstances surrounding the alleged conduct and your reactions to those circumstances. While you initially chose not to respond to the concerns, you eventually stated that you were simply being a vigorous advocate for the union. You additionally expressed concern that the reason for this meeting would spread through the district like wildfire by a certain individual who you refused to name.
>
> Based upon the meeting and the various letters of correspondence from you, as well as various conduct reflected in your recent assignments, job duties, and extensive absentee record, it was determined that the district needed to determine your fitness for duty. You were specifically asked whether there was any physical and/or mental disability that the district could assist you with by making an accommodation. You stated firmly that there was not. Under these circumstances your immediate return to work is unacceptable.
>
> The conduct, coupled with your record of absenteeism, and your various statements concerning other employees of the district, suggest[s] a need for a medical evaluation.

The letter concluded by setting forth the name and address of the psychologist Respondent had selected to perform the FFD evaluation, and Lozon was instructed to comply fully with her directives.

When Lozon was initially placed on administrative leave, the school district continued to pay his salary in full. On January 22, 2002, the district received the results of the FFD evaluation, and members of the administration met with a union representative to discuss the psychologist's findings. The evaluation concluded that Lozon had no intention of harming anyone or being violent, but that he was "experiencing some problems" and appeared to be "intense, anxious and distressed." The examining psychologist recommended that Lozon be required to attend anger management classes before being allowed to return to work.

The school district stopped paying Lozon's salary following receipt of the FFD evaluation, thus requiring him to use accrued sick time in order to get paid. However, the school district was concerned that because of Lozon's many absences throughout the year, he would quickly exhaust his sick time and, therefore, lose his health care benefits. In order to prevent that from occurring, the Employer offered Lozon the opportunity to take time off under the Family and Medical Leave Act (FMLA). On the advice of an attorney, however, Lozon refused to sign the FMLA paperwork.

Lozon completed the anger management classes at his own expense. At an Equal Employment Opportunity Commission hearing pertaining to this dispute, Lozon submitted his bills for the classes to Miller, who then turned them over to the Employer's accounts payable office for processing. It was not until the hearing in this matter that Miller learned that Lozon had never been reimbursed for the classes. Miller acknowledged on the record that it was the school district's obligation to pay the bills, and she promised to remedy the situation.

Upon completing the anger management classes, Lozon returned to work in the position he had held prior to the suspension and with the same pay and benefits. As a result of having been off work, Lozon used a total of 22 days of earned sick time and one personal day. Lozon also missed an additional nine days without pay.

Positions of the Parties:

Charging Party argues that the school district violated Section 10(1)(a) and (c) of PERA by retaliating against Lozon for engaging in protected activity. Specifically, the Union contends that Respondent's decision to place Lozon on a partially unpaid leave of absence and require him to submit to a FFD evaluation and anger management classes occurred as a direct result of Lozon's protected conduct at the November 27, 2001, grievance meeting. Charging Party alleges that Lozon's absence handicapped the Union by stripping the Local of its only experienced leader

Respondent denies that its decision to place Lozon on administrative leave was in retaliation for his representation of the Union's position at the grievance hearing. According to the Employer, the decision was the result of a perceived change in Lozon's personality and behavior during the preceding months. The Employer notes that when Lozon completed the anger management classes, he was returned to his original position, paid his regular salary, and received all of the benefits afforded under the contract, including his seniority rights.

Discussion and Conclusions of Law:

Section 10(1)(c) of PERA prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. Section 10(1)(a) makes it unlawful for an employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to employees under Section 9 of the Act. Section 9 provides:

> It shall be lawful for a public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

The elements of a prima facie case of unlawful discrimination or retaliation under Section 10(1)(a) or (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. Once the prima facie case is met by the charging party, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action 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).

There is no question that Lozon was engaged in protected activity of which the Employer was aware when he made his remarks on behalf of the Union at the November 27, 2001, grievance meeting. In an attempt to establish anti-union animus or hostility on the part of the Employer in this matter, Charging Party relies on prior Commission decisions including *Reese Public Schools*, 1967 MERC Lab Op 489, *Unionville-Sebewaing Area Schools*, 1981 MERC Lab Op 932, 934-935 and *Baldwin Community Schools*, 1986 MERC Lab Op 513. In those cases, the Commission and its ALJs acknowledged the principle that rude or insulting remarks, obstreperous comments, and other forms of rough language, are protected when made spontaneously in the course of concerted, otherwise protected activity. See also *Benzie v Sinclair*, 1984 MERC Lab Op 838; *Isabella County Sheriff's Department*, 1978 MERC Lab Op 689. Charging Party contends that Lozon's behavior at the November 27, 2001, grievance meeting was not so egregious as to remove him from the protections of PERA and, therefore, that Respondent violated Section 10(1)(a) and (c) of the Act by taking action against him based on that conduct.

I find this matter to be clearly distinguishable from the cases relied upon by Charging Party. The record overwhelmingly establishes that the school district's decision to place Lozon on administrative leave and require him to undergo a FFD evaluation was in response to a pattern of erratic and atypical behavior which Lozon exhibited prior to the employment action, and that his conduct at the grievance meeting was only one factor leading to that decision. Lozon himself conceded that 2001 was a "difficult" year for him. His father became ill and later died, his health deteriorated, and he lost his position as building leader. Upon learning that he had not been selected for another job, Lozon wrote to the superintendent that he might "go nuts" if he continued to think about it. Two days after the grievance meeting, Lozon confronted Miller in an agitated state, causing her to feel threatened and in danger. Around this time, members of the administration began to perceive a change in Lozon's personality and noted that he seemed to blame all of his problems on his supervisor. Finally, Lozon was agitated, hostile and noncooperative at a meeting called by the superintendent regarding his condition. It was only then that the superintendent decided to take some action against Lozon.

Rather than discipline Lozon or terminate his employment, the school district placed him on a paid administrative leave pending the results of the FFD evaluation. When the Employer later decided to keep Lozon off work and require him to take anger management classes, it did so at the advice of the psychologist who performed the evaluation, and the school district offered Lozon the opportunity to take a leave of absence under the FMLA in order to protect his health insurance benefits while he was off work. Miller testified credibly that the ultimate decision to place Lozon on leave and require him to undergo a FFD evaluation was because of the perceived change in his personality during the months preceding the employment action. There is no evidence that the superintendent or anyone else in the administration was

hostile towards toward Lozon's protected activity or to the Union in general. Rather, it appears that the same decision would have been made whether or not Lozon had engaged in protected activity, and that the school district was merely acting out of a good faith and reasonable concern for Lozon's mental well-being and the welfare of others within the workplace.

In an attempt to establish that the Employer's decision to place Lozon on administrative leave in the fall of 2001 was motivated by anti-union animus, Charging Party cites the fact that its president, vice president and other officers were promoted to positions outside of the unit earlier that year, and that those promotions, combined with Lozon's absence, left the Union without experienced leadership. Charging Party contends that these actions were intended to handicap the Union, and that they establish that the Employer's decision to place Lozon on leave was pretext. It is Charging Party's burden to produce substantial evidence from which a reasonable inference of discrimination or retaliation may be drawn. To infer animus based upon the promotions of several Union officers would require "convoluted conjecture tantamount to speculation" in violation of the Supreme Court's decision in *MERC v Detroit Symphony Orchestra*, 393 Mich 116 (1974).

Viewing the record as a whole, I conclude that it was Lozon's behavior before, during and after the November 27, grievance meeting, rather than his protected activity, which motivated the Employer to place him on administrative leave and require him to undergo a FFD evaluation and take anger management classes. Accordingly, I find that Respondent did not violate Sections 10(1)(a) and (c) of PERA and recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____