

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

In the Matter of:

CITY OF DETROIT (PUBLIC LIGHTING DEPT),
Public Employer-Respondent,

Case No. C03 J-223

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 207,
Labor Organization-Charging Party.

APPEARANCES:

Andrew R. Jarvis, Esq., Assistant General Counsel, City of Detroit Law Department, for Respondent

Scheff & Washington, P.C., by George B. Washington, Esq., for Charging Party

DECISION AND ORDER

On September 27, 2004, Administrative Law Judge Julia C. 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

Nora Lynch, Commission Chairman

Harry W. Bishop, Commission Member

Nino E. Green, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of Detroit (Public Lighting Department) 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 discipline employees for engaging in activities protected by Section 9 of PERA.

WE WILL NOT discipline union stewards for attempting to enforce provisions of a collective bargaining agreement.

WE WILL remove from AFSCME Local 207 Steward Charles Murphy's file the written reprimand issued to him on August 5, 2003.

CITY OF DETROIT (PUBLIC LIGHTING DEPARTMENT)

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, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

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Andrew R. Jarvis, Esq., Assistant General Counsel, City of Detroit Law Department, for 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 March 17, 2004, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including exhibits presented at the hearing, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The American Federation of State, County and Municipal Employees (AFSCME), Local 207, filed this charge against the City of Detroit on October 22, 2003. Charging Party represents a bargaining unit of Respondent's employees that includes employees in its Public Lighting Department. Charging Party alleges that on August 5, 2003, Respondent violated Sections 10(1)(a) and (c) of PERA by disciplining Charging Party's chief steward in the Public Lighting Department for engaging in union activity, i.e. attempting, on July 28, 2003, to set up a meeting with a supervisor to discuss a possible contract violation.

Respondent maintains it disciplined the steward, Charles Murphy, because Murphy was away from his assigned work area conducting union business without his supervisor's permission.

Facts:

Murphy is a repair mechanic in Respondent's Public Lighting Department (the department.) Murphy repairs damaged traffic signal heads at the department's facility on Grinnell Street. His immediate supervisor is Carolyn Davis.

Murphy has been Charging Party's chief steward for the Grinnell Street facility since about 1990. The Public Lighting Department's policy on conducting union business states:

Stewards, at no time, will leave their job assignments without the expressed approval of their supervisor (or an appropriate Division/Section Head) to conduct union business.
[Emphasis in original]

The department's rules of conduct also prohibit employees from being out of their assigned working areas for any purpose without authorization by their supervisors unless they are on a scheduled break. This is a Group II offense requiring a written warning for the first offense.

Although Murphy sometimes works in the field, his primary work location is the traffic signal workshop near the back of the first floor of the Grinnell Street building. However, Murphy regularly leaves the shop in the normal course of performing his duties throughout the day. Murphy routinely walks through the building to get to the part of the outside yard where damaged equipment brought in by street crews is stored. He also has to walk through the building to get to Davis' office in the front. Murphy sometimes goes to another part of the building to pick up safety equipment. He also occasionally goes to the Engineering Department on the second floor. In addition, Murphy has to cross the length of the building to get from the traffic signal workshop to the employee entrance where the sign-in/out sheet is kept. Murphy is not required to obtain permission from Davis before leaving the workshop to come to her office or perform his other duties in and around the building. He testified that in his trips back and forth across the Grinnell Street building, he regularly stops to chat briefly with co-workers or pick up a cup of coffee.

When Murphy wants to leave the workshop to attend a grievance meeting or discuss a grievance matter informally with a manager or supervisor in the Grinnell Street building, he obtains Davis' permission. However, according to Murphy, when trying to set up a meeting with a supervisor, he often simply stops at the supervisor's office during his routine trips across the building to let the supervisor know he wants a meeting. More frequently, he writes a letter to the supervisor asking for a meeting and explaining his purpose. Murphy then hands the letter to the supervisor or drops it off at his or her office during Murphy's trips in or out of the workshop. In either case, the supervisor or his secretary calls Murphy at the workshop and lets him know when the supervisor is available to meet with him. According to Murphy, he does not consider these side trips "union business" within the meaning of the department's policy. Murphy has never asked Davis' permission to make these side trips to supervisors' offices, and was never told he needed to

do so.¹ Until he received the written warning that is the subject of this charge, Murphy had never been disciplined for leaving his work area or conducting union business without permission.

Cynthia Lowe is supervisor of stores and custodial operations at the Grinnell Street facility. Murphy has filed a number of grievances over alleged contract violations committed by Lowe. On March 12, 2003, Lowe filed a complaint against Murphy with the City's Human Resources Department alleging that in a grievance meeting on March 11, 2003, Murphy accused her of deliberately tampering with her employees' time records. Lowe's complaint also alleged that in a grievance meeting in April 2001, Murphy attacked "her personal past." Lowe had also repeatedly complained to Human Resources department representatives that Murphy shouted at her in grievance meetings.

In July 2003, one of Lowe's subordinates complained to Murphy that overtime was not being distributed equally in accord with the contract. After discussing the matter with the employee, Murphy wrote Lowe a letter stating that he wanted to discuss equalization of overtime with her. According to Murphy, his letter only asked for a meeting to discuss overtime distribution. According to Lowe, the letter also demanded that Lowe provide Murphy with certain records.²

On the morning of July 28, Murphy signed in at about 7:05 am and then went to pick up safety glasses. Murphy had his letter to Lowe with him. Lowe's office is in the middle of the building, between the sign-in area and the traffic signal shop. At about 7:20, Murphy knocked on the door of Lowe's office. Lowe was in the office with Suzanne Thomas, her assistant. Murphy handed Lowe his letter. At this point, Murphy's and Lowe's versions of their encounter diverge. According to Murphy, he began to leave, but Lowe said, "Hold on. What is the letter about? What is the letter about?" Lowe then opened the letter. Murphy said he was not there to discuss it. Lowe replied, "Well, no. We can get this straightened out right now." Lowe told Thomas to get the overtime records. According to Murphy, Lowe seemed about to fly into a rage. Murphy repeated twice more that he was not there to discuss the issue, left, and went to the traffic signal workshop.

Lowe could not remember whether she read Murphy's letter while he was in her office. According to Lowe, after giving her the envelope Murphy told her, "I need the time sheets. I want the storekeeper list of who worked overtime." Lowe told Thomas to get the time sheets, and Murphy said, "She's not supposed to handle that. This is your job. I want this overtime list and I need it by x." Murphy said other things that Lowe could not recall. At some point, Murphy said, "We're going to get this straight." Eventually, Lowe realized that Murphy should not be in her office talking about union business without a pre-arranged meeting. Lowe told Murphy that he was not supposed to be there, and that they would handle the matter later.

¹ Davis, Division Head Johnny Williams, and Respondent Human Resources Representative Diane Rudolph all testified that prior to July 2003 they had received complaints from more than one supervisor in the Grinnell Street facility that Murphy was conducting union business on work time. However, neither Rudolph, Williams nor Davis testified that they had spoken to Murphy about this issue. Davis said specifically that she had not.

² Murphy did not keep a copy of the letter. Lowe testified that she had the letter, but that she had not brought it with her to the hearing.

After Murphy left, Lowe called Murphy's supervisor, Davis. Lowe told Davis that Murphy had interrupted her, and asked Davis if Murphy had been released to conduct union business. Davis told Lowe that he had not. Lowe then e-mailed Division Head Johnny Williams, her supervisor and Davis', complaining that Murphy had come to her office that morning to discuss union business concerning the overtime list. Lowe told him that Davis had confirmed that Murphy had not been released to be on union business. In a later conversation, Lowe told Williams that Murphy had come into her office asking for documents. Williams did not talk to Murphy or Davis about the incident.

On July 30, Lowe's assistant, Thomas, sent Williams a memo stating, "At about 7:15 am Mr. Murphy entered the stores office to speak with Ms. Lowe on union business regarding the storekeepers' overtime list." Based on this memo, what Lowe had told him, and the fact that Murphy had to walk through a set of doors to get to Lowe's office, Williams concluded that Murphy was out of his work area without permission. On August 5, Murphy received a written reprimand for this infraction.

Discussion and Conclusions of Law:

According to Charging Party, this is a straightforward case of retaliation. It asserts that on the morning of July 28, 2003, Murphy merely did what he had previously done many times before with his supervisor's implicit permission – make a brief stop on his way to his workshop to drop off a letter asking to meet with a supervisor about an alleged contract violation. According to Charging Party, Lowe resented Murphy because he had repeatedly accused her of violating the collective bargaining agreement. On the morning of July 28, Lowe, angered by yet another complaint, saw an opportunity to get Murphy disciplined for a violation of the policy prohibiting stewards from leaving their work areas to conduct union business without express permission. The fact that Williams made no effort to investigate the facts beyond talking to Lowe indicates, according to Charging Party, that Williams also saw this as an opportunity to get back at Murphy for his previous activities as steward.

According to Respondent, this is a straightforward case of an employee being disciplined for a violation of lawful work rules. Respondent contends that Murphy's work area is the traffic signal shop. When Murphy went to Lowe's office on July 28, 2003, he was out of his work area. Davis had not given him permission to be there. He was disciplined for violating the department's policy prohibiting employees from being away from their work areas without their supervisors' permission. Moreover, Murphy was conducting union business. The department has a procedure under which stewards are to request permission for time off to conduct union business, and Murphy did not follow this procedure.

A public employer cannot lawfully discipline an employee for attempting in good faith to enforce a right claimed under a collective bargaining agreement. *MERC v Reeths-Puffer School Dist*, 391 Mich 253, 264 (1964). However, Section 9 does not give a union representative the right to conduct union business during time when he or she is being paid to work. *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. An employer does not interfere with employees' Section 9 rights by adopting rules governing the circumstances under which union business can be performed, including requiring union officers to receive permission from their supervisors before leaving work to engage in union activity. *City of Grand Rapids*,

1980 MERC Lab Op 18. An employer may also lawfully restrict other concerted protected activity during working time. *Republic Aviation Corp v. NLRB*, 324 U.S. 793,798-99 (1945) (rule prohibiting solicitation during working time presumptively lawful).

When a union steward files a grievance or otherwise attempts to enforce the terms of a collective bargaining agreement, he or she is engaged in activity protected by Section 9 of PERA. Meeting with and requesting to meet with supervisors concerning possible contract violations, and requesting information necessary to determine whether the contract has been violated, are activities protected by the Act. The issue here is whether Murphy's conduct on July 28, 2003 was unprotected because, in the course of attempting to enforce the contract, he violated Respondent's legitimate rules prohibiting him being out of his work areas without authorization from his supervisor, and from leaving his work assignment to perform union business without his supervisor's express permission.

I credit Murphy's testimony regarding his encounter with Lowe on July 28. I base my finding, in part, on Lowe's demeanor on the witness stand. I also base it on the fact that, although Lowe brought a file of documents to the hearing, she did not bring the letter that might have supported her testimony that Murphy demanded that she produce time records when he came to her office that morning. I also note that Respondent failed to call Thomas to support Lowe's version of events.

I also agree with Charging Party that the evidence does not establish that Murphy was out of his assigned working areas without authorization. Murphy testified without contradiction that his duties require him to be in places other than the traffic signal shop during the workday, and that Davis permitted, i.e. authorized him, to perform brief personal errands when outside the shop. I also find that Murphy was not engaged in "union business" as contemplated by Respondent's policy when he stopped at Lowe's office that morning. I agree with Charging Party that dropping off a letter is not clearly an activity for which a union representative might expect to need supervisory permission. More significantly, the fact that Murphy regularly scheduled meetings with supervisors this way indicates that the department had never considered dropping off a letter about scheduling a meeting to be "union business" within the meaning of its policy. In sum, I find that Murphy's conduct on the morning on July 28, 2003, did not violate either Respondent's rule regarding leaving one's work areas without permission, or its policy regarding union business on work time, and that Murphy did not lose the protection of the Act when he visited Lowe's office on July 28 to drop off a letter requesting a meeting to discuss a contract violation. I conclude that Respondent could not lawfully discipline Murphy for engaging in conduct protected by Section 9 of PERA. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent City of Detroit (Public Lighting Department), its officers and agents, are hereby ordered to:

1. Cease and desist from disciplining employees for engaging in activities protected by Section 9 of

PERA, including disciplining stewards for attempting to enforce provisions of a collective bargaining agreement.

2. Remove from Charles Murphy's file the written reprimand issued to him on August 5, 2003.
3. Post the attached notice to employees in conspicuous places on the Respondent's premises, including places 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: _____