STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer

Case No. C04 C-068

-and-

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

APPEARANCES:

City of Detroit Law Department, by Kathryn M. Niemer, Esq., Assistant Corporation Counsel, for Respondent

Sheff & Washington, P.C., by George B. Washington, Esq. and Miranda Massie, Esq. (On Brief), for Charging Party

DECISION AND ORDER

On February 28, 2005, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative 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: _____

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on August 31, 2004, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript, exhibits and post-hearing briefs filed by the parties on or before November 8, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On March 8, 2004, the American Federation of State, County & Municipal Employees, Local 207 (Charging Party or the Union), filed an unfair labor practice charge against Respondent, City of Detroit (Respondent or the Employer). The charge alleges that Respondent violated Sections 10(1)(a) and (c) of PERA by discharging Susan Ryan in retaliation for performing her duties as the Union's chief steward.

Findings of Fact:

Susan Ryan began working for the City in 1997 as a sewage plant attendant in the City's water and sewerage department. She was promoted to the position of sewage plant operator in 1999. At the time of her discharge, Ryan was chief steward for the Union, which represents approximately 1000 to 1300 employees, including 400 to 500 employees at the W. Jefferson sewage treatment plant where Ryan is employed. Ryan is also a member of Charging Party's executive board and, in the fall of 2003, was elected recording secretary.

Charging Party and Respondent are parties to a collective bargaining agreement which contains a multi-step grievance procedure to resolve disputes between the parties over the interpretation, application or enforcement of matters covered by the contract. Disciplinary procedures are set forth in Article 11 of the contract. When the Employer decides to discipline a unit member, Article 11, Section B requires that a management representative must, upon request, discuss the disciplinary action with the employee and his or her steward. At these meetings, which the parties refer to as disciplinary conferences, management typically presents its case first, and then the steward is given an opportunity to ask questions. The parties then discuss what discipline is appropriate and attempt to work out a first-step agreement. Although the employee is usually present for the entire meeting, there have been occasions in which the Employer and the Union have continued their discussions after the employee has left the room.

The events giving rise to the instant charge occurred on February 25, 2004. On that day, Ryan worked her regular shift as sewage plant operator, beginning at 7:00 a.m. At approximately 3:00 p.m., just as she was preparing to leave for the day, Ryan was contacted by the assistant head sewage plant operator, Alice Lett, and asked to participate in a disciplinary conference on behalf of bargaining unit member William Isbell. At approximately 3:15 p.m., Ryan met with Isbell to prepare for the conference. Thereafter, Ryan and Isbell sat down in a reception area near the office of the sewage plant supervisor, John Gawthrop, to wait for the conference to begin.

After waiting for some time, Ryan became concerned that Gawthrop was deliberately ignoring her. She poked her head in Gawthrop's office to inquire about the status of the disciplinary conference. Gawthrop told her that the conference would begin when he was done. The conference finally began at approximately 4:15 p.m. In attendance were Ryan, Isbell, Gawthrop, Lett and head sewage plant operator Stan Clark. Ryan testified that everyone at the meeting was provided with a seat except her and that when she asked for a chair, Gawthrop said no. Ryan testified that she leaned against a filing cabinet for the remainder of the conference.

The conference began with Respondent stating its position regarding Isbell, who the Employer contends was absent from his work area on the preceding day. Ryan then presented the Union's position. There was no discussion of the specific offense for which Isbell was being charged, nor did the parties negotiate or discuss the level of discipline which would be appropriate under the circumstances. After approximately 20 to 30 minutes, Ryan and Isbell were asked to leave the room and wait in the reception area. A few minutes later, they were called back into the meeting. Ryan testified that she was once again forced to stand.

Gawthrop announced that the Employer was going to suspend Isbell for 29 days for being absent without leave (AWOL), with a recommendation for discharge. Ryan objected on the ground that the Employer had not previously indicated that it was contemplating charging Isbell with AWOL, which is a dischargeable offense under Respondent's disciplinary guidelines. Gawthrop then asked Isbell for his driver's license. When Ryan instructed Isbell not to comply with this request, Gawthrop told Ryan that she was being insubordinate. At this point, Isbell got up and left the room.

Upon Isbell's departure, Ryan told Gawthrop that he was being disrespectful to her and treating her in an unprofessional manner. She also expressed her dissatisfaction with the fact that Gawthrop had not given the Union the opportunity to discuss or negotiate Isbell's discipline. In addition, she indicated to Gawthrop her belief that parties should consult with human resources with respect to the issue of whether the Employer was entitled to Isbell's driver's license.

Gawthrop did not respond to any of the specific issues or concerns raised by Ryan. Rather, he continually interrupted her and told her that she was being insubordinate. Gawthrop also instructed Ryan to leave his office and threatened her with discipline if she refused to do so. Ryan responded by telling Gawthrop that she was participating in the conference as a Union representative and that it was improper for him to attempt to suppress her criticisms by threatening her with discipline. Ryan also told Gawthrop that he should allow her to do her "motherfucking job." Gawthrop replied that he could charge her with insubordination as long as she was on the clock for the City of Detroit.

During this exchange, which lasted only a brief period, both Ryan and Gawthrop spoke with raised voices. In addition, Ryan testified that at some point during the incident, Gawthrop got out of his chair and stood approximately two feet away from her. Ryan testified that she did not immediately comply with Gawthrop's request to leave because she felt that there were certain issues which she needed to raise, and that she immediately left the room once she had "made her case."

Lett's account of the incident varied slightly from Ryan's. Lett denied that Ryan was ever refused a seat in the conference room, and she testified that it was Ryan who stood up and approached Gawthrop during the conversation. Lett testified that in addition to telling Gawthrop to let her do her "motherfucking job," Ryan also called Gawthrop an "asshole and a "jerk" once or twice during the exchange. According to Lett, Gawthrop repeatedly asked Ryan to leave the room and, at one point, threatened her with a three-day suspension if she refused to comply with his request.

Upon leaving the room, Ryan went to get her time card. When she returned to Gawthrop's office to have it signed, security was present. Gawthrop told Ryan that she was being given a three-day suspension for insubordination and that she should wait for the Union president, John Riehl, to arrive. Riehl showed up for Ryan's disciplinary conference approximately 30 minutes later. In attendance were Ryan, Riehl, Gawthrop, Lett and Clark. Gawthrop announced that he was giving Ryan a 29-day suspension with a recommendation of discharge for her conduct at the earlier meeting. Riehl asked Gawthrop why the discipline had been increased, but no explanation was provided.

A notice of suspension signed by Gawthrop and dated February 25, 2004, indicated that Ryan was being disciplined for "use of abusive language towards a supervisor," which is a dischargeable offense under the Employer's disciplinary guidelines. The notice of suspension also listed "insubordination -- failure to follow a direct order of a supervisor" and "becoming involved in an

unnecessary prolonged discussion with a supervisor contrary to such a supervisor's directive" as reasons for the discipline. Ryan was ultimately discharged as a result of her conduct at the February 25th disciplinary conference.

The record establishes that rough language is regularly used around the W. Jefferson plant by both employees and supervisors alike, including during grievance meetings and disciplinary conferences. Ryan testified that she has been informally cautioned about her use of rough language by management, and that she, in turn, has had to admonish supervisors about their use of rough language around her.

Positions of the Parties:

Charging Party argues that Ryan was engaged in protected concerted activity at the time of the incident leading to her discharge and, therefore, her termination was in violation of Sections 10(1)(a) and (c) of PERA. According to Charging Party, Ryan's conduct was protected under PERA because she was acting in her capacity as Union steward, and because her comments were specifically directed at the integrity of the disciplinary process. Charging Party further contends that the incident constituted a spontaneous outburst by Ryan resulting from Gawthrop's provocation and was not so egregious as to remove her from the protection of the Act.

Respondent asserts that Ryan was not engaged in protected concerted activity at the time of the incident since the employee in question had already left the meeting and Gawthrop had made it clear to Ryan that the disciplinary conference had ended. According to Respondent, there was no further reason for Ryan to continue arguing with Gawthrop. In addition, Respondent contends that no PERA violation is established based upon the record since Ryan was disciplined not for her protected concerted activities, but rather for violating the Employer's established disciplinary guidelines. Finally, Respondent argues that the charge should be dismissed because the Union failed to prove that Ryan's termination was motivated by antiunion animus or hostility.

Discussion and Conclusions of Law:

Under Section 9 of PERA, public employees have the legal right 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." 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. Section 10(1)(c) of PERA prohibits a public employer from discriminating against employees in order to encourage of discourage membership in a labor organization. In determining whether an employer has engaged in unlawful activity under Section 10(1)(a) or (c) of PERA, the totality of the circumstances surrounding the action will be examined. See *Rochester School District*, 2000 MERC Lab Op 38; *Residential Systems*, 1991 MERC Lab Op 394, 406.

There is no question that Susan Ryan was engaged in protected activity during the February 25, 2004, disciplinary conference. The conference was held pursuant to the terms of the collective bargaining agreement, and Ryan, a Union steward, participated in that conference on behalf of

William Isbell, a bargaining unit member. The fact that Isbell left the room prior to Ryan's outburst does not alter the character or nature of the meeting. The record indicates that the Employer and Union have a history of continuing such discussions after the departure of the employee in question. After Isbell left the room, Ryan continued to raise issues pertaining to Isbell's discipline, including whether he was obligated to turn over his driver's license to the Employer. Ryan also protested what she perceived to be disrespectful treatment by Gawthrop during the conference. The protection of employees engaged in concerted activity extends to complaining about the conduct and performance of supervisors. *Isabella County Sheriff's Dep't, supra*; *Bloomingdale Bd of Ed*, 1976 MERC Lab Op 337. I conclude that the events which transpired after Isbell left the room were part of the res gestae of protected activities. The next question, therefore, is whether Ryan's conduct was so severe as to take it outside of the protection of the Act.

The Commission has long recognized that in the course of collective bargaining and grievance administration, tempers may become heated and harsh words may be exchanged. *City of Riverview*, 2001 MERC Lab Op 354. See also *Benzie County Central Sch v Sinclair*, 1984 MERC Lab Op 838; *Reese Public Sch*, 1967 MERC Lab Op 489. Discipline for offensive conduct occurring in this context should be permitted only in the most extreme cases. *City of Detroit (Water & Sewerage Dep't)*, 1988 MERC Lab Op 1039, 1046. Rude or insulting remarks, obstreperous comments, and other forms of rough language, are protected under PERA when made in the course of protected concerted activity. *Genesee County Sheriff's Dep't*, ___ MPER ¶ ___ (2005); *Baldwin Comm Sch*, 1986 MERC Lab Op 513. Even a reference to an act of physical violence in this context does not, by itself, remove an employee from the Act's protection. *Unionville-Sebewaing Area Sch*, 1981 MERC Lab Op 932, 935.

An employee engaged in otherwise protected activity may lawfully be disciplined under PERA only when his or her behavior is so flagrant or extreme as to render that individual unfit for future service. *Isabella County Sheriff's Dep't* 1978 MERC Lab Op 689, 174 (no exceptions); *Unionville-Sebewaing Area Sch, supra* at 934. See also *Genesee County Sheriff's Dep't, supra.* The question of whether conduct should be protected under the Act may depend on whether the incident takes place "on the shop floor" in the presence of other employees or the public, or in a grievance meeting or collective bargaining session. Spontaneous remarks may be protected, whereas a history of similar intimidation or insubordination by the employee militates against finding the conduct protected. *Baldwin Comm Sch, supra* at 520; *Univ of Mich*, 2000 MERC Lab Op 192, 195 (no exceptions). Also relevant is whether the employee was merely responding to heated remarks or insults by the employer. *Baldwin Comm Sch.*

In *Unionville-Sebewaing Area Sch, supra*, the Commission held that an employee's conduct at a meeting with the employer was not sufficiently flagrant as to remove him from the protection of PERA. During the course of a meeting called by the school district to discuss working conditions for custodians, the charging party referred to the superintendent of schools as a "liar" in the presence of other employees, and later rose from his seat and made some reference to hitting or punching the superintendent. Affirming the finding of its ALJ, the Commission held that the charging party was engaged in protected concerted activity at the time of the incident and that his subsequent discharge for insubordination was unlawful.

In *Baldwin Comm Sch, supra,* the Commission held that the school district violated PERA by disciplining a teacher for conduct which occurred while that individual was engaged in protected activity. During a meeting with the principal and a union representative concerning grievances, the teacher became agitated, shouted, pounded his fist on the desk and waived a pencil in the principal's face. In addition, the teacher accused the principal of being a homosexual and of making homosexual advances. The Commission held that the teacher's conduct at the meeting, while offensive, was not so egregious as to remove it from the protection of the Act.

In *City of Detroit (Water & Sewerage Dep't),* 1988 MERC Lab Op 1039, the employer discharged a union steward for offensive remarks made in the course of a discussion with the employer's EEO coordinator. The steward had approached the EEO coordinator regarding the proposed transfer of a union member. During the course of the conversation, the steward swore at the EEO coordinator and called her a "minority" who was not qualified to do the job. The Commission concluded that the employee was engaged in protected activity at the time of the incident because he was pursuing a grievance on behalf of a union member. While finding the employee's gratuitous racial slur exceedingly offensive, the Commission nonetheless held that the comment did not remove the individual from the protection of the Act since it was made spontaneously and in the heat of the discussion.

Ryan's outburst at the February 25, 2004, disciplinary conference was certainly no worse than the conduct described in the above cases. It is undisputed that Ryan became angry, spoke in a loud voice and complained that Gawthrop was preventing her from doing her "motherfucking job." In addition, Lett testified that Ryan called Gawthrop an "asshole" and a "jerk" at least one time. However, the record establishes that rough language is routinely used around the plant by both employees and supervisors, including during the course of grievance meetings and disciplinary conferences. Moreover, it is clear that Ryan's comments were made spontaneously and in the heat of the discussion about issues related to Gawthrop's handling of the conference. At the time, Ryan was angry about what she perceived to be unfair and disrespectful treatment. The incident occurred in a supervisor's office and not on the "shop floor." Ryan testified credibly that the entire episode was relatively brief and that she complied with Gawthrop's requests to leave the room as soon as she had finished raising the issues that she felt needed to be addressed. Ryan did not threaten Gawthrop with physical violence, nor is there any allegation that Gawthrop in fact felt threatened by her behavior. There is also no competent evidence establishing that Ryan had any history of similar conduct.[1] Under these circumstances, I conclude that Ryan's actions during the course of the disciplinary conference did not render her unfit for further service or in any way remove her from the protection of the Act.

I also find no merit to the Employer's contention that Ryan's termination was a permissible application of its disciplinary guidelines. Discipline imposed upon employees for spontaneous outbursts made in the course of protected activity may be unlawful even though the employees could be legitimately disciplined for such conduct had it occurred outside the context of protected activity. See e.g. *Baldwin Comm Sch, supra* at 518, citing *Capac Comm Sch,* 1984 MERC Lab Op 434 and *Unionville-Sebewaing Area Sch, supra* at 934-935. See also *City of Detroit (Water & Sewerage Dep't), supra* (discharge of an employee for offensive remarks made in the course of a grievance

[1] Although Ryan testified that she may have been disciplined in the past for using abusive language, Respondent did not assert that past incidents played any role in its decision to discharge her.

discussion violated PERA despite the existence of a rule prohibiting abusive language toward supervisors).

I conclude that Respondent violated PERA by discharging Susan Ryan for offensive remarks made in the course of an otherwise protected disciplinary conference. Under such circumstances, it is not necessary for Charging Party to demonstrate by independent evidence that Respondent was motivated by animus against the Union. *City of Detroit (Water & Sewerage Dep't), supra* at 1043; See also *Detroit Fire Dep't*, 1982 MERC Lab Op 1220, 1224-1226, 1233-1235.

RECOMMENDED ORDER

Based upon the above findings of fact and conclusions of law, Respondent City of Detroit, its officers, agents and representatives are hereby ordered to:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights to organize together or form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective bargaining or negotiations or other mutual aid or protection or to negotiate or bargain collectively with their public employer through representatives of their own free choice, as guaranteed in Section 9 of PERA.

2. Take the following affirmative action to remedy the unfair labor practices found herein and effectuate the policies of the Act:

   a. Offer Susan Ryan immediate and full reinstatement to her former or substantially equivalent position without prejudice to her seniority or other rights and privileges previously enjoyed and make her whole for any loss of pay which she may have suffered as a result of her termination by paying to her a sum equal to that which she would have earned from the date of discrimination to the date of offer of reinstatement, less interim earnings, together with interest thereon at the statutory rate.

   b. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted, for a period of 30 consecutive days

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, CITY OF DETROIT, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights to organize together or form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective bargaining or negotiations or other mutual aid or protection or to negotiate or bargain collectively with their public employer through representatives of their own free choice, as guaranteed in Section 9 of PERA.

WE WILL offer Susan Ryan immediate and full reinstatement to her former or a substantially equivalent position without prejudice to her seniority or other rights and privileges previously enjoyed and make her whole for any loss of pay which she may have suffered as a result of her termination by paying to her a sum equal to that which she would have earned from the date of discrimination to the date of offer of reinstatement, less interim earnings, together with interest thereon at the statutory rate.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

CITY OF DETROIT

By: _____

Title: _____

Date: _____

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