STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LIVONIA,
Public Employer - Respondent,

Case Nos. C06 I-223 &C06 L-294

-and-

MICHIGAN AFSCME COUNCIL 25,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Roumell, Lange & Cholak PLC, by Gregory T. Schultz, Esq., and Kelly A. Walters, Esq. for the Respondent

Miller Cohen PLC, by Eric L. Frankie, Esq. for the Charging Party

DECISION AND ORDER

On December 27, 2007, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above case finding that Respondent, City of Livonia (City), violated Section 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a), when its human resources director and its civil service commission chairman told employees Lillibridge, Jones, and Ponder that they were not required to comply with Michigan Employment Relations Commission (MERC or Commission) subpoenas. The ALJ also found that the evidence was insufficient to support a finding that the City engaged in unlawful surveillance of Ponder's union activities or that the City investigated and threatened to discipline him in retaliation for his participation in protected union activity. The ALJ also found that Charging Party failed to establish that the City's refusal to pay its employees for time spent attending MERC hearings constituted unlawful discrimination under Section 10(1)(c) or (d) of PERA. The ALJ recommended that we order the City to cease and desist from telling its employees that they did not have to comply with Commission subpoenas or in any other manner interfering with, restraining, or coercing employees in the exercise of their PERA rights. The ALJ also ordered that the City post a notice to its employees.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On January 22, 2008, the City filed its Partial Exception to the ALJ's Decision and Recommended Order. On March 5, 2008, Charging Party filed a

Response to the City's Partial Exception and a request for Oral Argument. Because Oral Argument will not materially assist us in reaching our decision, this request is denied.

In its exception, the City argues that the ALJ erred in finding that the City violated Section 10(1)(a) of PERA when its human resources director and its civil service commission chairman told employees that there is no penalty for failure to comply with a MERC subpoena. The City argues that it was not until its post-hearing brief that Charging Party asserted this violation and that the City was not given proper notice and an opportunity to respond to this charge via testimony or brief. We have reviewed the City's exception and find that it has merit.

Factual Summary:

We adopt the facts as stated in the ALJ's Decision and Recommended Order and repeat them only as necessary here. Charging Party filed two separate unfair labor practice charges against the City, which were consolidated for hearing. The first charge, filed in Case No. C06 I-223, asserts that the City engaged in unlawful surveillance of employee Roger Ponder's union activities, and threatened to discipline him for his protected conduct. In the second charge, filed in Case No. C06 L-294, Charging Party asserts that the City unlawfully discriminated against Ponder, AFSCME's Local 192 president Yvonne Lillibridge, and Steward Peggy Jones by withholding payment for time served as witnesses who were subpoenaed to appear at MERC hearings.

In its post-hearing brief, Charging Party asserted that the City interfered with the employees' Section 9 rights when its human resources director Robert Biga and its civil service commission chairman Harry Tatigian told employees Yvonne Lillibridge, Peggy Jones, and Roger Ponder that they did not have to attend MERC hearings although they had been subpoenaed. The ALJ found that the Biga and Tatigian's statements interfered with the employees' exercise of their rights under Section 9 of PERA and issued a Recommended Order finding a violation of Section 10(1)(a).

Discussion and Conclusions of Law:

Rule 153 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.153, sets forth the proper manner for amendment of charges:

> (1) The charging party may file an amended charge before, during, or after the conclusion of the hearing. All amendments made before or after hearing shall be in writing and shall, except for good cause shown, be prepared on a form furnished by the commission. An original and 4 copies of the amended charge shall be filed with the commission and a copy served on each party. Amendments made at hearing shall be made in writing to the administrative law judge or stated orally on the record.
>
> (2) Where an amendment is made in writing, each respondent may file with the commission a signed original and 4 copies of an objection to the

amended charge within 10 days after receipt thereof, and at the same time shall serve a copy of the objection on each party.

(3) If objection to the amended charge is not filed or stated orally on the record, then the commission or administrative law judge designated by the commission may permit the amendment upon such terms as are just and consistent with due process.

Although we agree with the ALJ's finding that the City violated Section 10(1)(a) of PERA when its human resources director and its civil service commission chairman told employees that they were not required to comply with MERC subpoenas, we must reverse the ALJ's decision. This issue was not properly before the ALJ because Charging Party did not amend either charge to add this claim. We hold that the inclusion in a post-hearing brief of a previously unasserted claim of unlawful conduct does not constitute proper filing and service of an amendment to an unfair labor practice charge in accordance with Rule 153. Charging Party failed to comply with the requirements of the Commission's Rules and the City was given insufficient notice of the allegations. We conclude that it would be a denial of the City's right to due process to adopt the recommended order.

We have considered all other arguments presented by the parties and conclude that they would not change the result in this case.

ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
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APPEARANCES:

Roumell, Lange & Cholack PLC, by Gregory T. Schultz, Esq., and Kelly A. Walters, Esq.

Miller Cohen PLC, by Eric L. Frankie, 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, this case was heard at Detroit, Michigan on February 27, 2007, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on May 17, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On September 22, 2006, Michigan AFSCME Council 25 filed an unfair labor practice charge (C06 I-223) against the City of Livonia. It filed a second charge against the same Respondent (C06 L-294) on December 13, 2006. The charges were consolidated for hearing. The charge in Case No. C06 I-223 alleged that on August 11, 2006, Respondent engaged in unlawful surveillance of custodian Roger Ponder's union activities. It also alleges that on or about September 18, 2006, Respondent threatened to discipline Ponder because of these activities. The charge in Case No. C06 I-223 alleged that Respondent unlawfully discriminated against Ponder, AFSCME Local 192 president Yvonne Lillibridge, and Local 192 steward Peggy Jones by refusing to pay them, pursuant to the collective bargaining agreement, when they were subpoenaed as witnesses for Commission hearings conducted on December 21 and December 22, 2006 and January 19, 2007.

Findings of Fact:

Alleged Surveillance and Investigation of Ponder

AFSCME Local 192, an affiliate of Charging Party, represents a bargaining unit of Respondent's clerical employees and employees in its department of public works. In the spring of 2006, Charging Party began a drive to organize previously unrepresented employees in Respondent's parks and recreation department. Roger Ponder, a member of Local 192's unit, is employed in the department of public works. However, he is assigned to Respondent's recreation center, where most of the employees targeted by the organizing drive work. In the summer of 2006, Ponder was appointed by Charging Party to its organizing committee. Ponder testified that he answered recreation department employees' questions about the union and reported their comments to Charging Party's organizers.

Sometime between the beginning of the summer and August 11, Ponder's foremen, Dave Flahan and Mike Boyle, asked Ponder whether he was on Charging Party's organizing committee for the recreation center. Ponder said that he was. Flahan and Boyle are members of a supervisory unit also represented by AFSCME.

Although he was not formally their supervisor, recreation center facility manager Tom Murphy usually talked directly to the custodians and the building mechanic assigned to the recreation center if he had concerns about their work. However, in the early summer of 2006, department of public works building supervisor Steve Makie testified asked Murphy to contact him "if anything goes on with the custodians that was questionable or possibly inappropriate or any kind of deviance from their normal duties that he thought could be of concern to either management, the public, or any parties." Both Makie and Murphy testified that they did not learn of Ponder's involvement in the organizing drive until after August 11.

On July 9, 2006, Charging Party held a picnic for parks and recreations employees at a city park. Charging Party paid for food and a band. Ponder was at the picnic for part of the day, as were other members of the organizing committee. While he was there, Ponder saw Karen Kapchonek, the superintendent of the parks and recreation department, drive past the picnic site about three times. On July 10, 2006, Charging Party filed a petition with the Commission for a representation election in a unit of parks and recreation employees.

In early August, Charging Party representatives came to the recreation center and rented a party room for the dates of August 15 and August 17. On August 11, Ponder went into the break room at the recreation center to take his fifteen minute afternoon break at the normal time of 5:30 pm. The employee break room is in the general vicinity of the recreation center's administrative offices. The time clock is in the corridor outside the break room. While Ponder was in the break room, Ann Maria Camerella punched in at the time clock and entered the room to talk to Ponder. At that time, Camerella was an employee of the parks and recreation department and, like Ponder, was a member of Charging Party's organizing committee. On that day, Camerella was in a hurry because she was late for work. Ponder and Camerella had a brief discussion about

management's reaction to the union campaign. Ponder told Camerella that Murphy had "poked his head in a couple of times" while he was in the break room. Camerella then left to go to work.

Ponder testified that after he finished his break, he picked up trash in the break room. He then left to clean the restrooms in the front of the building, stopping for a minute to talk to Camerella at the front desk before he did so. To get from the break room to the front desk, Ponder had to walk north along the corridor outside the break room. As Ponder usually does, he recorded his activities for the day in a log. According to the log, Ponder took a break and cleaned the front rest rooms between 5:30 and 6:00 pm.

Murphy testified that while on his way out of the building on the evening of August 11, he passed by the break room and saw a vase of roses on the table. When he went into the break room to see who had received the flowers, he saw Ponder sitting on the couch with a clipboard and a TV remote on his lap. They exchanged a few words. Murphy was surprised to see someone in the break room that late and looked at the clock, noting that it was 6:10 pm. Murphy did not say anything to Ponder, but went to his office, checked Ponder's work schedule, and confirmed that Ponder's normal break period was between 5:30 and 5:45. Murphy then went to look at the recording from the security camera in the corridor outside the break room to check to see if Ponder was taking a late break. The recreation center has had stationary cameras in numerous locations inside and outside the center since it was built in 2003. These cameras remain in operation 24 hours per day, and recreation center employees are aware of their existence. The camera in the corridor outside the break room captures persons walking up and down a segment of this corridor. It does not capture the time clock, the door to the break room, or activity within the break room. Murphy testified that the recording from this camera showed Ponder going south down the corridor to the break room at 5:31 and going north along this corridor towards the front desk at 6:13.[1] The recording also showed Camerella in the corridor at about 5:44. At about 6:45 pm on August 11, Murphy sent an e-mail to Makie stating that he believed Ponder had taken an extended break that day.

On August 15 and August 19, AFSCME representatives manned tables in the party room at the recreation center, answering questions about the union and passing out a survey to find out what employees might want in a union contract. Pizza and soda was provided. Ponder spent an entire day manning a table in this room. During that time Ponder was visible to anyone who walked by. Murphy admitted that he probably saw Ponder there.

On August 25, Ponder and his union steward were called into a meeting with Makie to discuss Murphy's allegation that Ponder had taken too long a break on August 11. At the steward's suggestion, Ponder wrote a statement of his movements on that day and gave them to Makie. The statement mirrored the log, except that Ponder noted in his statement that he returned to the break room at about 6:10 pm to record his activities in the log sheet. During this meeting, Makie reminded Ponder that he had received a written warning in 2005 about overstaying his

[1] Murphy and Makie testified regarding the contents of this recording. The recording itself was not introduced as an exhibit.

break, and reviewed with him his break and lunch times. [2]Ponder testified that he assumed from this meeting that he might be disciplined.

After the meeting, Makie asked Murphy to send him the recording from the camera in the break room corridor and from other cameras in the recreation center that showed Ponder on that date. Murphy put together a recording with segments from five or six cameras. From this recording, Makie prepared a written chronology of Ponder's movements between about 4:20 and 6:20 pm on August 11. Makie also prepared separate chronologies based on Ponder's log sheet and Ponder's statement. In reviewing the recording, Makie noted that the camera in the break room hall showed Ponder going south toward the break room at 5:31 and walking back along this corridor toward the front lobby at 6:13:58, as Murphy had said. However, another camera showed Ponder entering the lobby from a corridor with cleaning supplies at 6:13:41. Makie attributed this to the cameras' clocks not being synchronized. On August 25, Makie wrote a memo to his supervisor stating that there were inconsistencies between Ponder's statement and the recordings. On September 1, Makie wrote another memo stating that he had concluded that Ponder had taken an extended break on August 11, falsified his log sheet to cover this up, and then lied about it when confronted.

On September 18, 2006, Ponder was called to another meeting with Makie. This time he was accompanied by Charging Party counsel Eric Frankie. Makie, Ponder and Frankie went over Ponder's statement of his movements on August 11. Frankie asked if there was a recording from the security cameras, was told that there was, and asked for a copy. Frankie later obtained a copy of the recording pursuant to the Freedom of Information Act (FOIA).

Makie's supervisor, assistant superintendent for public service Brian Wilson, reviewed Makie's investigation and decided that the recordings did not necessarily substantiate that Ponder had overstayed his break on August 11. Wilson concluded that since no supervisor had personally observed when Ponder had started and ended his break, there was not enough evidence to discipline Ponder. Ponder did not receive any discipline for the events of August 11.

Employees' Attendance at Commission Hearings

As noted above, Charging Party filed a petition for a representation election among employees of Respondent's parks and recreation department on July 10, 2006. Hearings on this petition were held on November 13, December 21 and December 22, 2006, and January 19, 2007. Charging Party obtained witness subpoenas, signed by the administrative law judge, for Ponder, Lillibridge and Jones for all four days of hearing.

Article 40 of the collective bargaining agreement between Local 192 and Respondent reads as follows:

> A. An employee who serves on jury duty or is required to appear in court on a subpoena (except where the employee has an interest in the case) will be paid his regular pay.

[2] According to Ponder, Respondent gave similar warnings to a number of employees simply to remind them of their break times.

B. Jury duty and duty while appearing on a subpoena will be considered as time worked.

No employee had ever requested to be paid pursuant to Article 40 for attending an administrative hearing. When Ponder received his subpoena for November 13, he showed it to Boyle. Boyle said that since it was a subpoena, Ponder should be paid for the time under the contract. Boyle told Ponder to fill out the paperwork for taking a leave day. Lillibridge and Jones also received similar instructions from their supervisors.

Lillibridge, Jones and Ponder attended the November 13 hearing but were not called to testify. On November 20, Respondent human resources director Robert Biga notified Jones, Lillibridge and Ponder that they would not be paid for attending the November 13 hearing since the hearing did not involve any Local 192 issues and attendance at the hearing was not covered by any civil service rules or collective bargaining provision.

Local 192 filed a grievance over Respondent's refusal to pay the three employees for attending the hearing. Per the grievance procedure, the grievance was heard by Respondent's three civil service commissioners at their December 6, 2006 meeting. Charging Party argued at this meeting that the employees should be paid under Article 40 because they had received an official subpoena from the State of Michigan and had no personal interest in representation case. According to the minutes of the meeting, two of the three commissioners replied that since the Employment Relations Commission was not a court but an administrative body, a Commission hearing did not come within the language of the contract. Lillibridge, Ponder and Jones told the commissioners that they had received permission from their supervisors in advance to attend the hearing. According to the minutes, the following exchange then took place between Biga and the commissioners:

> [Biga] reiterated that the labor contract refers to appearance in court under a subpoena and, as the subpoena indicates, this was for an administrative hearing. It should be noted in the upper left hand corner [the subpoena] lists "Completion: Voluntary." Under "Penalty" it says "Failure to respond will result in enforcement proceedings." There is also a statement in here that says, "Hereof fail not, at your peril." So there are some languages [sic] in the subpoena that are disconcerting to individuals. He responded that in at least one instance that he is familiar with, an employee who received a subpoena contacted the administrative law judge and was advised if they didn't show nothing would happen. [Commission chairman Harry] Tatigian asked if it was one of the three aggrieved individuals, to which Mr. Biga replied no. Mr. Biga contacted the administrative law judge to find out whether or not anything would happen to anyone who failed to appear and he was advised that these were non-enforceable subpoenas. Mr. Biga continued that he had a witness list [from Charging Party] of 12 people but did not know people were subpoenaed. He discovered these people were subpoenaed by Council 25 and this was signed off by the administrative law judge. He responded that if people had contacted him, he could have told them that they didn't have to appear; there is no penalty. Of the 12 people who were subpoenaed, five did not show.

None of them were penalized as far as he knew. The other four people who attended were not AFSCME Union Local 192 members and also were not paid for that time.

Tatigian stated that with respect to the contract language, Mr. Biga was correct; however, these people did contact their supervisors. If their supervisors told them they could attend the hearing and they would be paid, it would be difficult to rule against their grievance. He also stated he thought the supervisors were in error for letting the employees attend without checking with Mr. Biga to begin with.

Mr. Biga responded that he contacted [several supervisors] and advised them all that these employees were not covered by this contract provision and they would not be paid. Tatigian confirmed that this occurred after the fact. Mr. Biga replied he did not know the individuals concerned had been talked to by any of their supervisory staff. He added that Dave Flahan did not indicate that he told Mr. Ponder that he would be paid. After talking to the supervisors, none of them had given an indication to their employees that they would be paid. The letter was written so there was a record that he contacted the supervisors and let them know that individuals were not to be paid, pursuant to their contract. This was a nonenforceable subpoena and if anyone had contacted him beforehand, he would have explained to them they would not be penalized for failing to attend. He was aware in the first hearing in September that was cancelled that there was a person who was subpoenaed. That person's father contacted the judge and was told that she did not have to appear. Mr. Biga further explained that he had no knowledge that people were subpoenaed; he just had a witness list.

Mr. Tatigian stated that he was not criticizing Mr. Biga; he respected his decision and that on the contract language Mr. Biga was 100% correct. The employees are not entitled to receive compensation; however, once they contacted their supervisors prior to the hearing and they attended with the understanding they would be paid it was tough to say no… [Biga said that there was] also an unfair labor practice filed against the City that refutes the fact that one of these employees does not have a personal interest. He quoted from the unfair labor practice, "while it is true that Mr. Ponder is apparently a part of AFSCME's existing bargaining unit at the city, he has taken an active and supportive role in a Recreation Center employee organizing drive."[3] This indicated to Mr. Biga that this person had more than a passing interest in this case and he does have a personal involvement. Mr. Tatigian asked Mr. Ponder if this was true. Mr. Ponder responded yes, he was on the organizing committee at the Recreation Center. [Commissioner] Campau didn't see how there was a connection between a personal involvement and an organizational involvement. Mr. Tatigian commented that if you belong to an organization, there is an interest of some sort. Mr. Biga suggested if the Civil Service Commission was in a quandary about the first hearing that it is a gray area and these individual should be paid. If the Civil Service Commission so chose, they could pay the individuals for that date but

[3] Biga was quoting from the unfair labor practice charge in Case No. C06 I-223.

> make it clear so that any subsequent hearings would be on their own time. Mr. Tatigian said he understood how a subpoena could be kind of a threatening thing for the average person in this country. But in this case, it was kind of a meaningless piece of paper; a request to come down to the hearing and Mr. Biga was 100% correct on that.

The commissioners voted, three to none, to grant the requests of Ponder, Lillibridge and Jones for paid time off for November 13, 2006, and to advise them that in the future they would not receive paid time off for attending hearings that were not court-ordered. Lillibridge, Jones and Ponder were subpoenaed again for the hearings on December 22, December 23 and January 19. They used vacation time or took unpaid time off to attend these hearings.

Discussion and Conclusions of Law:

Surveillance

The National Labor Relations Board (NLRB or the Board) has long held that an employer interferes with its employees' exercise of their rights under the National Labor Relation Act (NLRA), 29 USC 150 et seq, when, absent a proper justification, it engages in surveillance of its employees' protected activities. The fundamental principles governing employer surveillance of protected employee activity were summarized by the NLRB in *FW Woolworth Co*, 310 NLRB 1197 (1993), and *National Steel & Shipbuilding Co*, 324 NLRB 499, (1997), *enfd* 156 F3d 1268 (DC Cir, 1998). The Board noted that "mere observation" of open, public union activity on or near the employer's premises is not surveillance. The Board concluded, however, that photographing or videotaping employees' union activity is more than mere observation because pictorial recordkeeping tends to create fear among employees of future reprisals. Therefore, the Board stated, an employer who photographs or videotapes its employees engaged in protected activities must demonstrate that it has a reasonable justification for this surveillance. The Board in each case assesses whether there was proper justification for the surveillance and whether it reasonably tended to coerce employees. *Timkin Co,* 331 NLRB 774, 754 (2000).

Charging Party asserts that on August 11, 2006, Respondent engaged in unlawful surveillance when it recorded Ponder around the time that he had a conversation with Camerella about the union organizing drive. I find that Respondent's recording of Ponder's movements on that day did not constitute surveillance of his union activities and did not have a tendency to coerce. Unlike the cameras in the cases cited by Charging Party, the cameras in Respondent's recreation center that captured his movements on that day were not installed or activated after the onset of union activity. Moreover, the cameras monitored activity in public areas such as corridors and lobbies, not locker or break rooms where conversations between employees about the union were likely to occur. Ponder was recorded walking down halls and through the lobby, not talking with other employees in the break room. I conclude that no reasonable employee could have viewed the presence of these cameras as a veiled threat to retaliate against him or her for engaging in protected activity.

Charging Party also asserts that Murphy personally engaged in surveillance of Ponder's union activities on August 11. I find that, even if Ponder's testimony is credited, the evidence is

insufficient to establish either that Murphy attempted to spy on Ponder's conversation with Camerella or that he was watching to see with whom Ponder might be speaking on his break on August 11. The only evidence in the record that Murphy was monitoring Ponder's activities on August 11 was Ponder's testimony that Murphy "poked his head in" the break room several times while Ponder was there. According to Ponder's testimony, this was before Camerella arrived. There is no indication that Murphy eavesdropped on their conversation. Moreover, Murphy's office is in the general area of the break room, and Ponder did not identify Murphy's behavior on that day as unusual in any way. I conclude that Charging Party failed to establish that Murphy engaged in unlawful surveillance of Ponder's union activities.

Investigation of Ponder

Ponder was not disciplined for his conduct on August 11. However, Charging Party alleges that Respondent discriminated against Ponder because of his union activities by investigating Ponder's overstaying his break as if it were a major offense, leading Ponder to believe that he might receive serious discipline.

In order to establish a prima facie case of unlawful discrimination under Section 10(1) (c) of PERA, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist,* 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551-552. Ponder's participation in Charging Party's attempt to organize employees of Respondent's parks and recreation department, including talking to other employees about the union and appearing at Charging Party's organizational picnic, was clearly activity protected by PERA. I also find that Respondent knew of Ponder's protected activities before August 11, 2006. Ponder testified without contradiction that he told his two foremen, Boyle and Flahan, that he was on the organizing committee for the recreation center. He also testified without contradiction that he attended the organizational picnic held by Charging Party in early June and that he saw recreation department superintendent Karen Kapchonick driving by three times while he was there. I note that Ponder is a larger than average man who stands out in a crowd. Since Ponder is assigned to the recreation center but not one of the employees targeted by the organizing drive, Respondent could have reasonably inferred from his presence at this picnic that he was assisting in the organizing effort.

Anti-union animus may be proven by indirect or circumstantial evidence, including the pretextual nature of the reason's offered for the alleged discriminatory actions. *Tubular Corp of America*, 337 NLRB 99 (2001); *Fluor Daniel, Inc*, 304 NLRB 970 (1991). However, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of unlawful discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *Charter Twp of Plymouth*, 18 MPER 46 (2005); *City of Grand Rapids (Fire Dep't),*1998 MERC Lab Op 703, 707. In this case, the timing of the investigation of Ponder's conduct is suspicious, as it occurred between Charging Party's petition for representation election and the hearing on this petition, and shortly after Charging Party's representatives came to the recreation center to rent rooms for their August 15

and August 19 organizing events. However, suspicious timing, by itself, is not sufficient to establish unlawful intent. *North Central Community Mental Health*¸ 1998 MERC Lab Op 417, 437; *Univ of Michigan*, 1990 MERC Lab Op 242, 249. Charging Party argues that the amount of time and effort that Respondent put into the investigation of a minor infraction by an employee with no significant disciplinary record, and the fact that Respondent ultimately withdrew the threat of discipline, suggest that Respondent's actions were intended to retaliate against Ponder for his union activities. However, Respondent could have simply been trying to obtain extra documentation before disciplining a union activist during the middle of an organizing campaign. I find that the evidence as a whole does not support a finding that Respondent's investigation of Ponder's conduct was motivated, in whole or in part, by anti-union animus. I conclude, therefore, that Charging Party failed to establish a prima facie case of unlawful discrimination under Section 10(1) (c) of PERA.

Attendance at Commission Hearings

The charge alleged that Respondent discriminated against Ponder, Lillibridge and Jones in violation of Sections 10(1)(c) and (d) of PERA and engaged in unlawful interference in violation of Section 10(1)(a) by refusing to pay them for their attendance, under subpoena, at Commission hearings held on December 21 and December 22, 2006 and January 19, 2007. In its post-hearing brief, Charging Party also asserts that Respondent interfered with the employees' Section 9 rights by telling them that they did not have to attend these hearings despite being subpoenaed.

MCL 423.11(1) gives the Commission and persons designated by it the authority to hold public or private hearings and subpoena witnesses and compel their attendance. Rule 172 (2)(e) of the Commission's General Rules, 2002 AACS, R 423.172, delegates to administrative law judges and fact-finders the power to grant applications for subpoenas and subpoena witnesses. Commission-issued subpoenas are also governed by Section 73 of the Michigan Administrative Procedures Act (APA), MCL 24.273:

> An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

Like Section 73 of the APA, Section 11(1) of the NLRA requires the Board to issue a subpoena upon applications of any party to its proceedings and provides a procedure for seeking revocation of a Board subpoena. Section 11(2) states that any federal district court shall have the authority to punish a refusal to obey a Board subpoena by a contempt order. In *Winn-Dixie Stores, Inc*, 128 NLRB 574, 579 (1960), the Board held that a person served with a Board subpoena is under a legal obligation to comply with that subpoena until it is revoked, despite the fact that only a district judge has the power to enforce the subpoena. In *Mr. F's Beef and Bourbon*, 212 NLRB 462 (1974), the Board affirmed its administrative law judge's finding that an employer committed an unfair labor practice when its attorney told employees that it was up to them whether they attended a Board hearing in response to subpoenas. The administrative law judge noted, at 466:

> As Congress had never invested the Board or its examiners with contempt powers, a notion occasionally arises in the minds of some that subpoenas issued by this Agency to compel the attendance of witnesses at formal hearings do not impose upon the recipient an obligation to comply, unless and until the subpoena is enforced by an order issued by a United States district judge. The Board long ago laid this notion to rest in *Winn-Dixie Stores* when it issued an admonition not to confuse the legal obligation to honor a Board subpoena with the procedure spelled out by Congress for enforcing that obligation. Hence, when an employer informs an employee that he does not have to comply with a Board subpoena, or when it tells him that he is free to suit himself in deciding whether to go or not to go to a Board hearing in response to the commands of a subpoena, such statements constitute unlawful interference with Section 7 rights and are a violation of Section 8(a) (1) of the Act. [4]

In *Bobs Motors, Inc*, 241 NLRB 1236 (1979), the Board found an employer guilty of an unfair labor practice when it told an employee that the Board's subpoena was not enforceable and that it was up to him to decide whether to appear at the hearing. See also *Tufo Wholesale Dairy, Inc*, 320 NLRB 896, 904-905 (1996) (employer violated NLRB by attempting to persuade employee not to appear at Board hearing by telling him that Board never enforces subpoenas and nothing would happen to him.)

Ponder, Lillibridge and Jones were subpoenaed to testify at Commission hearings held on November 13, December 21, and December 22, 2006 and January 19, 2007. On December 6, 2006, according to the minutes of the a civil service commission meeting, human resources director Biga said to those present, including Ponder, Lillibridge and Jones "that if people had contacted him, he could have told them that they didn't have to appear [at the November 13 hearing]; there is no penalty. . . This was a nonenforceable subpoena and if anyone had contacted him beforehand, he would have explained to them they would not be penalized for failing to attend." Commissioner Tatigian said, according to these minutes, that he "understood how a subpoena could be kind of a threatening thing for the average person in this country. But in this case, it was kind of a meaningless piece of paper; [just] a request to come down to the hearing." While neither Biga nor Tatigian actually told Ponder, Lillibridge and Jones not to attend the subsequent hearings, they did tell the employees that they had no obligation to honor their

[4] The rights of employees set out in Section 7 of the NLRA are identical to those in Section 9 of PERA.

subpoenas. I agree with Charging Party that these statements interfered with the exercise of employees' rights in violation of Section 10(1) (a) of PERA.

Charging Party also alleges that Respondent violated PERA by refusing to pay Ponder, Lillibridge and Jones for attending Commission hearings for which they were subpoenaed. In *Western Clinical Laboratory, Inc*, 225 NLRB 725 (1976), the Board held that an employer's insistence that an employee use vacation time to attend a Board hearing, when he preferred time off without pay, violated the employee's rights and interfered with Board processes even though there was no evidence that the employer's action was in reprisal for the employee having testified. The Board said, at 725,

> In order for the Board to fulfill its obligation to adequately administer the Act, it is necessary that its processes not be unjustifiably fettered by anything that precludes parties from participating in such processes free from coercion or restraint. In our opinion, forcing an employee who attends a Board hearing as a witness under subpoena to use his accrued vacation time, when he would prefer to take leave without pay, amounts to such a restraint regardless of the motive behind such action. In our judgment, potential witnesses will be reluctant to take the time to testify at Board hearings if they fear the loss of their accrued vacation time by doing so. Thus, the mere existence of such an apprehension would have an adverse effect upon the Board's ability to conduct fair and complete proceedings.

On this same theory, the Board held that an employer committed an unfair labor practice when it charged an employee testifying at a Board hearing with an absence under its "no-fault" attendance policy. *US Precision Lens*, 288 NLRB 505 (1988).

It is clear, however, that an employer does not interfere with employees' Section 7 rights simply by refusing to pay them for time spent away from work attending Board hearings, whether under subpoena or not. In this case, any obligation Respondent had to pay Lillibridge, Ponder and Jones arose from the collective bargaining agreement, which provided for pay only when employees were required to appear in "court" under subpoena. The term "court" could be read as encompassing other types of tribunals, but Lillibridge, Ponder and Jones' request to be paid for attending Commission hearings was the first time any employee had asked to be paid under this language for attending an administrative hearing of any type. I find the evidence insufficient to support a finding that Respondent's decision not to pay them constituted retaliation against them for the union activities or testifying at the hearing. I conclude that Respondent did not violate Sections 10(1) (c) or (d) of PERA by refusing to pay Lillibridge, Ponder or Jones for attending Commission hearings under subpoena on December 21 and December 22, 2006 and January 19, 2007.

In sum, I find that Respondent violated Section 10(1)(a) of PERA when, on December 6, 2006, Respondent human resources director Robert Biga and civil service commission chairman Harry Tatigian told employees Yvonne Lillibridge, Peggy Jones, and Roger Ponder that they were not required to comply with Commission subpoenas. I find the evidence insufficient to support a finding that Respondent engaged in unlawful surveillance of Ponder's union activities

or that it investigated and threatened to discipline him for overstaying his break on August 11, 2006 because of these activities. I also find that Charging Party failed to establish that Respondent's refusal to pay Lillibridge, Jones and Ponder for time spent attending Commission hearings constituted unlawful discrimination under Section 10(1) (c) of the Act. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

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

1. Cease and desist from telling employees that they do not have to comply with Commission subpoenas, or in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by PERA.

2. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing, the Michigan Employment Relations Commission has found the **City of Livonia** 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 tell employees that they do not have to comply with Commission subpoenas, or in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by PERA.

We acknowledge that as a public employer under the PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment or other conditions of employment. All of our employees are free to form, join or assist in labor organizations and to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection.

CITY OF LIVONIA

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 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.

Case Nos. C06 I-223 and C06 L-294