STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KENT COUNTY,
Public Employer-Respondent,

Case No. C09 F-080

-and-

DON STEWART,
An Individual-Charging Party.
_____/

APPEARANCES:

Thomas L. Drenth, Labor Counsel for Respondent Employer

Don Stewart, *In Propria Persona*

DECISION AND ORDER

On June 15, 2010, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that the unfair labor practice charge filed by Charging Party, Don Stewart, against Respondent, Kent County (Employer) should be dismissed for failure to state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. The charge and amended pleadings allege a violation of PERA based the termination of Charging Party's employment in response to his refusal to comply with a directive from his supervisor, a right that he alleges is protected under his collective bargaining agreement. Finding the charge deficient, the ALJ ordered Charging Party to provide an explanation of why the charge should not be dismissed for failure to state a claim. Charging Party amended his charge, but failed to allege any facts supporting the claim that his discharge resulted from his exercise of activity protected under section 9, and the ALJ recommended summary dismissal of the charge. The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA.

After receiving an extension, Charging Party filed exceptions to the ALJ's decision on August 5, 2010. On August 30, 2010, the Employer filed its cross exceptions and brief supporting the ALJ's conclusions; however, the submission was untimely filed and will not be considered in this decision. On September 4, 2010, Charging Party filed a response to the Employer's brief; a filing not permitted under the General Rules of the Michigan Employment

Relations Commission, 2002 AACS, R 423.101 - R 423.194. It, too, will not be considered in this decision.

In his exceptions, Charging Party contends that the ALJ erred by recommending summary dismissal. He argues that the ALJ wrongfully summarized his arguments and failed to consistently apply the relevant legal authority. Charging Party also disagrees with the ALJ's conclusion that (1) his actions constituted "insubordination", and (2) he had not engaged in conduct protected by section 9. After carefully reviewing the exceptions, we find them to be without merit.

Factual Summary:

We accept the ALJ's factual summary set forth in the Decision and Recommended Order and will not repeat it here, except where necessary. We also accept as true, Charging Party's factual allegations in reviewing the appropriateness of the ALJ's summary dismissal recommendation.

Respondent Employer terminated Charging Party for refusing to comply with a directive issued by his supervisor. Charging Party challenged the dismissal as improper claiming that the directive was given prior to his work start time. He asserted that the collective bargaining agreement precluded him from complying with workplace directives during non working hours. His charge against Respondent asserts that his refusal to comply with the directive constituted "protected activity" in light of the specific contractual provision and within the intended meaning of section 9. Relying solely on the language of the contractual provision, Charging Party failed to indicate in his charge and subsequent pleadings any other allegations suggesting anti-union animus or a discriminatory motivation for the termination.

Discussion and Conclusions of Law:

Charging Party was discharged for refusing to obey a supervisor's directive. Based on his collective bargaining agreement, Charging Party asserts that the termination violates PERA and that his activity is protected under section 9. We disagree.

It is well established that PERA does not prohibit all types of unfair treatment by public employers. *Detroit Pub Sch*, 22 MPER 16 (2009). Only misconduct by public employers that interferes with, restrains, discriminates against or is in retaliation to an employee's exercise of the specific rights set forth in section 9 is subject to redress by the Act. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974). Moreover, absent a factually supported allegation that an employer's actions were motivated by anti-union animus, this Commission is foreclosed from judging the merits of the employer's conduct. *Detroit Pub Sch*.

We concur with the ALJ's conclusion that Charging Party's pleadings and exceptions do not allege sufficient facts to support a PERA claim against Respondent. We also agree with the ALJ that Charging Party's refusal to comply with his supervisor's directive did not constitute "protected conduct" as defined per the seminal case of *NLRB v City Disposal Systems, Inc*, 465 US 822, 837 (1984). In this matter, the contract provision on which Charging Party relies does

not specifically provide for a refusal option when faced with work directives issued during non-working hours. Charging Party also refutes that his discharge was due to his own insubordination. Even if true, his allegations of contract violations by the Employer, alone, do not constitute a cause of action under PERA. *Detroit Bd of Ed*, 1995 MERC Lab Op 75, 78. Since the charge fails to state a cognizable claim under PERA, it is subject to dismissal under Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.165.

Finally, we have carefully examined the remaining issues raised in the exceptions and find that they would not change the results. Accordingly, we agree with the Administrative Law Judge's conclusions and summarily dismiss the charge against the Employer.

ORDER

The unfair labor practice charge against the Employer is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

KENT COUNTY,
Public Employer-Respondent,

Case No. C09 F-080

-and-

DON STEWART,
An Individual-Charging Party.
_____/

APPEARANCES:

Thomas L. Drenth, Esq., Labor Counsel, Kent County, for Respondent

Don Stewart, appearing for himself

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTIONS FOR SUMMARY DISPOSITION

On June 2, 2009, Don Stewart filed the above charges with the Michigan Employment Relations Commission (the Commission) against his former employer, Kent County, pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210.[1] The charge was amended on June 25, 2009. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules.

On February 23, 2010, Stewart filed a motion for summary judgment pursuant to Rule 165(2)(e) of the Commission's General Rules, 2002 AACS, R 423.165(2)(e), asserting that Respondent failed to state a valid defense to the charge in its answer filed July 30, 2009 and that Stewart was entitled to judgment as a matter of law. On March 15, 2010, Respondent filed a motion for summary dismissal pursuant to Rule 165(2) (d), asserting that Stewart failed to state a claim upon which relief could be granted against it. Based on facts set forth in Stewart's pleadings and other facts not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

[1] Stewart also filed a charge against his collective bargaining representative, the International Union, United Automobile Workers, Local 2600. (Case No. CU09 F-018). On December 21, 2009, I issued a Decision and Recommended Order on the Respondent's motion for summary disposition recommending that the charge be dismissed. This decision is pending before the Commission on exceptions.

The Unfair Labor Practice Charge:

Stewart was employed as an equipment operator at Respondent's airport until his discharge on January 7, 2009. He was a member of a bargaining unit represented by UAW Local 2600 (the Union). At the time of Stewart's discharge, Respondent and the Union had an existing collective bargaining agreement. Stewart's charge, as amended, alleges that Respondent unjustly and unlawfully terminated him in violation of this collective bargaining agreement. Stewart also alleges that his termination violated Section 10(1) (a) of PERA because he was discharged for exercising his right under the collective bargaining agreement to refuse to follow orders issued to him by his supervisor outside of his normal hours of work.

In an answer filed July 30, 2009, Respondent asserted that Stewart was terminated for violating numerous County rules, including but not limited to insubordination, failure to report a vehicle accident, and leaving the work area without permission, combined with a previous unsatisfactory disciplinary record. On August 27, 2009, Stewart filed a response to this answer. In his response, Stewart asserted that he was not guilty of insubordination because his supervisor knowingly issued him orders before the start of his shift in violation of the collective bargaining agreement. Stewart asserted that the other reasons given by Respondent for his termination were also baseless.

The Motions for Summary Disposition:

On February 23, 2010, Stewart filed a motion for summary disposition. In his motion, Stewart argues that he was not guilty of insubordination because he was exercising his right under the collective bargaining agreement to refuse to comply with orders issued to him outside of his normal hours of work. Stewart asserts that his termination was based on Respondent's manipulation of the facts and lies and that there was no legal cause to terminate him.

On March 15, 2010, Respondent filed a brief in opposition to Stewart's motion and a counter-motion for summary dismissal. Although its motion did not include affidavits, in its brief Respondent discusses in detail each of the alleged rule violations cited in Stewart's termination letter and argues that his termination was justified. Respondent also asserts that Stewart did not engage in any activity protected by the Act. It argues that Stewart has not provided any facts to support a finding that he honestly and reasonably believed that the collective bargaining agreement gave him the right to refuse directives issued before the start of his shift. Respondent points out that the collective bargaining agreement contains no language expressly prohibiting pre-shift directives, and that Stewart has not cited any County policy or procedure prohibiting them.

Stewart's Motion to Strike

On March 18, 2010, Stewart filed a motion under Rule 163 of the Commission's General Rules, 2002 AACS, R 423.163, to strike the entirety of Respondent's motion for summary disposition as "immaterial, lacking any merit to the instant case," and "a continuation of the County's defamation of Stewart's character."

Under Rule 163, an administrative law judge may order stricken from the pleadings "redundant, immaterial, impertinent, scandalous, or indecent matter or may strike all or part of a pleading not drawn in conformity with these rules." Respondent's motion and brief in opposition to Stewart's motion includes a discussion of Stewart's alleged misconduct, including its version of the events leading up to his discharge. For purposes of deciding Respondent's motion for summary disposition, I must assume that all facts asserted by Stewart are true. However, in giving its version of events Respondent is clearly responding to arguments raised by Stewart in his motion for summary disposition. Stewart's motion to strike is, therefore, denied.

Facts:

The pertinent facts, as alleged in Stewart's charge and pleadings, are as follows. Stewart worked the second shift as an equipment operator at Respondent's airport. His normal working hours were between11:45 a.m. and 8:15 p.m. His supervisor was Eric VanderStel.

Section 9.1 of the collective bargaining agreement between Respondent and the Union read:

> Workweek. The normal workweek of County employees shall be forty (40) hours per week, not including meal periods, unless regularly scheduled otherwise.
>
> > Definition: Normal work week. A normal work week for regular full-time employees shall consist of forty (40) hours, not including meal periods.
> >
> > Normal work day. A normal work day for such employees shall be eight (8) hours, not including meal periods, unless regularly scheduled otherwise.

On December 9, 2008, VanderStel heard Stewart swear over the radio while operating a piece of equipment. VanderStel told Stewart to report to the maintenance garage and, when he did so, told him to stop swearing over the radio. Stewart took offense at this reprimand as use of rough language was common at the facility.

On Wednesday, December 10, 2008, Stewart clipped the rear of another vehicle with his vehicle as he was leaving the airport's maintenance facility. At 11:30 a.m. on Thursday, December 11, VanderStel came up to Stewart before the start of his shift and before Stewart had punched in. In his amended charge, Stewart described their conversation as follows:

> [At] 11:30 a.m., Supervisor VanderStel directed (ordered) I go to Airport Movement and Safety Area Training. I informed him I had already attended the class along with the rest of the department and that unless everyone else in the department was going again I would not attend and that his actions were discriminatory and harassment. I also told him he was abusing his authority issuing an unlawful order before I was on the clock. I also told him I was well within my contract rights to ignore his directives. The directives were never repeated on county time. As the day progressed, other operators would ask me to

assist them to accomplish work they were assigned. VanderStel didn't talk to me and I made no attempt to talk to him.

In his motion for summary disposition, Stewart described the incident this way:

> At 11:35 a.m., VanderStel demanded that I attend a "safety class" and file an accident form. I informed him that I did not have an accident. He was also informed that he was violating the collective bargaining agreement and issuing illegal directives on my personal time (before the start of the normal 8 hour day), [and] that I was well within my rights to ignore him. I also informed him that unless he directed all the other equipment operators that were in the same annual airfield orientation class to retake it, his actions were nothing short of discrimination and harassment. As such I was not listening to him, and would not attend the class. I spoke with Mr. Applebach [instructor of the class] right before the airfield orientation class, specifically asking him why I was scheduled for the class. He stated that he did not schedule me for the class and had no explanation for me being there. I informed him I would return to my shop.

On Friday, December 12, VanderStel again spoke to Stewart before the start of his shift. Stewart described the incident in his amended charge as follows:

> [On]December 12, 2008, 11:35 a.m., VanderStel ordered that I could not leave the building unless he said so.[2] I responded he was harassing me and I had rights and would use them as I saw fit. Despite my efforts to comply with the collective bargaining agreement, VanderStel still insisted on making demands on my personal time.

In his motion for summary disposition, Stewart asserted:

> At 11:30 a.m., a very irate VanderStel directed I help and assist another equipment operator make an adjustment for a small tractor salt/sand unit and then he declared, "You can't leave the building unless I say so." I replied that I knew my rights and would exercise them as I saw fit.[3]

On Monday, December 15, Stewart came to work but left after the start of his shift but before punching in. He described the events of that morning in his amended charge as follows:

> [On] December 15, 2008, I showed up for work, but was leery of having to deal with another day of VanderStel's harassment and had not punched in. I got a phone call from my wife saying there was a problem with the brakes and she was having trouble stopping the car. I called chief steward Mike Gatens regarding the

[2] According to Respondent, VanderStel told Stewart that he was not to leave the building to operate equipment on the grounds of the airport until he attended the safety class again.

[3] Respondent concluded that Stewart's response to VanderStel's directive was insubordinate. However, Stewart was not accused of disobeying VanderStel's directive not to leave the building or of refusing to assist the other employee.

> contract. I informed him of VanderStel's harassment and his persistent habit of giving me orders before the start of my shift, violating contract stipulation of the 8 hour work day. I also asked him exactly what the contract stipulations were concerning taking a personal day off. He made no comments in reference to the 8 hour work day. He stated the contract made no provision for how to use the personal day, it was a use or lose type of thing. [He said that] management wants you to get their approval, the union has debated about it but has not consented . . . I got off the phone and realized I had forgotten to punch in on the time clock, that I was actually standing there on my own time. I did not need anyone's permission to leave the building. County attendance policy only required that I let the supervisor know that I was not going to be available for work, it did not stipulate how it had to be done. I gave VanderStel his notice and left the building with him mumbling words I did not understand.
>
> In his charge, Stewart asserted:
>
> [At] 11:40 a.m. [on December 15], VanderStel began grumbling about the "class" as soon as I walked into the building. During his one-man tirade I forgot to punch in. I got a phone call from my wife stating a major safety problem with her car. I informed VanderStel of my family emergency and told him I was unavailable for work, that he could call it whatever he wanted, I was leaving. He had his notice and I left the building. After solving my family emergency, I called supervisor McNally and he asked me to report for work as he was short-handed and need the help.

On Tuesday, December 16, Stewart was called to a meeting with Airport Facilities Management Director Thomas Eckland and questioned about the incidents described above. On December 17, VanderStel told Stewart, four minutes before the start of his shift, that he had to attend the safety class that day. About a half hour later, after Stewart had punched in, VanderStel approached Stewart and repeated this order. Stewart told VanderStel that if he hadn't repeated the directive on "county time" he would not have gone to the class, but since his directive was "legal" he would attend. Stewart attended the class.

On January 7, 2009, Respondent sent Stewart a five page letter terminating him for allegedly violating six work rules, including leaving his assigned work area before the end of his shift without prior permission of his supervisor on December 15 and multiple acts of insubordination.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to organize together or to form, join, or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, and to engage in other "lawful concerted activities for the purposes of collective bargaining or mutual aid and protection." Sections 10(1) (a) and (c) of PERA prohibit a public employer from discriminating against employees for their union activities or because they have exercised their Section 9 rights. Section 10(1) (a) also

prohibits other types of inference with the employees' exercise of their statutory rights. However, PERA does not provide a cause of action for all types of discrimination, harassment or unfair treatment of public employees by their employers. The discharge of a public employee is not a violation of PERA simply because it is unfair or violates a term of a collective bargaining agreement between his employer and his union. Absent an allegation that an employee's discharge was motivated by union or other activity protected by Section 9 of PERA, the Commission is prohibited from making a judgment on the merits or fairness of the discharge. See e.g. *City of Detroit (Fire Department)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524. Accordingly, the threshold question in this case is whether Stewart engaged in conduct protected by Section 9 of PERA. If he did not, Stewart has no claim under PERA even if Respondent's charges of misconduct lacked merit.

Stewart asserts that his refusal to comply with VanderStel's order to attend a safety class on December 11, 2009 was protected by the Act because he was invoking his right under the collective bargaining agreement not to comply with an order issued before his normal hours of work. Stewart also argues that his response to VanderStel's December 12 order not to leave the building and his decision to leave the maintenance facility without VanderStel's specific permission on December 15 also constituted conduct protected by the Act for this same reason.

Section 9 of PERA protects "concerted" activities. This term includes actions taken by two or more employees acting together, or by a single employee to induce group action, or by a single employee acting as the representative of others. Moreover, because collective bargaining agreements are the result of "concerted action," a public employer violates PERA by disciplining an employee for attempting in good faith to enforce a right claimed under a collective bargaining agreement, even if the employee is mistaken in his interpretation of the contract. *MERC v Reeths-Puffer School Dist*, 391 Mich 253, 264 (1964).

As Stewart acknowledges, employees are normally required to comply with the orders of their supervisors even if they disagree with them. A refusal to do so constitutes insubordination. However, in *NLRB v City Disposal Systems, Inc*, 465 US 822, 837 (1984), the Supreme Court held that an employee's refusal to comply with a supervisor's order could be protected by Section 8 of the National Labor Relations Act (NLRA), 29 USC 150 et seq, the federal statute on which PERA was modeled, if that refusal was based on a collective bargaining agreement. In that case, a truck driver was terminated after he refused an order to drive a truck he believed was unsafe. The employee had observed a fellow employee having problems with the truck's brakes the previous week. Together, the two employees took the truck to the garage and the employer said that the truck would be repaired. When the employer ordered the employee to drive the truck the next week after his own truck broke down, he knew that the truck's brakes had not yet been repaired. When he told the employer that there was something wrong with the brakes, however, the employer said, "half the trucks had problems and that if [the employer] tried to fix all of them it would be unable to do business."

The collective bargaining agreement between the employer and the employee's collective bargaining agent included the following provision:

ARTICLE XXI

EQUIPMENT, ACCIDENTS AND REPORTS

> *Section 1.* The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

The Supreme Court held that the employee's refusal was protected conduct, even though he was acting alone and had not specifically invoked the contract. It said:

> As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, … the employee is engaged in concerted activity. 465 US at 837

Although the employee's interpretation of the contract need not be correct, it must be objectively reasonable and honestly asserted. In *ABF Freight Systems*, 271 NLRB 35, 37 (1984), the National Labor Relation Board (NLRB) held that a truck driver's refusal to drive a truck he claimed was unsafe was not protected, even though the contract contained a provision similar to that in *City Disposal.* The truck driver had a history of rejecting many more trucks as unsafe than his fellow drivers did, and the truck was repeatedly checked out after he complained and found safe by both the employer's mechanics and other employees. The NLRB concluded that the truck driver's complaints were neither reasonable nor honest attempts to invoke a right secured by the collective bargaining agreement. Similarly, in *Mead Corp*¸ 275 NLRB 323, 324 (1985), the NLRB held that an employee's refusal to work overtime did not constitute protected concerted activity under *NLRB v City Disposal Systems* because the contract provision he cited was not reasonably susceptible to an interpretation exempting him from the obligation to work overtime.

As discussed above, the circumstances in *City Disposal* presented an exception to the rule that employees must follow their supervisors' orders. In that case, the contract explicitly gave employees the right to refuse to drive an unsafe vehicle. The contract provision Stewart relies upon, Section 9.1, merely establishes the "normal work day" and the "normal work week" for bargaining unit employees. This provision does not give employees the right to refuse orders given by their supervisors, even an order to work outside of the "normal" hours set by contract. I find that Stewart could not and did not have a reasonable and honest belief that Section 9.1 gave him the right to disregard a supervisor's order to perform a task later in the workday simply because the order was uttered before his normal work hours or before he had punched in.[4] Also, unlike the truck driver in *City Disposal*, Stewart would not have put himself at risk by complying

[4] After Stewart filed his motion for summary disposition, he submitted a document purporting to be an opinion survey of Respondent's other equipment operators indicating that the majority agreed with him that they did not have to follow orders issued before their shifts. However, this document is not relevant to the question of whether Stewart's interpretation of Section 9.1 was objectively reasonable.

with VanderStel's order. I find that Stewart's refusal to obey VanderStel's order to attend the safety class also was not reasonably directed toward the enforcement of his contractual rights since he could, without harm to himself, have complied with the order and then grieved the fact that it was issued before the start of his shift. For these reasons, I conclude that Stewart's refusal to comply with VanderStel's order on the morning of December 11, 2008 was not protected by Section 9 of PERA.

I also conclude that Stewart's actions on the mornings of December 12 and December 15, 2008 were not protected by PERA. The facts indicate that starting around December 9, 2008, Stewart became increasingly angry at VanderStel for giving him what Stewart felt were unreasonable orders. On December 12, Stewart responded to VanderStel's order that he not leave the building with a broad challenge to VanderStel's authority, i.e. Stewart told VanderStel that he "knew his rights and would exercise them as he saw fit." On December 15, Stewart left work after the start of his work day. Although Stewart apparently had a good reason for leaving, he refused to ask VanderStel's permission to leave, justifying his refusal on the grounds that he had forgotten to punch in that morning. On neither of these occasions was Stewart asserting a right protected by the collective bargaining agreement or involved in any type of activity protected by Section 9 of the Act.

In sum, I conclude, based on the facts as alleged by Stewart, that he did not engage in activity protected by Section 9 of PERA and that his January 7, 2009 termination did not violate Section 10(1)(a) of PERA. I recommend, therefore, that the Commission grant Respondent's motion for summary disposition and that it issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____