

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

In the Matter of:

KINROSS TOWNSHIP,  
Public Employer-Respondent,

Case No. C09 J-205

-and-

BRIAN MCMILLIAN,  
An Individual Charging Party.

APPEARANCES:

White, Clarke and Mock, by Daniel W. White, for Respondent

Brian McMillian, *In Propria Persona*

**DECISION AND ORDER**

On November 18, 2010, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charge and complaint.

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

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

**ORDER**

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: \_\_\_\_\_

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

In the Matter of:

KINROSS TOWNSHIP,  
Public Employer-Respondent,

-and-

BRIAN MCMILLAN,  
An Individual-Charging Party.

Case No. C09 J-205

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**APPEARANCES:**

White, Clark and Mock, by Daniel White, for Respondent

Brian McMillan, appearing for himself.

**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 matter was heard on May 24, 2010 by Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission.<sup>1</sup> Based upon the evidence and arguments presented at the hearing, I make the following findings of fact and conclusions of law and recommend that the Commission issue the following order.

**The Unfair Labor Practice Charge:**

Brian McMillan filed this charge against his former employer, Kinross Township, on October 27, 2009. The charge was amended on November 20, 2009. McMillan was employed by Respondent as a maintenance supervisor when he was terminated on September 23, 2009. McMillan alleges that he was discharged because of his union activities, including signing a union authorization card in the spring of 2009, and because Respondent incorrectly believed that he was responsible for initiating a union organizing campaign. Respondent asserts that McMillan was terminated because he could not communicate or get along with his subordinates.

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<sup>1</sup> The hearing was conducted by videoconference between Detroit and a facility owned by the State of Michigan in Newberry, Michigan. Respondent and Charging Party were in Newberry, while the court reporter and administrative law judge were in Detroit.

## Findings of Fact:

McMillan was hired by Respondent in 1998. At the time of his termination, he was maintenance supervisor/foreman in Respondent's department of public works (DPW). During McMillan's employment, Respondent's employees were not represented by a bargaining agent. As discussed below, in the spring of 2009 one or more of Respondent's employees contacted AFSCME and distributed authorization cards for that labor organization. McMillan was not a part of this group, although he signed a card. The record does not indicate when the first contact with AFSCME was made, but there is no evidence in the record that Respondent was aware of any union activity among its employees before March 16, 2009. In December 2009, after McMillan had been terminated and had filed this charge, AFSCME filed a petition for a representation election. In May 2010, it was certified as the bargaining agent for a unit of nonsupervisory employees of the Respondent.

### McMillan's Employment History and March 2, 2009 Discipline

Prior to 2009, the only discipline in McMillan's personnel file was a December 2002 counseling memo. According to the memo, another employee complained that McMillan said "F—k them, if they want sand, there is a bucket there," when the employee suggested that he spread sand in the parking lot in the morning before people arrived. According to the memo, McMillan denied that he used that word f—k. DPW superintendent Norman Perkins warned McMillan that if he was ever heard using that word again he would be reprimanded.

As evidence that McMillan had a history of difficulty in getting along with other employees, Respondent introduced three of McMillan's written performance evaluations. McMillan received the first one, dated August 24, 2007, before he was promoted to maintenance supervisor. This evaluation was signed by former maintenance supervisor Lee Thompson and rated McMillan's overall performance as "very good." However, under the heading "specific areas of needed improvement," the evaluation stated that McMillan needed to work on getting along with his fellow workers, and that he sometimes caused a rift because of his attitude. McMillan testified that this comment was not in Thompson's handwriting and was not on the evaluation form when Thompson gave it to him to sign. It appears, from a comparison of the handwriting on the evaluation with other documents in the record, that this comment was actually written by Perkins. As discussed below, Perkins also expressed concerns about McMillan's interpersonal skills in 2008 and in early 2009 before Perkins learned of the union organization effort.

Thompson retired in the spring of 2008. On or about May 5, 2008, McMillan was appointed acting maintenance supervisor. In a memo dated May 6, 2008, Perkins documented that he had discussed the new job with McMillan. Perkins stated that he had told McMillan that he was a good worker and a very knowledgeable mechanic, but that Perkins had concerns about his ability to communicate with employees in a professional manner. At the hearing, Perkins testified that he had received complaints about McMillan's rudeness from nearly every employee in the DPW at one time or another. Perkins noted in the May 6 memo that McMillan was to serve as acting maintenance supervisor for three months and that Perkins had arranged for McMillan to attend a seminar for managers to improve his communication skills. McMillan confirmed that

Perkins criticized the way he treated other employees. He admitted that Perkins' criticisms had some basis, but stated that Perkins was also too ready to accept what other employees said as true.

In August 2008, McMillan received a written performance evaluation signed by Perkins rating his overall performance as "good." Perkins stated that McMillan had shown improvement in his interpersonal relationships, and recommended that he continue to attend seminars to improve his supervisory skills. Around the same time, Perkins recommended to Respondent's township board that McMillan be permanently appointed to the maintenance supervisor position. In his memo to the board recommending the appointment, Perkins stated that while McMillan still had some problems with the way he handled his subordinates, he had improved in this area.

In late February or early March 2009, one of McMillan's subordinates, Rodney Leask, complained to Perkins that McMillan had been making disparaging comments about Leask's Native American heritage. Leask related several jokes McMillan had made in his presence. The point of these jokes was that Native Americans were supposedly lazy and/or generally worthless. He also told Perkins that recently, when he was describing to McMillan a problem his child was having with a teacher at school, McMillan said, "It's not the teachers, it's your stupid kids." According to Perkins' summary of their conversation, Leask also said that he had not complained earlier because he was concerned that McMillan would retaliate against him. When Perkins asked McMillan about Leask's complaints, McMillan admitted that he had made jokes about Native Americans in front of Leask. However, he denied making some of the jokes Leask had reported and also denied saying anything about Leask's children.

On March 2, Perkins issued a verbal warning to McMillan for making derogatory remarks about Leask's ethnic heritage. A note of the verbal warning was put in McMillan's personnel file. The warning stated that if Perkins received any further reports of McMillan making derogatory comments about employees' ethnic backgrounds, or any report that McMillan had retaliated against Leask, McMillan would receive a three day suspension without pay.

At the hearing, McMillan testified that he did not make the remark about Leask's children; that other employees also made joking references to Leask's heritage; that other employees, including Perkins, routinely made ethnic jokes; and that McMillan himself had been called "leprechaun." Leask admitted that other employees also joked about him being a Native American, but insisted that McMillan's jokes were different because they were directed at him personally. Perkins also agreed that ethnic jokes were common in the DPW, but testified that he felt he had to take some action since Leask had complained.

McMillan received his warning on March 2. As noted above, there is no evidence that Respondent knew of any union activity among its employees before March 16. Whether or not McMillan's warning was justified, Respondent's belief that he initiated the union activity could not have been the cause of his receiving this warning. Accordingly, I find it unnecessary to resolve the dispute over what McMillan actually said to Leask before March 2 or whether McMillan's comments were different from those made by other employees.

McMillan and Leask agree that after McMillan received the verbal warning, he did not make any more jokes or remarks about Leask's Native American heritage. However, according to Leask, McMillan asked him the next day why he had not come to him (McMillan) before going to Perkins. He also testified that after McMillan received the verbal warning, McMillan seemed to be constantly criticizing him. Another DPW employee, Greg Wright, also testified that McMillan did not seem to like Leask and that McMillan often gave Leask a hard time. McMillan himself testified that Leask "didn't like to get his hands dirty," and that as Leask's supervisor he often had to tell him to "get out of the office and work." Between March and September 2009, Leask made several complaints to Perkins that McMillan was treating him too harshly, but Perkins did not take any action.

#### Union Organizational Activity

Sometime in late 2008 or early 2009, the personnel committee of Respondent's township board prepared a set of recommendations for changes in employee compensation. These recommendations included increases in the amount employees would have to pay for their health insurance and other changes that negatively affected employee compensation. When Respondent's township board met on March 16, 2009, these recommendations were on the agenda. A number of Respondent's employees, including McMillan, attended the meeting. During the meeting, an employee, not identified in the record, passed out union authorization cards and/or union informational material to other employees standing in the hallway outside the meeting room. Although McMillan had in the past made remarks at work about organizing a union, he did not participate in the distribution of the union materials at the board meeting and was not aware of any union activity among employees until he saw the material being distributed on March 16.

According to McMillan, the day after the meeting Perkins approached him at work and told him that someone had been passing out union materials at the board meeting. McMillan testified that Perkins told him that Lawrence Palma, the Township supervisor, was accusing McMillan of being involved in this activity. McMillan responded that "paperwork was being floated around," but that he had nothing to do with the union because he did not want to lose his job over union activity. He also told Perkins that he would not tell him who had been passing out the material. On cross-examination, McMillan added that Perkins told him that "he (McMillan) didn't need to lose his job over union activity."

Perkins testified that it was McMillan who came to him the day after the board meeting to tell him that union materials had been distributed at the meeting. According to Perkins, he asked McMillan who had done this, but McMillan would not tell him. Perkins was not asked specifically whether he made the remark about McMillan losing his job. Instead, Respondent's counsel asked him if he had ever "overheard any township supervisor, deputy supervisor or other township official indicate that some sort of retribution, punitive action or adverse reaction of some kind should occur to Mr. McMillan because of the union interest or activity." Perkins replied that he had not.

Perkins testified that after his conversation with McMillan, he went to Palma's office to report what McMillan had told him about the union activity. Palma asked him if he thought it

was McMillan who was distributing the material, and Perkins told Palma that McMillan had said it was not.

Palma had no memory of this conversation with Perkins. He testified:

I recall there has been several conversations about [the union activity,] but none that I really paid much attention to. It's got nothing to do with me, it's up to those people.

On March 17, Perkins prepared a memo and sent it to the Township board. In the memo, Perkins informed the board that an unidentified individual had been passing out "union papers" at the March 16 board meeting. Perkins wrote:

Having a Union come into the Township is, in my opinion, NOT having the Township's best interests in mind. I have worked under Union contracts and I have talked to people who have been on both sides of the Union, being represented and dealing with the Union as a "company man." If at all possible, the Union issue should be completely avoided.

How do you avoid having a Union come into the Township? To do this, the Township Board needs to work with all department heads, listen to what they have to say and take those requests and concerns to heart. The Board needs to think about what has been said by the department heads, work with the employees and come up with a solution that is acceptable by all parties. Changes in policies should be made only with good, sound reasoning. Employees need to be made aware of those good, sound reasons and have ample opportunity for comments. This HAS NOT been happening here in Kinross Charter Township. When a breakdown of communication occurs, the talk of Union representation arises. [Emphasis in original.]

The memo went on to criticize the personnel committee's compensation recommendations and to rebut some criticisms the committee had made of the DPW.

Within a few days after the March 16 meeting, McMillan signed a union authorization card. McMillan testified that after this occurred, and about a week after Perkins distributed his memo to the board, Palma came to the maintenance shop where McMillan was working. McMillan testified that, with two other employees standing nearby, Palma said "something to [McMillan] about the union." McMillan told Palma that he had nothing to do with it. According to McMillan, Palma told him, "I hear you talking union all the time." Palma was not asked if he made this specific statement. He testified, however, that he was in the maintenance shop, apparently on several occasions, when employees mentioned a union. According to Palma, all he ever said on this topic was "It's up to you."

Between March and September 2009, employees sometimes discussed a union during their lunch hours. McMillan overheard some of these conversations, but did not participate in

them. McMillan did not have any additional conversations with anyone in management about a union until September 2009.

### McMillan's Discharge

On August 5, 2009, McMillan received a written evaluation from Perkins which rated his overall performance as "very good." Perkins wrote:

Brian has been able to keep the workers under him busy. He does communicate with his workers. Brian needs to work on the way he talks to and treats those he is in charge of. Needs to stop calling workers bitches and retards even if it is just in fun.

In early September 2009, when McMillan was on vacation, Perkins told his administrative assistant, Cathy, to tell Leask to clean and reorganize the office that McMillan used. McMillan returned from vacation on September 8. McMillan asked Leask what was going on in his office. According to McMillan, when Leask explained that Perkins had told him to reorganize it, McMillan said fine and then left to go to work. Leask, however, testified that McMillan began complaining, in an angry and sarcastic tone, about how the office had been rearranged. According to Leask, he told McMillan that Cathy had told him to get the office straightened up because everything was out of place. According to Leask, McMillan replied, "F—k Cathy, this is my office." I found Leask to be a believable witness, and I credit his testimony about this incident.

Shortly after his conversation with McMillan, Leask began having chest pains. He and Greg Wright went to Perkins' office and asked for permission for Wright to take Leask to an urgent care center. Perkins testified that Leask looked as if he was going to collapse in front of him. According to Perkins' memo of the event, Leask told Perkins that he "had put up with it long enough and couldn't take it anymore." When Perkins asked him what he meant, Leask said that he had worked very hard to clean the office, but that McMillan had told him that he didn't like the way it was cleaned and organized. Leask then said that McMillan was "on his case all the time," and that no matter what he did it wasn't good enough. Perkins testified that he asked Leask whether or not he thought he was going to get into a fight with McMillan, and Leask replied that he (Leask) had almost hit him. Perkins told Leask that he would talk to McMillan. Leask was taken to the urgent care clinic and then to the hospital where he was treated for high blood pressure and then released.

Perkins immediately called McMillan into his office and questioned him about the incident with Leask. McMillan told Perkins that nothing had happened. Perkins replied that something had to have happened for Leask to be that upset. Perkins told McMillan that he had heard too many complaints about how he treated people. He said that if McMillan did not change, Perkins would take the foreman job away or let him go.

When he returned to work the following day, Leask filled out an incident report about his conversation with McMillan. In addition to stating that McMillan had criticized the way he had reorganized the office, Leask mentioned that McMillan had said "F--k Cathy."

On September 14, 2009, Perkins and Palma gave McMillan a three day suspension for “using verbal abuse toward Rod Leask and causing severe stress” and for using profanity in referring to Cathy. Perkins testified that he believed McMillan was lying when he said nothing had happened between him and Leask on September 8 because of Leask’s previous complaints and the complaints he had received from other employees about the way McMillan treated them. Perkins also believed Leask was telling the truth when he said McMillan had said “F—k Cathy.”

On the day McMillan received the suspension, he went to Palma’s office to talk to him. Palma shares an office with Dorothy Johnson, the deputy township supervisor. According to McMillan, however, Johnson had stepped out of the office when he spoke to Palma. McMillan said to Palma that he had signed a card for the union, but that he was not the one who had initiated the union activity. According to McMillan, Palma said, “You’ve been talking union, and I believe you’re the one that did it.” According to McMillan, he responded that he would be willing to give Palma the names of the employees who did start it, but that Palma said that he did not need or did not want the names. McMillan testified that as he was walking out of the room, Palma said, “If you guys go union, you are going to lose.”

Palma recalled McMillan coming to his office and complaining about the discipline, but not any discussion about a union. However, Johnson testified that she was present when McMillan came to Palma’s office on September 14. According to Johnson, McMillan said that he wanted to talk to them, and then said that he did not have anything to do with the union activity. According to Johnson, Palma said that this was not why McMillan was suspended. Johnson testified that Palma did not engage McMillan in any discussion about the union.

The suspension notice stated that the matter would be investigated further when McMillan returned from the suspension. During McMillan’s suspension, another DPW employee, Todd Godfrey, came to Perkins and told him that McMillan had made a threatening remark after Leask had been taken to the urgent care center on September 8. Perkins told Godfrey to write a statement, and Godfrey wrote that McMillan had told him that he and Leask would have “severe words” after work. On September 17, McMillan met with Perkins and Palma, and his suspension was extended to September 23 to allow for further investigation of this remark. Perkins recommended to Palma that McMillan be terminated. On September 23, Perkins was notified that he was being terminated due to “lack of management skills and communication with your subordinates.”

#### Discussion and Conclusions of Law:

Section 10(1) (c) of PERA prohibits a public employer from discriminating against employees in order to discourage or encourage membership in a labor organization. Section 10(1) (c), like Section 8(a) (3) of the National Labor Relations Act, 29 USC 150 et seq, has two basic elements: (1) discrimination, and (2) motive to discourage or encourage union activity. *Midwest Television, Inc*, 343 NLRB 748, 752 (2004). The ultimate burden is on the charging party to prove both that he was discriminated against and that the employer’s motive was unlawful. However, the Commission uses a burden-shifting analysis in discrimination cases. In order to establish a prima facie case of unlawful discrimination, the charging party must



demonstrate: (1) the existence of union or other activity protected by PERA; (2) employer knowledge of the union or other protected activity; (3) an adverse employment action; (4) employer anti-union animus or hostility toward the exercise of its employees' protected rights; and (5) that this animus was at least a motivating factor in the alleged discriminatory action. *Southfield Pub Schs*, 22 MPER 26 (2009); *Waterford Sch Dist*, 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551-552. Anti-union animus and a causal relationship between the animus and the alleged discrimination can be demonstrated by direct or circumstantial evidence. If the charging party can establish that union activity was a factor in the action taken against him, the burden shifts to the employer to produce credible evidence of a lawful motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Schs*, 125 Mich App 71, 74 (1983); *NLRB v Wright Line, a Division of Wright Line, Inc*, 662 F 2d 899 (CA 1, 1981).

McMillan asserts that Respondent discharged him in September 2009 because of his union activity, which consisted of signing a union authorization card, but primarily because it mistakenly believed that he had initiated the union organizing campaign. The fact of this campaign and that Respondent learned of it on or around March 16, 2009 is not in dispute. According to McMillan, after Respondent learned of the union activity taking place at the board meeting on March 16, Perkins approached him and told him that Palma suspected him of being behind it. This statement, as McMillan described it, carried an implicit threat that Palma would retaliate against McMillan if the activity continued. Moreover, according to McMillan, Perkins made the threat more explicit by telling him that "he didn't need to lose his job over union activity." The threat conveyed by Perkins was reinforced several days later when, according to McMillan, Palma came out to the maintenance shop, said something to McMillan about the union activity, and refused to accept McMillan's protestations that he was not involved. According to McMillan, after McMillan received his suspension notice on September 14, 2009, he had a conversation with Palma in which Palma again confirmed that he believed McMillan had initiated the union activity and also made a negative comment about the union.

I credit McMillan's testimony as to these three conversations. I found McMillan's account of these conversations believable, and his surprise and increasing frustration when Palma and Perkins did not support his account of events seemed genuine. By contrast, the Palma's testimony, and Perkins testimony on this issue, was evasive. Perkins denied that he had overheard any township official threatening retribution against McMillan, but not that he himself implied to McMillan that union activity would put his job at risk. I did not find believable Palma's assertion that he paid little attention when told that Respondent's employees were organizing, or that he said nothing to employees when they raised the topic of unions except "it's your choice." Moreover, Palma's testimony that there was no discussion of unions when McMillan came to his office on September 14 conflicted with Johnson's version of the conversation. Like Perkins, Palma did not deny making the specific remarks attributed to him by McMillan.

I find that Perkins and Palma believed that McMillan was instrumental in the union organizing effort, that Palma and Perkins were hostile to this effort, and that on March 17 Perkins impliedly threatened McMillan by telling him that he didn't need to lose his job over the union activity. Despite these findings, however, I conclude that McMillan failed to establish that

Respondent's belief that McMillan was involved in the union activity was a motivating factor in its decision to discharge him. I note that Perkins' concern about McMillan's treatment of other employees predated the union organizing effort. On March 2, 2009, before the March 16 board meeting which brought the union activity to light, McMillan was given a reprimand for his conduct toward Leask and warned that he would be suspended if Perkins discovered that he was retaliating against Leask for complaining about him. Shortly thereafter, Respondent decided that McMillan was involved in organizing a union. However, it did not discipline him again immediately, even though Leask's continuing complaints that McMillan was being too hard on him after might have provided Respondent with an excuse. In fact, in August 2009 Perkins rated McMillan's performance more favorably than he had in the past, although Perkins continued to criticize the way McMillan addressed other employees.

McMillan was not disciplined again until September, 2009, after the incident with Leask on September 8. As I stated in my findings of fact, I credit Leask's testimony regarding this incident. The complaints Leask made to Perkins on September 8 do not appear to be substantially different from those Leask had made earlier. However, Leask was genuinely ill when he went to Perkins' office, and Perkins appears to have been concerned that McMillan might have been the cause. In addition, Leask later reported to Perkins that McMillan had used an obscenity in referring to Perkins' administrative assistant; an employee told Perkins that McMillan had threatened to have "severe words" with Leask after work; and McMillan denied that anything had happened between Leask and himself. I conclude, based on the record as a whole that the reasons Respondent gave for McMillan's termination – that he could not communicate or get along with his subordinates – were not a pretext, and that Respondent's belief that McMillan had initiated the union activity the previous spring was not a factor in his discharge. I recommend, therefore, that the Commission issue the following order.

**RECOMMENDED ORDER**

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern  
Administrative Law Judge

Dated: \_\_\_\_\_