STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent

Case No. C06 D-081

-and-

AFSCME LOCAL 207,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Andrew Jarvis, Esq., City of Detroit Law Department, for Respondent

Scheff and Washington, PC, by George Washington, Esq., for Charging Party

DECISION AND ORDER

On December 05, 2008, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
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

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APPEARANCES:

Andrew Jarvis, Esq., City of Detroit Law Department, for Respondent

Scheff and Washington, PC, by George Washington, Esq., for Charging Party

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 September 24 and December 3, 2007, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Respondent on February 7, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

AFSCME Local 207 filed this charge against the City of Detroit on April 6, 2006 alleging that it violated Sections 10(1)(a) and (c) by disciplining Peavy Horton for conduct protected by Section 9 of the Act. Horton is employed in Respondent's public lighting department (the department) as a street light maintenance worker. In 2006, Horton was a member of Charging Party's executive board and an alternate steward. On March 13, 2006, Horton was suspended for three work days for alleged improper conduct during an employee safety meeting. On March 17, 2006, Horton was suspended for five work days for allegedly refusing to attend a meeting with a department superintendent without a union representative.

Findings of Fact:

The March 13, 2006 Suspension

Michael Mulvey became the overhead lines safety supervisor in the public lighting department in late 2005. Mulvey took this position after developing a disability that prevented him from doing his previous job as a cable splicer; the symptoms of his condition included increased irritability. As overhead lines safety supervisor, Mulvey met periodically with the employees who worked on the street lighting system to discuss safety issues. In early March 2006, Mulvey was notified by his supervisor that MIOSHA had observed line repairmen working in "bucket" trucks high above the street without the required safety harnesses and helmets. When Mulvey met with a MIOSHA representative, he was told that the department would be fined and would also be required to conduct a safety meeting to remind employees to use their equipment.

Mulvey scheduled a safety meeting for March 7, 2006. Attending this meeting were about eight department supervisors and managers and approximately thirty nonsupervisory employees from four or five different bargaining units. Horton was seated near the back of the room. Horton raised his hand when Mulvey began to speak and Mulvey told Horton to put his hand down because he was not answering any questions right then. According to Horton, he said that he preferred to keep his hand up in the air. Horton testified that he wanted to be sure he was the first person allowed to ask a question. According to Horton's immediate supervisor, James Deener, Horton said that he was "just stretching," and everyone laughed.

Horton kept his hand in the air as Mulvey began to talk but eventually lowered it. Mulvey explained that MIOSHA was fining the department for allowing employees to work without helmets and harnesses. He said that the department was not going to stand for this type of conduct and that employees who were not wearing the appropriate equipment would be given time off. Mulvey also said that he believed that some department employee had called MIOSHA to report the equipment violations. Mulvey testified without contradiction that when he stated that he was the safety officer, Horton interrupted and said loudly that Mulvey was not the safety officer. Mulvey responded in a loud voice that since the safety officer had been laid off he was doing both jobs. Mulvey admitted that Horton's remark "got his goat" because he felt that Horton was challenging his right to hold the meeting. According to Respondent general foreman John Miller, Horton told Mulvey that he could not be both the safety supervisor and the safety officer. The two men argued briefly until one of the supervisors said, "Let's move on," and Mulvey continued with his presentation.

A line repair employee raised his hand and Mulvey recognized him and answered his question. Another line repair employee, one of the employees who had been observed by MIOSHA working without a harness or helmet, then raised his hand and Mulvey also answered his question. Horton put his hand back up in the air, but Mulvey did not recognize him. Mulvey testified that he intentionally ignored Horton's raised hand because Horton had a tendency to "harp on the same things over and over," and he did not want Horton to speak until the end of the meeting.

After Mulvey had answered the second employee's question, Horton spoke up without being recognized. He asked Mulvey if the department had chin straps for safety helmets so that they would not blow off. According to Horton, he also said that in his area employees had to take off their gloves to work on a fixture because they had not been supplied with the proper gloves. All Respondent's witnesses testified, and I credit their testimony, that Mulvey told Horton that he would talk to him later in his office about the chin straps, but that Horton continued speaking. According to Mulvey, when he said he did not know if they had chin straps, Horton said that he was not going to wear his helmet without a chin strap because when he went up in the bucket it blew off in the wind. Mulvey responded that this was no excuse for not wearing a helmet. Miller testified that Horton asked what he was supposed to do if his helmet blew off, and other employees started to speak up, saying things like, "Well, just bring another hard hat, dummy," and "Go pick it up."

Both Mulvey and Horton were speaking in loud voices during this exchange. Mulvey began moving across the room towards Horton. As he walked, Mulvey shook his finger and said that he was going to continue with the meeting, that Horton was to stop interrupting, and that he was going to see that Horton was disciplined. Horton said that this was a safety meeting and that he wanted to ask his questions about safety. Respondent's witnesses testified, and I credit their testimony, that Horton got up and moved toward Mulvey until the two men were about six feet apart in the middle of the room. According to Mulvey, Horton said, "Go for it," or "Come on and do it." However, since none of Respondent's other witnesses recalled these remarks, I do not credit Mulvey's testimony on this point. When the two men had reached the middle of the room, Mulvey turned to Horton's supervisor, Deener, and asked him to do something. Deener testified that Mulvey said, "Your supervisor is here, and I'm putting you on notice, and I want to have you written up for disrupting a meeting." One of the supervisors announced that the meeting was over and the employees left.

After the meeting, Mulvey wrote down his version of what had occurred and turned it in to his supervisors. On March 13, Horton was called to the office of Johnny Williams, the department's superintendent of construction and maintenance, and given a three day suspension for improper conduct at the March 7 meeting. Horton filed a complaint with MIOSHA about this discipline, and Charging Party filed both a grievance and this unfair labor practice charge. On June 9, 2006, Horton was notified that, in settlement of his MIOSHA complaint, his suspension was being reduced to a written warning. Horton was reimbursed for the wages he lost on March 13, 14, and 15, but the warning remained in his file.

The March 17, 2006 Suspension

Street light maintenance employees, who mostly work out on the streets, have department-issued cell phones to use for emergency communications. The phones also track the location of the employee. When the phones were first issued to employees, superintendent Williams passed them out himself at a meeting. Although in March 2006 the phones were not working reliably, they were part of the street light maintenance workers' equipment. When Horton left work on March 12, 2006 to serve his three-day suspension, he was required to hand his phone over to his supervisor Deener.

Horton returned to work on March 16. Sometime between 8:15 and 8:30 am that morning, Williams told Deener to have Horton come to Williams' office to pick up his phone. Horton's version of what happened that morning was as follows. On a normal day, Horton waits with other street maintenance workers for a work assignment, loads his truck with the necessary equipment, and leaves the facility for the street. On March 16, Brian Jones, another street maintenance worker, was acting foreman and was handing out work assignments. Instead of giving Horton an assignment, Jones told Horton that he had a meeting with Williams at 10:00 or 10:30. He did not tell Horton what the meeting was about. Horton testified that when an employee is called to meet with Williams, it usually means that he is going to be disciplined. Horton told Jones that he needed a union representative. Jones said he would give the message to Deener. Jones then left, leaving Horton sitting in the assignment area. Without any assigned work to do, Horton wandered around the lighting shop area waiting for Deener. Sometime between 9:30 and 9:45, Deener found him and told him that he had to meet with Williams at 10. Horton told Deener that he needed a union representative, but Deener told him that his steward was not there. Horton said to Deener that he knew that this was not true, as he had seen the steward that morning.

According to Horton, he left Deener and telephoned Charging Party's office on his personal cell phone. He was told that Charging Party vice-president Andre Batie would call him back. Shortly before 10, as Horton was walking toward Williams' office for the meeting, Batie called him on his cell. Williams, Batie and Horton then had a three-way conversation in Williams' doorway. Horton told Batie that Williams was trying to force him to have a meeting right then. Williams told Batie that Horton did not need a steward because this was not a disciplinary meeting. Batie said that he was in a meeting, but that since Horton said he needed a union representative, Batie would be over by noon. Horton was standing in Williams' doorway when Batie hung up, and testified that Williams told him to "get the hell out." Horton left the office area and went back to the shop.

Deener and Williams both testified at the hearing, and Respondent also introduced a statement that Deener prepared about this incident and gave to his supervisor later in the day on March 16. However, there were significant differences between Deener's statement and his testimony on the witness stand. According to his statement, Deener spoke to Horton shortly after Williams told Deener to have him come to his office around 8:15. According to the statement, Horton said at that time that he would not meet with Williams without a union representative. Deener gave this message to Williams, who told Deener that the meeting was not disciplinary. According to his statement, Deener went back to the shop to relay this to Horton, but could not find him. About fifteen minutes later, he returned, saw Horton, and told him what Williams had said. According to the statement, Deener asked Horton if he was refusing a direct order, and Horton said no, but "gave some explanation." Horton then went to make a phone call and Deener walked away. According to Deener's statement, Horton did not go to Williams' office until approximately 45 minutes to one hour after Deener had first told him to do so.

In his testimony, however, Deener admitted that he initially told Jones to tell Horton that he needed to come to Williams' office to pick up his phone. Jones did not testify. Deener testified that sometime after 9:00 am, Jones told him that he had "had a talk" with Horton. Since Horton had not come to his or Williams' office, Deener went looking for him. As he said in his

statement, Deener testified that he walked around the shop and could not find Horton. Fifteen minutes later, he returned to the shop and saw Horton. According to Deener's testimony, this was sometime between 9:15 and 9:30. It was at this point, according to Deener's testimony, that Horton told him he would not meet with Williams without a union representative. Deener testified that he told Williams what Horton had said, Williams told Deener that this was not a disciplinary matter, and Deener went back to Horton and told him that all Williams wanted was to give him his phone back. According to Deener's testimony, Horton didn't respond, but walked away to make a phone call. Deener testified that he himself walked in the other direction, and that he next saw Horton when he came up to Williams' office.

Williams' testimony was consistent with Deener's statement, but not his testimony. Williams recalled that he told Deener at about 8:15 to have Horton report to his office to pick up his phone. A few minutes later, Deener came back and told him that Horton wanted a union steward. Williams told Deener to tell Horton that no discipline was being issued. Deener returned, saying that he could not find Horton. According to Williams, Horton did not come to his office until around 9:55.

Based on the inconsistencies in the testimony of Respondent's witnesses, and also upon the demeanor of the witnesses at the hearing, I credit Horton's version of events of that morning, including his testimony that no one told him that Williams wanted to see him to give him back his cell phone. As noted above, on the witness stand Deener confirmed Horton's testimony that Deener relied on Jones to tell Horton that he was supposed to meet with Williams on the morning of March 16. Nothing in the record contradicts Horton's testimony that Jones told him that the meeting was at 10 or 10:30, and that Jones did not tell him what the meeting was about. According to Deener's testimony, he did not himself speak to Horton until after 9:15. I also noted that Deener testified that he told Horton that Williams only wanted to give him his phone, Deener's statement does not indicate that he told Horton why Williams wanted to see him.

After Williams told him to leave his office, Horton went back to the assignment area and stayed there until about noon. No supervisor approached him during this period. At noon, he decided to leave the facility and get some lunch. In the parking lot, he met Batie arriving. A security guard walked up to the two men and told Batie that Williams had asked Batie to come see him alone. Batie asked Horton if Horton wanted him to meet with Williams, and Horton told him to see what Williams wanted. Horton returned to the building, and Batie went to Williams' office. Williams told Batie that he wanted to give Horton a phone, that Horton would not take it, and that Williams was going to charge him with insubordination. Before leaving the building, Batie found Horton and told him what Williams had said. Batie and Horton both testified that Horton told Batie that no one had said anything to him about a phone, and that he had wanted a union steward because he did not know what the meeting was about.

Sometime that day, Williams mentioned to general manager Valeria Wiggins that he had been looking for Horton that morning. She told him that she had seen Horton walking by her office several times that morning. Wiggins' office is on the other side of the building from the lighting shop. Later that day, Wiggins wrote Williams an e-mail stating that she had seen Horton passing by at 9:35 and again about ten or fifteen minutes later.

On March 17, 2006, Horton was given a five work day suspension for insubordination and for being out of his work area on the morning of March 16.

Discussion and Conclusions of Law:

The March 13 Suspension

Charging Party alleges that Respondent violated of Sections 10(1)(a) and (c) of PERA by disciplining Horton for speaking out at the March 7 safety meeting because in doing so Horton was carrying out his duties at union steward and was thus engaged in union activity protected by Section 9 of the Act.

Because tempers may become heated and harsh words exchanged in the course of grievance meetings, collective bargaining session and other activity protected by the Act, both the Commission and the National Labor Relations Board have long recognized that the protections afforded by Section 9 of PERA and Section 7 of the National Labor Relations Act (NLRA), 29 USC 150 et seq, would be illusory if employees were held to the same standards of conduct while engaged in these activities as when dealing with their supervisors in the general workplace. Therefore, when employees are disciplined for conduct which is part of the res gestae of protected concerted activity, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service. *Consumers Power Co,* 282 NLRB 130 (1986). See also *Bettcher Manufacturing Corp,* 76 NLRB 526, 527 (1948); *Crown Central Petroleum Corp v NLRB,* 430 F2d 724, 730 (CA 5, 1970). Rude or insulting remarks for which an employee could legitimately be disciplined if made in the course of the daily working relationship are thus protected under PERA when made in the course of protected concerted activity. *Genesee Co Sheriff's Dept,* 18 MPER 4 (2005); *Baldwin Cmty Schs,* 1986 MERC Lab Op 513. The Commission has held that an employee engaged in protected activity may lawfully be disciplined only when his or her behavior is so flagrant or extreme as to render that individual unfit for future service. *Isabella Co Sheriff's Dept,* 1978 MERC Lab Op 689, 174; *Unionville-Sebewaing Area Schs,* 1981 MERC Lab Op 932,934.

The first issue is whether Horton was engaged in activity protected by the Act when he spoke at the March 7, 2006 safety meeting. Respondent held the March 7, 2006 safety meeting because MIOSHA had directed it to do so and for the specific purpose of reminding employees to use required safety equipment. However, in addition to conveying information, Mulvey answered questions from several employees. During this meeting, Horton, Charging Party's alternate steward, asked several question and raised safety issues of potential concern to members of his unit and other employees. Although the specific issues he raised were not ones that Mulvey wanted to discuss at that time, I find that Horton was engaged in activity protected by the Act when he sought, as a steward, to air these concerns before other employees and supervisors in this meeting.

During the course of the March 7 meeting, Horton refused Mulvey's request that he put his hand down, interrupted Mulvey several times by speaking without being recognized, and questioned Mulvey's authority. I find that Horton was more than simply rude. Rather, the

evidence indicates that he deliberately sought to provoke Mulvey, whom he knew to have a short temper. As discussed above, however, the Act protects uncivil behavior when it occurs in the course of activity protected by Section 9. For example, in *Unionville-Sebewaing Area Schs,* 1981 MERC Lab Op 932,934, the Commission found that an employer could not lawfully discharge an employee who, while discussing working conditions during a meeting with the school superintendent and other employees, first called the superintendent a liar and then said something like, " I guess I'll have to hit you." I conclude the Horton's behavior at the March 7, 2006 was not so extreme as to remove him from the protection of the Act or render him unfit for future service. I conclude, therefore, that Respondent violated Sections 10(1) (a) and (c) of PERA when it disciplined Horton for his conduct at the March 7, 2006 safety meeting.

The March 17 Suspension

In *Univ of Michigan,* 1977 MERC Lab Op 496, the Commission adopted the rule set forth in *NLRB v Weingarten*, 429 US 251 (1976) that an employee has the right to have a union representative present when interviewed by his employer when the employee reasonably believes that the interview may lead to discipline. The employee must invoke the right by requesting union representation. The employer then may grant the request, present the employee with the option of continuing the interview without representation, or foregoing the interview altogether, or deny the request and terminate the interview. *Montgomery Ward & Co*, 273 NLRB 1226, 1227 (1984); *New Jersey Bell Telephone Co,* 300 NLRB 42 (1990). An employee who reasonably believes that discipline may result from a meeting may refuse to participate in the meeting without union representation, and an employer who disciplines the employee for refusing to attend the meeting under such circumstances violates Section 10(l) (a) of PERA. *Wayne-Westland EA v Wayne-Westland CS*, 176 Mich App 361 (1989), affg 1987 MERC Lab Op 624. See also *Charter Twp of Clinton,* 1995 MERC Lab Op 415 (no exceptions).

The fact that an employee is told by his or her employer prior to a meeting that discipline will not result is relevant to the reasonableness of the employee's belief that he or she might be disciplined. *City of Oak Park,* 16 MPER 13 (2003) (no exceptions); *City of Detroit,* 2000 MERC Lab Op 302 (no exceptions). See also *Spartan Stores, Inc v NLRB*, 628 F2d 953 (CA 6, 1980). However, "reasonable belief" is measured by objective standards under all the circumstances of the case. *Quality Mfg Co*, 195 NLRB 197 at 198 (1972); *Weingarten*, at 258. In *Wayne-Westland*, the Commission found that under the circumstances, an employee had a reasonable belief that his interview with his supervisor would lead to discipline even though the employer assured him to the contrary.

Respondent's witnesses testified that Williams wanted to meet with Horton on the morning of March 16, 2006 solely for the purpose of giving him back his cell phone before he went out on an assignment. Nothing in the record contradicts this testimony. However, according to Horton's testimony, which I have credited, Horton was not told the purpose of this meeting. When he requested the presence of a union representative at the meeting, Horton had just returned from a three day disciplinary suspension. Instead of being given an assignment that morning, Horton was told he was to meet with Williams. This meeting was scheduled more than an hour after his shift began, and Horton was not given any assignment or instructions for what to do with his time before the meeting. Williams was not Horton's immediate supervisor and

Horton testified credibly that when employees were called to meet individually with Williams it was usually for the purposes of discipline. I find that under the circumstances of the case, Horton had a reasonable belief that he might be disciplined as a result of the meeting. Accordingly, I find that Horton had the right to insist on the presence of a union representative at this meeting and that Horton could not be disciplined for insubordination for refusing to meet without one. [1] I conclude, therefore, that Respondent unlawfully suspended Horton on March 17, 2006 because he refused to attend a meeting with Williams without a union representative on March 16, 2006.

In accord with the findings of fact and conclusions of law set forth above, I find that Respondent violated Sections 10(1)(a) and (c) of PERA by disciplining Peavy Horton on March 13 and March 17, 2006 for union and other activity protected by Section 9 of PERA. I recommend that the Commission issue the following order.

[1] According to Horton's credited testimony, he never refused to meet with Williams without a union representative. Horton went to Williams' office at the time he had been told there was a meeting even though there was no union representative available. After their conversation with Batie, Williams told Horton to leave his office.

RECOMMENDED ORDER

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

1. Cease and desist from:

   a. Disciplining or otherwise discriminating against employees because they have engaged in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection.

   b. Interfering with, restraining or coercing employees in the exercise of their rights as guaranteed by Section 9 of PERA, including the right to insist on union representation at a meeting with a supervisor when the employee reasonably believes that the meeting may lead to discipline.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Rescind the written warning issued to Peavy Horton for conduct on March 7, 2006 and the five day suspension issued to him on March 17, 2006; remove all references to these disciplinary actions from Horton's personnel file and other records; and make Horton whole for loss of pay for the five day suspension by paying him a sum equal to that which he would have earned during the suspension, plus interest at the statutory rate.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____