

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

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C07 B-027

-and-

AFSCME COUNCIL 25, LOCAL 207,
Labor Organization-Charging Party.

APPEARANCES:

City of Detroit Law Department, by Bruce A. Campbell, Esq., for the Public Employer

Scheff & Washington P.C., by George B. Washington, Esq., for the Labor Organization

DECISION AND ORDER

On December 15, 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. Dardarian, 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:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C07 B-027

-and-

AFSCME COUNCIL 25, LOCAL 207,
Labor Organization-Charging Party.

APPEARANCES:

Bruce A. Campbell, Esq., City of Detroit Law Department, for Respondent

Scheff & Washington PC, by George B. 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 or the Act), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on January 23, 2008 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 the transcript of the hearing and exhibits introduced by both parties, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

AFSCME Council 25, Local 207 filed this charge against the City of Detroit on February 13, 2007. Charging Party represents service guards employed in Respondent's department of water and sewerage (the department) at its wastewater treatment plant. It alleges that between August 2006 and January 2007, two department supervisors – Terry Byes and Terrance Coombs – unlawfully coerced its members in the exercise of their rights under Section 9 of PERA and discriminated against them because of their union activities in violation of Sections 10(1)(a) and (c) of the Act. Specifically, Charging Party alleges that in late August 2006, Byes suspended the practice of allowing a guard to leave the premises at lunchtime to pick up food for other employees because Charging Party and its steward, Carmella Allen, had filed a

grievance.¹ Charging Party also alleges that on August 24, 2006, Byes and Coombs forcibly detained service guard Marlon Sigmon in Byes' office and refused to let him have a union representative. Charging Party alleges, in addition, that Byes and Coombs later transferred Sigmon to a job with fewer overtime opportunities in retaliation for his assertion of his rights. Finally, Charging Party alleges that on January 1, 2007, Byes ordered Allen to perform a grueling work assignment that no one had been assigned to do for years because she asserted her rights under the seniority provisions of the contract and then physically assaulted her when she attempted to get another supervisor to intervene.²

Findings of Fact:

Byes' Suspension of the "Special Detail"

In 2006, Byes was a senior service guard at Respondent's wastewater treatment plant and the immediate supervisor of service guards on the day shift at that facility. Coombs' title was supervising service guard. Coombs was Byes' immediate supervisor. Allen became a service guard in approximately 2001 and shortly thereafter was transferred to the day shift. In the spring or summer of 2006, Allen was elected Charging Party alternate steward. Shortly after the election, Byes said to Allen, "Oh, so you're the alternate now; somebody's going to have problems out of you now."³

A few months after Allen's election as alternate steward, service guard Squire Richardson resigned as Charging Party's steward and Allen took over the job. On August 14, 2006, shortly after she became the steward, Allen was at work when she received a call from Richardson stating that he had not had an afternoon break and that Byes had refused to let him leave his post to use the rest room. Allen telephoned Byes and reminded him that service guards were supposed to get two fifteen minute breaks. Allen asked if there was some emergency or if he was short handed. Byes told her that he was running the shift, and if he said that Richardson was not getting a break he was not getting one. After calling another union officer to make sure she was right, Allen called Byes back and insisted that Richardson be allowed to leave his post to use the bathroom. Allen and Byes argued for a few minutes. Allen then hung up the phone and called Coombs. Coombs told Allen that Byes had the right to decide that Richardson could not take a break because the department was a paramilitary organization. Allen replied that they were not in the military and that what Coombs had said was ridiculous. Shortly thereafter,

¹ Allen is referred to in this decision by her name at the time of the events involved in the charge even though by the time the charge was heard in January 2008 she had changed her name to Thompson.

² In his opening statement at the hearing, Charging Party's counsel also referred to an alleged threat made by Byes to Allen shortly after Allen became steward in the summer of 2006. This threat was not mentioned in the charge. Moreover, Allen's testimony established that this remark was made when she became alternate steward in about June 2006, more than six months before the charge was filed. Pursuant to Section 16(a) of PERA, an unfair labor practice charge that is filed more than six months after the commission of the alleged unfair labor practice is untimely. The limitation contained in Section 16(a) of PERA is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004); *Police Officers Labor Council, Local 355*, 2002 MERC Lab Op 145; *Walkerville Rural Cmty Schs*, 1994 MERC Lab Op 582.

³ Byes did not testify at the hearing. Allen was the only witness testifying to this and subsequent exchanges between her and Byes.

Charging Party filed a grievance alleging that Byes had improperly refused to allow Richardson to take his break.

Shortly after the grievance was filed, Allen asked Byes, "Are we all squared away with Richardson getting his break?" Byes replied, "Yeah, he'll get his break, and there won't be no more special details, so don't ask me for no more lunch runs." By "special detail," Byes was referring to the practice of allowing one service guard to leave the facility at lunchtime to pick up food for other employees. Allen said that Byes could give employees multiple short breaks if he needed to. She said, however, that if the breaks did not total thirty minutes, the union would have to file another grievance. Byes replied that Allen "could file all the grievances she wanted to," but that there was no longer going to be a special detail.

Soon after his conversation with Allen, Byes posted a list of break times for each employee. The first scheduled break was at 8:30 am. Several employees scheduled to take their breaks at this time complained to Allen that this was too early in the shift for a break. When Allen mentioned this to Byes, he told her, "You're a union rep. File a grievance." For two or three months after this conversation, service guards were not allowed to leave the facility at lunch time to pick up lunches for other employees on Byes' shift. After that, according to Allen, special details began appearing on the schedules again.

Incident between Sigmon and Coombs and Byes on August 24, 2006

On August 24, 2006, service guard Marlon Sigmon called the wastewater plant's dispatcher to report that a contractor with an expired identification card was trying to enter the plant. It was Sigmon's understanding that identification cards were good for one year after the expiration date, but he called the dispatch office to find out if this particular contractor's access had been suspended. Coombs was in the dispatcher's office at the time of the call. When the dispatcher told Sigmon that an expired card was an expired card, Sigmon replied that this was not what he had been told. Overhearing this, Coombs picked up the phone. According to Coombs, he told Sigmon that if a card was expired it was to be confiscated, and that Sigmon had never been told otherwise. Sigmon testified that Coombs began berating him over the phone in front of the dispatcher. According to Sigmon, Coombs yelled, "You don't know your job; you don't know what you are doing." According to Sigmon, he tried to explain that he had been told by Coombs and other supervisors that the identification badges were good for a year after expiration, but Coombs would not let him get a word in edgewise.

After Coombs hung up, Sigmon called Roger Willis, the chief of security for the department, to complain about Coombs' conduct. When Willis did not seem sufficiently concerned, Sigmon told Willis that he was going to file a grievance. Willis told Sigmon to do what he had to do, but added that a grievance wasn't going to do anything. Half an hour later, Willis called Sigmon back and suggested that he and Coombs sit down and talk. Sigmon told Willis that he did not feel comfortable doing that. Sigmon then approached Allen, his steward, and they discussed filing a grievance. In the meantime, Willis called Coombs to tell him about Sigmon's complaint. After the two men had discussed the incident, Willis suggested that Coombs and Byes sit down with Sigmon and go over the identification card policy. Coombs agreed.

At the end of their shift on August 24, Sigmon and Allen entered Byes' office together to put their equipment away before punching out. When Sigmon and Allen came in, both Byes and Coombs were there. Allen went into the hallway, but Coombs told Sigmon to sit down because they needed to talk. Standing just inside the doorway, Sigmon said that it was time for him to leave for the day. Coombs testified that he told Sigmon that they needed to have clarity on the issue they had discussed that morning. Sigmon testified that Coombs simply repeated that they needed to talk and told him again to sit down. With Allen standing outside in the hall, Sigmon said that he needed a union representative. Byes and Coombs told him that he was not being disciplined. Sigmon then moved to exit the room. He testified that when he tried to leave, Coombs grabbed him by the bicep, pulled him into the office, and slammed the door. Coombs then stood in front of the door so that Sigmon could not leave. According to Sigmon, he began shouting and, after a minute, dodged around Coombs and managed to open the door and escape into the hall. Coombs testified that when Sigmon started to leave the office, he (Coombs) reached over and pushed the door shut. According to Coombs, Sigmon simply said that he was not staying, opened the door, and walked out. Coombs denied that there was any shouting. Both men agree that Coombs called after Sigmon that he was not to punch out. However, after talking briefly to Willis on the phone, Coombs told Sigmon to leave. The entire incident took about three or four minutes.

Allen observed the above incident from just outside Coombs' office. Allen testified that as Sigmon was standing inside Coombs' doorway, she said, "Are you following me to the union hall, Sigmon?" Allen saw Coombs grab Sigmon and Allen then used her cell phone to call the union hall. A DVD from a surveillance camera positioned in the hall outside Byes' office showed Sigmon coming out of the office, standing briefly in the doorway with the left side of his body still in the room, and then moving rapidly sideways back into the office. Because of the camera angle, it is not possible to tell whether Sigmon moved voluntarily or was pulled. However, during the period Sigmon was in the office, the film showed an unidentified employee turning his head in the direction of the office as he passed through an adjacent area, as if some noise from the office had attracted his attention. Allen's and Sigmon's testimony regarding the August 24 incident was consistent with the film from the surveillance camera. Based on this evidence, and the demeanor of the witnesses at the hearing, I credit Allen's and Sigmon's testimony regarding the events of August 24, 2006.

Charging Party filed a grievance protesting Coombs' use of abusive language and physical violence. At the end of August or beginning of September 2006, Sigmon was temporarily reassigned from the wastewater treatment facility to another location. At the wastewater treatment facility, Sigmon had worked some overtime, while employees at the second location were not assigned overtime while he was working there. Sigmon remained at the second location for about nine or ten months. At the end of that period, members of Charging Party's unit were allowed to bid by seniority on assignments by shift and location, and Sigmon was bumped by a more senior employee to another assignment at the wastewater treatment plant.

Involuntary transfers of security guards are not explicitly permitted by the union contract. However, Charging Party and Respondent sometimes agree to allow an employee to be temporarily reassigned because of personality conflict on the job. In this case, Respondent

human resources consultant Brian Tennille testified that he made the decision to transfer Sigmon so that he and Coombs would not have further contact. Tennille informed Charging Party president John Riehl of this transfer, although Riehl did not explicitly agree to it.

Incident between Byes and Allen on January 1, 2007

Under Charging Party's contract, service guards receive extra money for working on a paid holiday and opportunities for holiday work are distributed by seniority. January 1, 2007 was a paid holiday. Because of her seniority, Allen should have been assigned to work that day. A week or so before the holiday, Allen noticed that her name was not on the work schedule. She mentioned this to Byes, and Byes told her that he would get it straightened out. A few days later, Allen noticed that the schedule had still not been changed and that a female friend of Byes who had much less seniority was on the schedule. After Allen reported the situation to another supervisor, Byes' friend's name was scratched out and replaced with Allen's.

On January 1, Allen was working at one of the guard posts at the entrance to the facility when Byes drove in through the gate. A few minutes later, Byes called Allen and told her to come to his office. When Allen arrived, Byes told her that he was assigning her to do foot patrol. Allen did not understand, and asked him if he meant a building check. A building check involves walking around to various locations inside the building. Byes said no, that she was going to walk around the outside perimeter of the treatment facility. This was a distance of about four miles. Allen stared at him. She said that in all the time she had been at the plant she had never heard of anyone assigned to do that.⁴ January 1 was a cold and dark day, and Allen was six months pregnant at the time. Allen walked away from Byes into the hall, called Coombs on her cell phone, and told him what Byes had said. Coombs told her that he was on his way to the plant. Allen returned to the area outside Byes' office and sat down at a table to wait. When Byes saw her, he came over, pounded on the table, and shouted at her to "get up and walk the fence line." Allen picked up her phone again and asked the dispatcher to send someone to Byes' office right away. Byes yelled, "You are not going to follow a direct order, are you?" and shoved the table into Allen's stomach with his hip. Allen got up from the table and went into the women's locker room to hide from Byes. When Coombs arrived, she asked him to take her to the hospital. Allen remained there for several hours hooked up to a fetal monitor. Allen was required by her health plan to pay \$75 for the emergency room visit.

At Charging Party's request, on March 22, 2007 Respondent and Charging Party held a special conference to discuss Byes' conduct toward Allen, including the January 1 incident and other incidents not covered by the charge. Tennille conducted this conference for Respondent. After investigating Charging Party's complaints, Tennille concluded that there was bad blood between Byes and Allen, and that if Byes had been disrespectful toward Allen, Allen had also been disrespectful toward Byes. According to Tennille, Byes told Tennille and Coombs that he had ordered Allen to "walk the plant," on January 1, 2007 but denied specifically telling her to do this outside the plant. In a written summary of the special conference which he provided to Charging Party, Tennille concluded that there was a misunderstanding between Byes and Allen

⁴ Charging Party president Riehl testified that service guards have not been assigned to walk the perimeter of the wastewater treatment plant since 1995, when Charging Party and Respondent settled a grievance by agreeing that guards would not be required to do this.

about the work assignment. However, shortly after the conference, Byes received a reprimand for using poor judgment on several occasions; among the examples used was the January 1 work assignment. Tennille testified that he did not believe Allen's assertion that Byes pushed a table into her stomach because the table in question was so heavy that he concluded that Byes could not have moved it without picking it up.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to "engage in lawful concerted activities for the purpose of collective negotiation or other mutual aid and protection." Section 10 of the Act prohibits a public employer from retaliating against employees for the exercise of these rights. It is well established that the filing of a grievance based on a provision of a collective bargaining agreement is protected activity under Section 9, as are other actions taken in good faith in an attempt to enforce a right claimed under a collective bargaining agreement. *MERC v Reeths-Puffer School Dist*, 391 Mich 253, 261 (1974).

Allen testified without contradiction to a conversation she had with Byes in late August 2006, shortly after Charging Party filed a grievance protesting Byes' refusal to allow Richardson to take the breaks he was entitled to under the contract. According to Allen, when she raised the break issue, Byes told her that Richardson would get his break but that service guards would no longer be allowed to leave the plant to pick up lunches for other employees. Byes offered no legitimate explanation for linking these two issues. In effect, Byes told Allen that because Charging Party had insisted that he adhere to the collective bargaining agreement, he was withdrawing a privilege that was not in the contract. Byes followed through with his threat and the practice of allowing a special detail was suspended. As shift supervisor, Byes was delegated authority by Respondent to make changes in the work schedule. However, a supervisor cannot lawfully exercise his delegated authority to punish employees because they or their union representative exercise rights protected by Section 9. I conclude that Respondent violated Sections 10(1)(a) and (c) of PERA when Byes suspended the practice of scheduling special details because Charging Party and its steward Allen attempted to enforce the break time provision in the collective bargaining agreement.

According to Allen's uncontradicted version of the events occurring on and leading up to January 1, 2007, Byes was angry at Allen for insisting on her contractual right to a place on the holiday work schedule and displacing Byes' friend. On that date, Byes ordered Allen to walk around the outside of the plant – an assignment that had not been part of the service guards' normal duties for more than a decade and would be especially punishing that day because of the weather and Allen's pregnancy. When Allen, instead of complying, tried to get other supervisors to intervene, Byes lost his temper and assaulted her with a table. I find the evidence clear that Byes assigned Allen to walk the perimeter of the plant because she had insisted on her rights under the seniority clause of the contract. I also find that Byes' further interfered with Allen's exercise of her statutory rights by assaulting her after she failed to comply with his discriminatory order. I conclude that the assault and the work assignment violated Sections 10(1) (a) and (c) of PERA.

On August 24, 2006, according to Charging Party, Byes and Coombs violated Sigmon's *Weingarten* rights by detaining him in Byes' office while refusing his request for a union representative. 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. *Weingarten* rights do not attach when the employer has already decided to discipline the employee and the purpose of the meeting is merely to inform him of that fact. In order to invoke his *Weingarten* rights, the employee must specifically request a representative. The employer then must either 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 the interview 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). "Reasonable belief" is measured by objective standards, taking account of all the circumstances of the case. *Quality Mfg Co*, 195 NLRB 197 at 198 (1972); *Weingarten*, at 258.

As discussed above, I fully credit Sigmon's account of the events of August 24. During Sigmon's shift that day, Coombs berated him in a loud voice in front of another employee for allegedly failing to understand the plant's identification card policy. At the end of his shift, Sigmon was told by Coombs to meet with him and Byes in Byes' office. When Sigmon asked for a union representative, Byes and Coombs told him that he was not "being disciplined." However, they did not tell Sigmon the purpose of the meeting. I conclude that because of his encounter with Coombs earlier that day, Sigmon had a reasonable belief that Byes and Coombs intended to interrogate him regarding department policies and that discipline might result from this interview. As noted above, an employer who disciplines an employee for refusing to participate in a meeting under such circumstances violates PERA. Although Sigmon was not disciplined as a result of the August 24 incident, I conclude that Coombs' attempts to physically prevent Sigmon from leaving Byes' office on August 24 violated Sigmon's *Weingarten* rights and, therefore, violated Section 10(1) (a) of PERA.

Charging Party also alleged that Sigmon was unlawfully transferred from the wastewater treatment plant to another facility with fewer opportunities for overtime in retaliation for his exercise of his PERA rights. However, the record indicates that employees are sometimes transferred, with Charging Party's consent, when there are personality conflicts on the job. Charging Party president Riehl was informed of the transfer but neither Sigmon nor Charging Party raised an objection. I conclude that Charging Part Riehl implicitly agreed to Sigmon's transfer and that the transfer did not violate Sections 10(1) (a) or (c) of PERA.

In sum, I conclude that Respondent violated Sections 10(1) (a) and (c) of PERA on or about August 2006 when it suspended the practice of allowing a service guard to leave the wastewater treatment plant at lunchtime to pick up food for other employees and on January 1, 2007, when Respondent supervisor Terry Byes assigned Carmella Allen/Thompson to walk

around the outside perimeter of the treatment plant and then physically assaulted her. I also conclude that Respondent violated Section 10(1) (a) of PERA on August 24, 2006 when supervisor Terrance Coombs physically attempted to prevent service guard Marlon Sigmon from leaving a meeting after denying his right to a union representative at this meeting. In accord with my findings of fact and conclusions of law in this case, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

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

1. Cease and desist from:

- a. Interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 9 of PERA, including insisting on the enforcement of a collective bargaining agreement and refusing to participate in a meeting with supervisors without a union representative when employees reasonably believe that discipline may result from this meeting.
- b. Retaliating against employees represented by AFSCME Local 207 by removing privileges, giving them unusual work assignments, or otherwise discriminating against them because they or their union have filed grievances or taken other actions to enforce the terms of the collective bargaining agreement.

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

- a. Make AFSCME Local 207 steward Carmella Allen/Thompson whole for monetary losses suffered as a result of senior service guard Terry Byes' assault on her on January 1, 2007, including interest at the statutory rate compounded quarterly.
- b. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees represented by AFSCME Local 207 are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____