STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer - Respondent,

Case No. C07 E-092

-and-

ROBERT J. SKRZYPCZAK, JR.,
An Individual - Charging Party.
_______________________________________/

APPEARANCES:

Barbara Johnson, Esq., Wayne County Corporation Counsel, for Respondent

Robert J. Skrzypczak, Jr., *In Propria Persona*

DECISION AND ORDER

On January 10, 2008, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above case finding that Respondent, Wayne County (County or Employer), did not violate Section 10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) and (c), by terminating the employment of Charging Party Robert J. Skrzypczak, Jr. The ALJ held that the County had a lawful reason for terminating Charging Party's employment and would have done so in the absence of Charging Party's protected union activities. The ALJ recommended that we dismiss the charge in its entirety. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On February 1, 2008, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. A brief in support of the ALJ's Decision and Recommended Order was filed by the County on February 8, 2008. On March 6, 2008, Charging Party filed a Request to Dismiss/Deny Respondent's Brief, contending that Respondent's brief was untimely filed.

In his exceptions, Charging Party contends that the ALJ erred by finding that the County's lawful reasons for discharging him were a greater factor in Respondent's decision to discharge him than his protected concerted activities. Charging Party further contends that the ALJ's review of the matter was incomplete and that the Employer violated Section 10(1)(a) of PERA.

In Charging Party's March 6, 2008 request that we dismiss Respondent's brief, Charging Party contends that Respondent's brief was untimely because it was not filed by February 4, 2008, the deadline set for filing exceptions. While that deadline does not apply to the response to exceptions, we note that Respondent's February 8, 2008 brief is in fact untimely. Charging Party filed a statement of service with his exceptions indicating that he mailed the exceptions to Respondent and to us on January 23, 2008. Pursuant to Rule 176(6) and Rule 183 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.176(6) and R 423.183, Respondent had until February 5, 2008, to respond to exceptions served on January 23, 2008. Respondent has not disputed Charging Party's assertions that its brief was untimely. Charging Party's request that we dismiss Respondent's brief as untimely is therefore granted. Accordingly, we have not considered Respondent's brief.

We have reviewed Charging Party's exceptions and find that the ALJ's Decision and Recommended Order should be modified.

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. Skrzypczak was hired as a safety engineer in Respondent's risk management division. His job duties included investigating health and safety concerns among several designated areas, investigating accidents, and conducting safety training. When first hired in August 2004, Skrzypczak was assigned to perform these duties at various facilities operated by the Employer and was expected to drive himself to those locations during the workday. In March 2005, Skrzypczak was convicted of the felony of fleeing and eluding a police officer. As a result, his driver's license was suspended from May 2005 until May 2006. Nevertheless, Skrzypczak continued to drive himself to his assigned work locations. After Charging Party's supervisor, Maria Saab, learned that Skrzypczak was driving while on duty, she contacted the Employer's personnel department and was told that Skrzypczak could continue to work only if he could perform his duties without driving. Saab also asked another safety engineer to drive Skrzypczak to his assigned work locations. When Saab noticed a reduction in productivity, she changed Skrzypczak's assigned locations to those to which he could walk from the safety engineers' office.

Skrzypczak's new work locations included the Juvenile Detention Facility (JDF), the Wayne County Jail, Respondent's main office building, and other small offices around the area. In January 2006, because of his felony conviction, Skrzypczak was denied the security clearance necessary for him to work in the Jail. Around that time, he also informed Saab that his license suspension would continue past May 2006. Saab told Skrzypczak that, with the exception of the Jail, he would continue to work at the locations to which he could walk from his office.

As part of his duties as the safety engineer assigned to the JDF, Skrzypczak served on the safety committee at that facility, along with various JDF management

representatives and a representative of the Government Administrators Union, Local 409 (Local 409), the union that represents most JDF employees. Skrzypczak, consistent with his committee duties, looked over incident records and generated reports to convey concerns about safety within the JDF. Skrzypczak was alarmed to see that JDF employees were experiencing increased exposure to severe injuries, as well as an increase in the number of assaults/restraint injuries between the years 2004 and 2006.

Skrzypczak began to draft new policies and safety proposals designed to reduce the number of assaults on JDF workers and decrease injuries. Initially, his work was well received, although his proposals were rejected by the safety committee because of statutory constraints on the JDF. Skrzypczak's zealous pursuit of the matter began to strain his relationship with other JDF safety committee members. After several attempts to persuade the committee to accept his proposals had failed, Skrzypczak and Jean Chaplin, the president of Local 409, decided to try to bring these safety issues to higher management. A meeting was scheduled between Chaplin and T. Sturdevant, Respondent's assistant director for child and family services, in late November 2006. Prior to this meeting, Skrzypczak met with Saab and the risk management division director, Jack Underwood, to obtain permission to attend the meeting. Underwood stated that if Skrzypczak were to attend the meeting and continue to attempt to alert higher management to the safety issues, both Underwood's and Skrzypczak's jobs might be in jeopardy. Underwood also told Skrzypczak that he was not to work with Local 409 any longer. By the end of 2006, Skrzypczak's acrimonious relationship with JDF staff had deteriorated further. JDF staff complained about Skrzypczak's abrasiveness and, in December 2006, forwarded an e-mail exemplar to Saab. As a result, in early 2007, Skrzypczak was removed from that assignment.

Inasmuch as his loss of driving privileges prevented Skrzypczak from working at many of the Employer's locations and his felony conviction prevented him from working at the Jail, his removal from the JDF assignment left Skrzypczak with a lighter workload. Therefore, Saab gave Skrzypczak clerical filing work to keep him busy; Skrzypczak protested the assignment, contending that he had sufficient other work to do and that the clerical tasks should be shared with the other safety engineer. In early February 2007, Skrzypczak met with his union representatives in an open area of the employer's main office building to discuss grieving the assignment of the clerical tasks and Underwood's directive that he not talk to Local 409 representatives. However, Skrzypczak decided not to pursue the grievance after that meeting was observed by Respondent's personnel director. On February 15, 2007, when Saab asked Skrzypczak to file four boxes of records, Skrzypczak loudly protested the assignment. After the two of them discussed the matter with Underwood, Underwood agreed with Saab and instructed Skrzypczak to perform the filing assignment. When Underwood later discovered that Skrzypczak had stacked the boxes away and left the building, Underwood viewed that as an act of insubordination. Underwood then investigated the status of Skrzypczak's driver's license, learned that the license had been suspended until March 2008, and discharged Skrzypczak. The discharge was subsequently rescinded because Underwood had not adhered to the collective bargaining agreement procedures for the discharge. However, a

few days thereafter, Skrzypczak was discharged for "improper conduct" and for not being able to perform his duties without a driver's license.

Discussion and Conclusions of Law:

In his exceptions, Charging Party contends that the ALJ's review of the matter was incomplete and that the Employer violated Section 10(1)(a) of PERA. The ALJ found that Charging Party engaged in protected concerted activity as defined by Section 9 of PERA when Skrzypczak and the Local 409 representative repeatedly expressed concerns over safety issues at the JDF and tried to bring those issues to the attention of higher management. The ALJ also found that the Employer was aware of that activity and ordered Skrzypczak to refrain from further contact with Local 409. However, since the ALJ did not address the legal effects of the Employer's order, we find it necessary to do so here. Where an employer expressly prohibits an employee from engaging in union or other protected concerted activity, the employer's prohibition interferes with the employee's Section 9 rights and violates Section 10(1)(a) of PERA. As such a prohibition is inherently destructive of the employee's Section 9 rights, a violation occurs irrespective of the employer's motivation. *Midland Co Road Comm*, 21 MPER 42 (2008) (no exceptions). See also *City of Greenville*, 2001 MERC Lab Op 55; 14 MPER 32028. We find that the Employer interfered with Charging Party's Section 9 rights to engage in protected concerted activity when Skrzypczak was prohibited from having further contact with Local 409. See *New Buffalo Bd of Ed,* 2001 MERC Lab Op 47, 14 MPER 32026 (2001). Accordingly, the ALJ's order must be modified to reflect the Employer's violation of Section 10(1)(a).

In his exceptions, Charging Party also contends that the ALJ erred by concluding that the Employer's stated reasons for his discharge were lawful and were a greater motivating factor in his discharge than his protected concerted activities. We find no error in the ALJ's conclusion on that issue. In her Decision and Recommended Order, the ALJ correctly states the test that must be applied to determine whether the charging party has established a prima facie case of discrimination. As the ALJ explained, to establish a violation of Section 10(1)(c) of PERA, the charging party must first make a prima facie showing that the employer's decision to discharge or otherwise adversely affect an employee was motivated by the employee's union or other protected activity. When a prima facie case of discrimination has been made, the burden then shifts to the employer to demonstrate that it would have taken the adverse action even in the absence of protected activity. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *City of St. Clair Shores,* 17 MPER 27 (2004); *City of Saginaw*, 1997 MERC Lab Op 414, 419; 10 MPER 28051. Ultimately, however, the charging party bears the burden of proof. *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9; 5 MPER 23008.

It was Skrzypczak's efforts to get the JDF to take action on the safety issues, coupled with Skrzypczak's rudeness in dealing with JDF staff that led to the termination of his JDF assignment. Skrzypczak's job required him to work with JDF staff members to resolve the safety issues at the JDF, but his abrasive behavior offended JDF staff members and interfered with his ability to work with them. Inasmuch as that behavior

hampered his ability to do his job at the JDF, we agree with the ALJ that the Employer had a lawful reason for removing Skrzypczak from the JDF assignment and the Employer did not violate PERA by doing so. See *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Univ of Michigan*, 2001 MERC Lab Op 40; 14 MPER 32027 (2001).

Skrzypczak's job duties required him to be able to drive to the Employer's various locations. When Skrzypczak's driver's license was suspended for a year, Respondent took several steps to accommodate him. From May 2005 until February 2007, the Employer tolerated increasing reductions in Skrzypczak's work assignments as the result of Skrzypczak's criminal activity and, finally, as a result of his rudeness in dealing with JDF staff. Then, when his duties were reduced to merely working at the Employer's main office building, and other small offices around the area, Skrzypczak angrily objected to performing the additional clerical duties that had been assigned to fill his time. Around the same time, the Employer discovered that Skrzypczak would be unable to drive, and therefore unable to fully perform his job requirements, for more than another year. The continuing restrictions on Skrzypczak's ability to perform his job duties, coupled with his unwillingness to accept additional responsibilities, constitute a lawful reason for Skrzypczak's discharge. We agree with the ALJ's conclusion that the Employer would have discharged Skrzypczak even if he had not engaged in protected concerted activities. Respondent's decision to discharge Skrzypczak did not violate Section 10(1)(c) of PERA.

We have carefully examined all other issues raised by the Charging Party and find they would not change the result. We modify the ALJ's order and find that Respondent violated Section 10(1)(a) when it instructed Charging Party to have no further contact with the representatives of Local 409. However, we agree with the ALJ that no violation was committed by Respondent's decision to remove Charging Party from the JDF assignment or by Respondent's decision to discharge Charging Party.

ORDER

It is ordered that Respondent Wayne County, its officers, agents, representatives, and successors shall:

1. Cease and desist from:

   a. Requiring or instructing its employees to refrain from, stop, or avoid contacting representatives of the Government Administrators Union, Local 409 or any other labor organization.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them in Section 9 of PERA.

2. Take the following affirmative action in order to effectuate the policies of the Act:

   a. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are

customarily posted. Copies of the notice shall be duly signed by a representative of Wayne County and shall remain posted for a period of thirty consecutive days. One signed copy of the notice shall be returned to the Commission and reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced, or covered by any other material.

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: ____________

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, Wayne County has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order, **WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

> **WE WILL NOT** require or instruct our employees to refrain from, stop, or avoid contacting representatives of the Government Administrators Union, Local 409 or any other labor organization.
>
> **WE WILL NOT** in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 9 of PERA.
>
> **ALL** of our employees are free to organize together or to form, join, or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

WAYNE COUNTY

By: ___________________________

Title: __________________________

Date: ___________

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

STATE OF MICHIGAN
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In the Matter of:

WAYNE COUNTY,
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ROBERT J. SKRZYPCZAK, JR.,
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APPEARANCES:

Barbara Johnson, Esq., Wayne County Corporation Counsel, for Respondent

Robert J. Skryzypczak, Jr., in propria persona

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 18, 2007 before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including exhibits submitted at the hearing, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On May 2, 2007, Robert J. Skrzypczak, Jr. filed this charge against his former employer, Wayne County, alleging that it terminated him for engaging in activity protected by PERA in violation of Sections 10(1)(a) and (c) of the Act. The charge was amended on June 4, 2007. Skryzypczak, a safety engineer, was discharged on or about March 19, 2007. Skrzypczak asserts that he was terminated because he urged the president of the union representing employees at Respondent's Juvenile Detention Facility (JDF) to complain about a safety issue.

Findings of Fact:

Skryzypczak was hired by Respondent as a safety engineer in its risk management division in August 2004. Safety engineers do health and safety inspections, investigate accidents and injuries, and conduct safety training. They also sit on workplace safety committees where they assist employees and managers in resolving workplace health and safety issues. As a safety

engineer, Skrzypczak was a member of a bargaining unit represented by AFSCME Local 1862 (Local 1862).

Respondent employs two full-time safety engineers. Their supervisor, Maria Saab, also works part time as a safety engineer. Saab divides Respondent's approximately sixty-two separate work locations among the safety engineers so that their workloads are approximately equal. The JDF, the Wayne County Jail, and Respondent's fourteen road maintenance yards together take up the majority of the safety engineers' time. When Skrzypczak was first hired, he was assigned to all the road maintenance yards, the Wyandotte wastewater treatment plant, and a number of other locations. He drove himself to his assigned location each day. In March 2005, however, Skrzypczak was convicted of 3rd degree fleeing and eluding a police officer, a felony offense. Although Skrzypczak received a suspended sentence, his driver's license was automatically suspended from May 2005 until May 2006.

In the summer of 2005, Saab noticed that Skryzypczak was still driving himself to his work assignments and became concerned about Respondent's liability. She asked Respondent's personnel/human resources office for advice. In the meantime, she instructed the other safety engineer to drop Skrzypczak at his assigned location every day before driving to his own assigned location. In September 2005, the personnel/human resources office issued a written opinion letter stating that Skryzypczak could not be terminated as a result of his conviction since his offense did not involve "moral turpitude," and that he could continue to be employed as a safety engineer if he could perform his duties without driving. The other safety engineer continued to chauffeur Skrzypczak to his assignments. However, by the end of 2005, Saab had concluded that this arrangement was impacting productivity. In December 2005 or early January 2006, Saab rearranged the safety engineers' assignments so that Skryzypczak had only locations within walking distance of the safety engineers' office - the JDF, two sections of the Wayne County Jail (the Jail), Respondent's main office building, and several small office buildings. Around the end of January, however, Skrzypczak was refused a new security clearance for the Jail because of his felony conviction. Skrzypczak also revealed to Saab that he would not be getting his driver's license back in May 2006 because of tickets he had received for driving with a suspended license. He told Saab that he had asked for a hearing and that his attorney had told him that he might get his license back after that hearing. Saab told him that until he got his license back, he would keep his current assignments, minus the Jail. [1]

Part of Skrzypczak's assignment at the JDF was serving on the safety committee at that facility. The committee consisted of management representatives from all areas of the JDF and a representative of the union representing most JDF employees, the Government Administrators Union, Local 409 (Local 409).[2] Workplace injuries, particularly assault/restraint injuries, were a regular item on the safety committee's agenda and discussed at every monthly meeting. Assault/restraint injuries are injuries suffered by staff as a result of assaults by JDF residents or in the course of restraining residents from harming themselves or someone else. As safety

[1] In the fall of 2006, Skrzypczak's driver's license was reinstated. Shortly thereafter, however, his license was suspended again until November 2007. In January 2007, the suspension was extended to March 2008.

[2] Jean Chaplin is the president of Local 409. It was not clear from the record whether Chaplin or some other Local 409 representative sat on this committee.

engineer, Skrzypczak had access to the JDF's incident reports. Skrzypczak was alarmed by the number of assault/restraint injuries suffered by JDF employees. In addition to the incident reports, Skrzypczak received complaints directly from JDF employees that violent behavior among residents at the JDF was increasing. In early 2006, Skrzypczak prepared a chart for the committee showing that the number of assault/restraint injuries had increased between 2004 and 2006. Although the increase was small, the percentage of employees with more severe injuries had also increased. Skrzypczak argued the statistics showed that that the issue needed immediate attention. Local 409's representative on the committee also expressed concern over the issue.

Until July 2006, JDF residents who demonstrated out-of-control behaviors were placed in seclusion for a period of time. This is a generally accepted behavior modification technique for secure detention facilities like the JDF. In January 2005, the legislature amended the State Mental Health Code to prohibit "child caring institutions" providing mental health treatment to juveniles from using seclusion or restraint to control behavior without an order from a licensed health care professional. In 2005, the JDF was licensed as a "child caring facility" because it has two units designated as mental health treatment units, the only juvenile detention facility in the Michigan with such a license. Since the January 2005 amendment was aimed at psychiatric institutions, the JDF initially assumed that the amendment applied only to its mental health units. However, in July 2006 the State Department of Human Services informed the JDF that the new restrictions applied to the entire facility. The JDF was then forced to rescind its long-standing restraint/confinement policy. Throughout the remainder of 2006, the JDF did not use seclusion or confinement while it worked on drafting a new policy that complied with the law. JDF employees were not accustomed to working without seclusion or confinement as a technique for managing behavior. Drusilla Watson, the JDF's liaison to the State licensing bureau and the chairperson of the JDF's safety committee, testified the JDF began training employees in a technique known as non-violent crisis intervention. At the advice of a consultant, it also began compiling documentation to demonstrate to the State that the new law was causing harm at the facility. Watson testified that there was significant resistance among employees to the changes mandated by the law.[3]

According to Respondent, a document from the State explaining the new law was distributed to members of the JDF safety committee, including Skrzypczak, in June 2006. However, Skrzypczak denied seeing this document. It was not clear from the record how much detail Skrzypczak received about the history of restraint/confinement at the JDF, the restrictions imposed by the new law, or the JDF's efforts to get out from under these restrictions. Sometime between July and October 2006, Skrzypczak presented the JDF safety committee with a draft policy under which residents who injured staff members would be subject to disciplinary confinement. Skryzypczak's proposal was patterned on policies in force at the Wayne County Jail. Administrators on the safety committee told him because the JDF was licensed by the State of Michigan as a child caring institution, the law did not allow the JDF to confine residents in this manner. After his proposal was rejected, Skryzypczak contacted the Macomb County JDF, obtained a copy of their restraint/confinement policy, and presented the safety committee with a

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[3] In March 2007, the JDF adopted a new restraint/confinement policy that complied with the new law. On June 11, 2007, the JDF received a separate license for its mental health treatment units. In July 2007, it reinstated its pre-2006 old seclusion/confinement policy for the rest of the JDF.

policy for the JDF based on that policy. He was told by the committee that the Macomb County JDF had modeled its policy on the JDF's policy, but that the Macomb County JDF was not subject to the same laws since it was not currently a licensed child caring facility.

In the fall of 2006, Skrzypczak's relationship with the administrators on the JDF safety committee began to fray over the issue of assault/restraint injuries. Skrzypczak proposed to Watson that the JDF purchase clothing for staff to protect them from injury. Watson told Skrzypczak that having employees dressed in what she termed "riot gear" was not appropriate in a facility for children. Skrzypczak testified that he asked the committee for suggestions on how to address the assault/restraint injury problem, and was essentially told that there was nothing that could be done. Skrzypczak reported to Saab that the administrators at the JDF were not being cooperative. Saab told him that the JDF safety committee had a history of being proactive, and that if the administrators told him that they could not do something, than they could not do it. Saab suggested that Skrzypczak try to implement an aggressive safety training program, but Skrzypczak did not believe that this was a solution. Skrzypczak also asked to meet with the director of the JDF to talk about this issue, but his request was denied.

Watson testified that Skryzypczak did not appear to understand the legal prohibition on the JDF's use of restraint/confinement. She testified that when she told Skrzypczak that mental health funds were part of the JDF's budget, Skrzypczak replied that it seemed to him that the JDF was more interested in dollars than in people. Watson and Stanley Daniel, department administrator at the JDF and also a member of the safety committee, testified that in the fall of 2006, Skryzypczak became increasingly loud and abrasive in committee meetings over the issue of assault/restraint injuries. Sometime during that fall, Watson and Daniel complained to Saab about Skryzypczak's conduct.

Although Local 409 expressed concern about the number of assault/restraint injuries in safety committee meetings, it did not file a grievance over the issue. In about October 2006, Skrzypczak approached Local 409 president Jean Chaplin and suggested that they work together to bring the number of assault/restraint injuries at the JDF to the attention of higher management. Shortly before Thanksgiving 2006, a meeting was scheduled between Chaplin and Respondent's assistant director for children and family services, T. Sturdevant. Skryzypczak asked Saab for permission to attend this meeting.

Skryzypczak testified that after he requested permission to attend the meeting, he had a meeting with Saab and risk management division director Jack Underwood. He testified that Saab and Underwood began the meeting by joking with each other about him being out of his mind. According to Skryzypczak, Underwood then said to him, "Are you crazy? Are you stupid? If you go forward with this information [the injury statistics] to bring it up the chain of command, my job is in jeopardy and, therefore, your job is in jeopardy as well." Skryzypczak testified that Underwood said that he was not to attend the meeting between Sturdevant and Chaplin. Underwood also told him, according to Skryzypczak, that he was "not to work with Local 409 any longer." Skryzypczak contacted Chaplin and told her that he had been directed not to attend her meeting.

Skryzypczak testified that he approached Underwood again the next day. According to Skrzypczak, he said, "Jack, I believe that if I go to this meeting, there is some good that could come out of it. There could be some visibility of this issue [sic] and, hopefully, we can bring it to the right people and try to get some sort of resolution." According to Skryzypczak, Underwood replied, "No, you are not going to that meeting and you are not going to work with the union anymore."

Underwood denied telling Skrzypczak not to work with the JDF union, saying he was stupid or crazy, or telling Skrzypczak that he would lose his job. Saab testified that after Skryzypczak sent her an email asking to attend the meeting, she told him that she did not want him to attend the meeting without her or Underwood. According to Saab, she planned to attend the meeting with Skryzypczak, but was prevented from doing so by a last minute emergency. Saab testified that she and Underwood did have a meeting with Skrzypczak about the assault/restraint injury issues at the JDF sometime before the Chaplin/Sturdevant meeting. According to Saab, they reminded Skrzypczak that risk management could only make safety recommendations and did not have the authority to implement changes. Saab testified that she also pointed out to Skrzypczak that while assault/restraint injuries were higher at the JDF than at the Macomb County JDF, the JDF's overall incident rate was lower than the national standard for this type of facility. Saab testified that Underwood did not use the words "crazy" or "stupid" at this meeting. However, she did not specifically deny hearing Underwood tell Skrzypczak not to work with Local 409 or that that he would lose his job if he continued to press for a solution to the assault/restraint injury problem.

I credit Skryzypczak's testimony that Underwood told him that if he continued trying to bring the assault/restraint issue to the attention of Respondent's higher management, Skryzypczak and Underwood might lose their jobs. I also credit his testimony that Underwood told him to stop discussing the issue with Local 409 during a meeting in which Saab was present and again in a one-on-one discussion the following day. I note that Saab, who testified credibly and in much detail regarding the events pertinent to this charge, did not deny that Underwood made either of these statements. Underwood, a senior administrator, seemed remarkably ill at ease while testifying regarding this incident. The behavior of these two witnesses convinces me that Skryzypczak's testimony about these two conversations was truthful and accurate in all essential details.

Wilson and Daniel met with Skrzypczak after the safety committee's meeting in late November or early December 2006 and attempted to explain to Skrzypczak why the JDF could not implement a restraint/confinement policy. Skrzypczak became so angry that Daniel and Wilson asked him to leave the facility. Shortly thereafter, Skrzypczak sent Daniel a packet of information about assault/restraint injuries. Stanley responded with an email asking what he was supposed to do with this information. Skrzypczak replied with the following email, sent December 8:

> This information was sent as a means to communicate the escalation of assault/restraint injuries and the need to place corrective actions for control of resident behaviors. As reports of more severe violent behavior of residents

continue to be passed through this office, I feel it is necessary to ensure your awareness.

As mentioned in numerous conversation in the past, a system for modifying behaviors should be the top priority of the facility yet as time passes by, almost a year, that I have pursued such, no one has communicated nor even attempted to my knowledge an operational change that positively impacts this matter.

Please be advised that I am doing whatever I can to demonstrate the need for attention of this issue and will continue until a significant reversal of these events are realized.

Should you have further questions, please contact me [by telephone].Your cooperation to call rather than send demeaning emails as in your last response of this issue is greatly appreciated.

On December 11, Stanley replied as follows:

Robert, AGAIN you demonstrated YOUR lack of knowledge, training, expertise in Juvenile Detention programming, rules, laws and best practices. You also demonstrate an apparent willingness [sic] to listen to those within this facility who are knowledgeable and have the expertise. The sheer audacity of your statement, "I feel it is necessary to ensure your awareness," again speaks volumes of your inexperience and absence of knowledge of Juvenile Detention overall, BUT especially this program. Unfortunately our efforts to assist you and expand your knowledge base regarding Juvenile Detention programming has been rebuff [sic] on more than one occasion. Instead you continue to choose to display your incivility attempting to address and direct a matter beyond your apparent ability and expertise. Again we are asking your superior Maria Saab, through this email, for an opportunity to sit at the same table and professionally address this matter. Therefore I invite Maria to accompany you to our [January 24, 2007 meeting].

Skrzypczak replied:

Stan, you didn't even know what to do with the stats… Remember… now whom [sic] do you believe is foolish.

Stanley forwarded these emails to Saab and to his own immediate supervisor. Saab told Skrzypczak that calling Daniel "foolish" was disrespectful. At the beginning of January 2007, after consulting with Underwood, Saab decided to remove Skrzypczak from his assignment at the JDF and to take over the assignment herself. In addition to work at the main office building and several other small buildings within walking distance, Saab assigned Skryzypczak office work normally done by a clerical employee who was on maternity leave, including inputting data into computers and filing. Within a week or so, Skrzypczak complained to Saab that it was unfair to assign this clerical work only to him. Saab told Skryzypczak that she felt that until he could drive again, he did not have enough to do. Skryzypczak protested that he had enough safety

assignments to keep him busy, and that the other safety engineer ought to do some of the clerical work.

In early February 2007, Skryzypczak asked to meet with representatives of AFSCME Local 1862 about filing a grievance. The meeting was held in an open atrium area in Respondent's main office building, a place with tables and chairs where employees often ate lunch. Skryzypczak asked the union representatives if he could file a grievance over Underwood's directive not to talk to Local 409 representatives. He related Underwood's statement to his union steward and said that he felt that his job had been threatened. He also told the union that he thought that Respondent was discriminating against him by assigning him so much administrative work. While Skryzypczak was describing what had taken place, Respondent's personnel director, Tim Taylor, came over to the table where Skryzypczak and his union representatives were sitting and said hello. Skryzypczak could not tell if Taylor had overheard any part of his conversation with his union representatives. However, he was so unnerved by Taylor's coming over to the table that he told his union president that he had decided not to file a grievance.

On February 15, 2007, Saab gave Skrzypczak four large boxes of old records that had been found in a storage room and told him to file their contents. Skrzypczak became angry and told Saab in a loud tone of voice that he was going to discuss this with Underwood. When he returned, he told Saab, again in a loud voice, that Underwood had told him he did not have to do this. Saab told him to come to Underwood's office with her, and, after discussion, Underwood agreed that Skrzypczak should do the filing. Skryzypczak called his union president and left a message asking him to go ahead and file the grievance they had discussed.

At the end of the day on February 15, Underwood passed through the safety engineers' office and noticed that the boxes of old records were not there. Someone told Underwood that Skrzypczak had loaded the boxes into a file cabinet before he left for the day. Underwood interpreted Skrzypczak's actions as a refusal to do the filing he had been ordered to do, although Skryzypczak later maintained that he was simply storing them there until he could finish the job. Underwood testified that after he saw the boxes in the file cabinet, he had someone research Skryzypczak's driving record. Underwood discovered that Skrzypczak's license was now suspended until March 2008. The next day, Underwood wrote Skryzypczak a letter terminating his employment. Underwood recapitulated the history of Skrzypczak's driver's license suspension. He stated that since Skrzypczak could not drive, and was no longer able to perform duties at the Jail or the JDF, he no longer met the minimum qualifications for the safety engineer position.

Skryzypczak's union filed a grievance challenging his discharge as without just cause. The grievance also asserted that Respondent had failed to follow the notice procedures contained in its collective bargaining agreement. Respondent's labor relations office agreed with the union that Underwood had failed to follow contractual termination procedures. On March 16, 2007, Skryzypczak was returned to the Respondent's payroll and given back pay for the period between February 19 and March 16. On March 19, Skryzypczak was terminated again effective March 22, 2007. In addition to asserting that Skrzypczak could not perform his duties without a driver's

license, the March 19 termination documents also cited Skrzypczak for "improper conduct" insubordination, offensive behavior, and unsatisfactory performance.

Discussion and Conclusions of Law:

In order to establish a prima facie case of unlawful discrimination under Section 10(1) (a) or (c) of PERA, a charging party must show: (1) an employee engaged in union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist,* 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551- 552. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive for its action and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Schs*, 125 Mich App 71, 74 (1983); *Wright Line, a Division of Wright Line, Inc,* 662 F2d 899 (CA 1, 1981).

Section 9 of PERA protects the rights of public employees to "organize together or to form, join or assist in labor organizations [and] to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid or protection." Section 9 of PERA is patterned after Section 7 of the National Labor Relations Act (NLRA), 29 USC 151 et seq. In *Meyers Indus, Inc v Prill,* 268 NLRB 493 (1984) ("*Meyers I* "), *rev'd sub nom. Prill v. NLRB,* 755 F2d 941 (DC Cir.), *cert. denied,* 474 U.S. 948, (1985), *on remand, Meyers Indus, Inc v Prill,* 281 NLRB 882 (1986) ("*Meyers II* "), *aff'd sub nom. Prill v NLRB,* 835 F2d 1481 (DC Cir, 1987), *cert. denied,* 487 U.S. 1205, (1988), the National Labor Relations Board (NLRB or the Board) established the test still used by it and by the Commission to determine whether an employee's actions are sufficiently linked to the actions of fellow employees to be deemed "concerted" under Section 7 of the NLRA or Section 9 of PERA. As the NLRB held in *Meyers I,* an employee's action may be deemed "concerted" only if the action is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Therefore, as the NLRB held in that case, complaints made by a single employee acting on his own about the safety of his truck were not protected. However, as the Board stated in *Meyers II,* concerted activity also "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II,* 281 NLRB at 887. See *City of Detroit (Police Dept),* 19 MPER 15 (2006)) (activity undertaken by one employee on behalf of others is protected activity even in the absence of the participation or authorization of a labor organization); *Asheville Sch, Inc,* 347 NLRB No. 84 (2006) (The Board has found an individual employee's activities to be concerted when they grow out of prior group activity; . . . or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected.)

I find that Skryzypczak engaged in concerted activities for mutual aid or protection within the meaning of Section 9 when he and Local 409's representative on the JDF safety committee repeatedly expressed concern over the number of assault/restraint injuries at the JDF; when he urged Local 409 president Chaplin to work with him to bring the issue to the attention of higher management; and when he sought to attend the meeting between Chaplin and

Sturdevant to help Chaplin argue that action needed to be taken on this issue. An employee who asserts a grievance in good faith is protected by PERA from retaliation whether or not the grievance is meritorious, *MERC v Reeths-Puffer School District*, 391 Mich 253, 265 (1974). Skryzypczak's concerted activities were protected by the Act even if Skryzypczak overestimated the seriousness of the assault/restraint injury problem at the JDF, as Respondent asserts, or proposed unworkable solutions.

Skryzypczak asserts that he was terminated because of his protected activities. However, his termination was preceded by another adverse action arguably related to his protected conduct, his removal from his assignment at the JDF in January 2007. According to Respondent, Skryzypczak was removed from this assignment because of his conduct toward JDF administrators and their complaints. As stated in my findings of fact, I credit Skryzypczak's testimony that sometime around Thanksgiving 2006, risk management division director Underwood told him to stop discussing the issue of assault/restraint injuries with Local 409 and that if he continued trying to bring the assault/restraint injury issue to the attention of Respondent's higher management, Skryzypczak and Underwood might lose their jobs. I find that these statements establish both that Underwood was aware that Skryzypczak had discussed the assault/restraint issue with Local 409 outside of safety committee meetings and that he feared that Skryzypczak would cause Local 409 to drawn attention to a potentially embarrassing injury statistic. Approximately six weeks after this conversation, Skryzypczak was removed from his assignment at the JDF. I conclude that the timing of Skryzypczak's reassignment and Underwood's statements to him about working with Local 409 are sufficient to establish that Skryzypczak's protected activities were a motivating cause of his reassignment. However, under *Evart* and Wright *Line,* I must also determine whether Respondent had a lawful as well as an unlawful motive for the transfer and, if so, whether, this lawful motive was the "but for" cause of the adverse action.

It is well established that an employee who makes rude, discourteous, or even threatening comments to his or her supervisor during a grievance meeting or while otherwise engaged in activity protected by the Act does not lose the Act's protection by virtue of these comments. *Univ of Mich,* 2000 MERC Lab Op 192; *City of Detroit (Water and Sewerage Dept),* 1988 MERC Lab Op 1039; *Baldwin Cmty Schs,* 1986 MERC Lab Op 513. In general, an employee engaged in otherwise lawful protected activity may be disciplined for his conduct in connection with that activity only when his conduct is so egregious as to render him "unfit for further service." *City of Detroit,* 18 MPER 27 (2005); *Isabella Co Sheriff's Dept,* 1978 MERC Lab Op 689, 174. However, the timing of the remarks, and where they are made, are factors considered in determining whether the employee may be disciplined for them. *City of Detroit (Water and Sewerage Dept)* 1988 MERC Lab Op 1039, 1042. The Commission has held that rude remarks made by employees to their supervisors while discussing grievances are entitled to less protection if made "on the shop floor" rather than during a grievance meeting. *City of Detroit; Baldwin Cmty Schs,* at 520.

In the instant case, the record indicates that Skryzypczak used a loud tone of voice while discussing the assault/restraint injury issue in JDF safety committee meetings. In addition, on at least two occasions Skryzypczak questioned the motives or intelligence of JDF administrators on the committee – once when he suggested to Watson that the JDF was more concerned about

money than people, and again in his exchange of emails with Stanley in December 2006. It is clear that under the cases discussed above, an employee could not under normal circumstances be disciplined for these types of comments if made during a discussion of safety issues at a grievance meeting. However, this case presents an unusual set of circumstances because Skryzypczak's job duties included working with JDF administrators to resolve safety problems. I find that like an employee who questions his supervisor's authority on the shop floor, Skryzypczak disrespectful remarks to Watson and Stanley interfered with his ability to perform his job duties as safety engineer at the JDF. I conclude, therefore, that Skryzypczak's conduct toward Watson and Stanley constituted a legitimate motive for Respondent's removal of him from his assignment as JDF safety officer. I also find that Skryzypczak would have been removed from this assignment because of Watson and Stanley's complaints even if he had not urged Local 409 to take further action on the assault/restraint injury issue.

Skryzypczak argues that Respondent did not have any legitimate reason to terminate him in March 2007 because he was performing his work adequately as a safety officer at that time and would be regaining his driver's license within a year. However, by March 2007, Skryzypczak he had been without a driver's license, a normal requirement of his job, for about twenty-five of his thirty-two months of employment as a safety officer. He could not regain this license for another year. Moreover, he could not work at the JDF because Watson and Stanley had complained about him, the Jail because his security clearance had been revoked, or the road maintenance yards because he could not drive to these locations. Thus, Skryzypczak could not work at any of the locations where most of the safety engineers' work is performed, or any of the smaller locations to which he would have to drive. Skryzypczak also was not willing to do the clerical duties which Saab tried to assign him in lieu of safety officer work. In sum, in March 2007, Skryzypczak was unable to do his fair share of the work, would not be able to do so for at least another year, and had been argumentative when assigned to do non-safety work. I conclude, based on the evidence as a whole, that Respondent had a lawful reason for terminating Skryzypczak in March 2007 and that it would have done so in the absence of Skryzypczak's protected activities. Accordingly, I recommend 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

Date: _______________