

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

In the Matter of:

CITY OF ROYAL OAK,
Public Employer-Respondent,

-and-

LEO L. HAUDEK,
An Individual-Charging Party.

Case No. C07 F-139

APPEARANCES:

Hardy, Lewis & Page, P.C., by Robert Nyovich, Esq., for Respondent

Leo L. Haudek, *In Propria Persona*

DECISION AND ORDER

On May 21, 2009, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

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

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on April 8 and June 26, 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 post-hearing briefs filed by the parties on or before August 25, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Leo L. Haudek filed this charge against his former employer, the City of Royal Oak, on June 19, 2007. Haudek was terminated on May 21, 2007. He alleges that his termination and the disciplinary actions that preceded it constituted unlawful retaliation against him for his activities as chief steward for SEIU Local 517, including filing grievances under the collective bargaining agreement.

Findings of Fact:

Haudek was hired by Respondent as a truck driver in September 2001. In March 2002, Haudek became an auto mechanic. Haudek was part of a bargaining unit represented by SEIU Local 517. Near the end of 2003, Haudek became chief steward for this unit.

On February 23, 2004, Haudek filed a grievance under the collective bargaining agreement asserting that Mark Morang, Haudek's supervisor, had behaved in a threatening manner toward one of Haudek's co-workers. Haudek also filed a second grievance asserting that Morang questioned him about a repair in a hostile manner, "provoked him," and then threatened to give him an oral reprimand.

Respondent has a workplace violence policy, entitled "Employment Protection Policy" that defines a "threat" as an expression of "the intent to cause physical or mental harm, regardless as to whether the person communicating the threat is able to carry it out." After investigating the incidents set out in the grievances, Ed Williams, Respondent's human resources director, concluded that the workplace violence policy had not been violated. However, Williams concluded that Morang needed to improve his employee relations and supervisory skills. At the beginning of March 2004, a note to that effect was placed in Morang's file and he was ordered to attend two days of training in supervisory skills and interpersonal relations.

In July 2004, Haudek complained directly to Williams that Morang was behaving toward him in a hostile manner. He did not get a response, although he testified that Morang "disappeared for awhile," and he believed that Morang was disciplined. At the end of 2004, Williams left his position as human resources director and was replaced by Mary Jo DiPaolo. There was no evidence presented regarding any event occurring between July 2004 and November 2005. ¹

On November 9, 2005, Morang approached Haudek angrily near the end of the day and, pointing a finger at him, accused him of loafing on the job. They argued, although the record did not indicate what Haudek said. Haudek left work before his shift was over and went to the hospital with a rapid heart beat. Haudek was off work on a medical leave for a month. On November 11, while he was on leave, Haudek was issued a written oral reprimand for failing to follow call in policies.

When Haudek returned to work on about December 13, 2005, he filed a grievance over the November 9 incident. The grievance alleged "continuation [of] threatening abusive behavior from motor pool supervisor" in violation of the safety clause in the contract and the workplace violence policy. On December 14, Haudek was given a notice of suspension prepared by Morang which was dated December 10. Haudek was suspended for three days for failure to perform his assigned tasks, insubordination, leaving work without permission, and "creating a hostile work environment."

At the end of December 2005, Morang gave Haudek a negative performance evaluation. In this evaluation, Morang criticized Haudek for taking too long to complete repairs and fill out paperwork. Morang also stated that Haudek took breaks that were too long and that he stopped working too soon at the end of the day. This was the first negative performance evaluation that Haudek had received.

In August 2006, Morang accused Haudek of using his cell phone inappropriately at work. Haudek complained about the accusation to Morang's supervisor, motor pool supervisor Albert Orr.

¹ In his brief, Haudek refers to an incident that allegedly occurred in February 2005. Since no evidence was presented at the hearing about this incident, it is not part of the record and cannot be considered here.

On August 24, Orr called Haudek, assistant Union steward Todd Blair, and Morang to his office to discuss the issue. During the meeting, Haudek said that other employees were allowed to use their cell phones all the time, and that he was being singled out. Morang called Haudek a liar. At Blair's suggestion, Orr ended the meeting. Back in the work area, Morang came up to Haudek and said, aggressively, "What's it going to be tomorrow, Leo? What is it going to be tomorrow?" Morang came close to Haudek as he spoke and waived his hands in the air. Haudek felt that Morang was going to attack him physically, and began running across the shop floor toward Orr's office yelling loudly for help. This attracted the attention of other employees in the motor pool and the building. Orr told Haudek to go home for the rest of the day.

The first thing the following morning, Haudek filled out a grievance asserting that Morang had violated the contract's safety conditions provision and the City's workplace violence policy by his hostile behavior the previous day. Haudek took the grievance directly to Respondent's City manager, Thomas Hoover, because he felt that DiPaolo had ignored his previous complaints about Morang. Hoover accepted the grievance but passed it along to DiPaolo to investigate as a complaint under the City's workplace violence policy. Haudek later received a response to the grievance stating that he had failed to follow the grievance procedure.

Later that day, August 25, 2006, Haudek was called into a meeting with his supervisors. Haudek was told that he was being put on paid administrative leave and ordered to undergo a mental status evaluation because of his behavior the previous day. Haudek went to a clinic selected by Respondent. The clinic reported that Haudek had no major mental health problems. However, it recommended that he receive counseling in anger management and conflict resolution skills and be reassigned to a different supervisor, if possible.

When Haudek returned to work, on September 19, 2006, he received a ten day suspension signed by Gregory Rassel, Respondent's recreation director and Orr's supervisor. The suspension stated that his conduct on August 24 was "out of control," had disrupted the work of other employees and was disrespectful to his supervisors. Haudek was directed to attend anger management classes or counseling. Five days of the suspension were to be held in abeyance pending his successful completion of these classes and on the condition that he not engage in further misconduct for a period of a year. Haudek told Respondent that he was already in counseling. On October 26, he gave Respondent a letter from his therapist indicating that he was suffering from anxiety, depression and reduced self-esteem due to recurrent hostility from his supervisor, the absence of processes in the workplace to resolve the conflict in a fair manner, and the mistaken attempts of Respondent's human resources department to resolve the conflict by finding Haudek at fault.

A grievance was filed over the suspension on September 21, 2006. The Union asked Respondent to allow Haudek to return to his former job as a truck driver, but Respondent refused. There was a dispute in the record over whether the Union withdrew the grievance or whether it was still being held in abeyance at the time of the hearing.

On November 1, 2006, there was another incident between Haudek and Morang. The details of this incident are not in the record. Haudek received approval from Orr to leave work before the end of his shift, went to his doctor, and was diagnosed with a stress reaction. Haudek was given a

slip from the doctor recommending that he be off work for five days, and a note recommending that he be transferred to a different position. Haudek gave copies of these documents to both Orr and DiPaolo. He also filled out paperwork for a worker's compensation claim. Haudek returned to work on November 6.

On the morning of January 26, 2007, Morang accused Haudek of incompetence when he was unable to repair a vehicle. Haudek called DiPaolo to complain about Morang's hostile behavior. Around noon, Morang was again berating Haudek and said to him, "Why don't you go to [Orr], you crybaby." Haudek called DiPaolo again. He was approved to leave work, and went to his doctor and obtained another note recommending that he be transferred to another job. Haudek gave a copy of this note to Orr and DiPaolo, but did not receive a response.

On March 15, 2007, Blair came to Haudek to complain that Morang was performing his (Blair's) duties and assigning him to do work outside his classification instead. Haudek went to Rassel and asked him where in the collective bargaining agreement it said that Morang was allowed to do this. Rassel told Haudek to "Let it go." Later, however, Orr suggested that Blair go talk to Rassel personally, and Blair and Rassel resolved the matter to Blair's satisfaction.

On March 21, 2007, Morang gave Haudek a three day suspension for allegedly being unable to perform work, or performing it too slowly, on three days in December, three days in January and March 8 and 9. Morang also accused Haudek of loafing on the job, and of being insubordinate during their discussion of his work performance on March 9. Morang wrote on the disciplinary action that Haudek told Morang that he "should fire him and he (Haudek) would do what he had to do." According to Morang, he then asked Haudek if he wanted him to fire him, and Haudek said, "Do what you have to do."

On or about March 29, a meeting was held with Rassel, the Union local president and Union attorney Howard Gordon to discuss the March 21 discipline. During this meeting, the Union pointed out that the contract required that Haudek be put on notice of any pending disciplinary action within ten days of the incident leading to it. Respondent and the Union agreed to replace the suspension with an oral written reprimand for poor performance.

On April 4, 2007, according to Haudek, Morang came up to him "like a bully," yelling and with arms flying. About a half hour later, Haudek called DiPaolo to complain about Morang's hostility. She directed him to Orr. Orr wrote later that Haudek told him that Morang had invaded his space and was trying to get him, and that this made him very nervous and scared. Orr initially tried to persuade Haudek to forget about the incident, but eventually called both Haudek and Morang into his office. In the meeting, according to Haudek, Morang laughed at him and said he was "full of s—t." Orr then told Haudek to wait in the lunch room. A few minutes later, Orr came in and told Haudek to report to Respondent's clinic for a drug screen. The screen was negative. When Haudek returned from the clinic, he asked for and received approval from Morang to leave work and go to his doctor. When Orr saw him about to leave, however, he stopped Haudek and told him that he "could not be leaving all the time." Haudek persuaded Orr to give him permission, however, by telling him that he had no control over this because when Morang came at him he began shaking.

Haudek was off work for several days between April 5 and April 11. Around April 9, several employees from Respondent's forestry division reported to Respondent that Haudek had challenged them to fight in the parking lot. Haudek later claimed that he made a mock challenge directed at one employee who understood that he was joking and responded accordingly.

On April 11, Haudek returned to work and filed a grievance asserting that Morang's behavior on April 4 was a violation of the workplace violence policy and the safety provision in the contract. On April 12, Orr issued Haudek a one day suspension for poor performance, failure to perform assigned tasks, and failure to follow instructions on April 4. The suspension was dated April 10, a day that Haudek was not at work. On April 16, Haudek filed a grievance over the suspension.

On Monday, April 16, 2007, shootings on the campus of Virginia Tech University made the news and were a topic of discussion among Respondent's employees. Haudek often brought a black bag to work. According to Haudek, that morning he heard an employee say that he was concerned about Haudek's bag. Haudek testified that he remarked to a group of employees that the bag was not ticking and suggested that they check it. Haudek also sometimes carried a briefcase with union documents and he had it with him on April 16. Haudek testified that sometime that morning, Orr came up to him and asked him what was in his briefcase. Haudek said that it was his union papers.

In the afternoon of April 16, Orr called the police. According to their report, Orr told the officers that Haudek often carried around a black bag, and that on that morning he had approached other employees and asked them to "feel what was inside" the bag. Orr also told the officers that Haudek had asked him (Orr) if he could hear the bag ticking. Orr asked the officers to be present while he escorted Haudek from Respondent's premises. When the officers arrived, Orr called Haudek into his office. When told that there was a concern about what was in his bag, Haudek gave officers permission to search him, his bag, his locker, and his vehicle. The bag was found to contain only religious tapes and batteries for a cassette player, and nothing suspicious or unusual was found on Haudek or among his property. After the search was completed, Haudek was told by Respondent that he was suspended indefinitely pending an investigation for his behavior on April 9 and April 16. Later, Haudek was asked to give a statement at the police station. No charges were brought against him.

On April 30, Haudek was notified that Respondent had completed its investigation and that it was considering discharging him for violations of the workplace violence policy. In the letter Haudek received, he was accused of making threatening statements to co-workers, including "You are all going to need to start carrying your [concealed weapons] to work because there is going to be a lot more of that happening in Michigan," and "You want to check my bag like homeland security to make sure it isn't ticking?" The letter also stated that Haudek had violated the policy by challenging the forestry employees to fight on April 9.

Respondent held a hearing on these charges on May 14, 2007. On May 16, Haudek received a letter terminating him effective May 21, 2007. The Union filed a grievance on Haudek's behalf. An arbitration hearing was held on this grievance some time between January and the end of June 2008, but no decision had been issued at the time of the hearing in this case.

Discussion and Conclusions of Law:

Haudek alleges that Respondent retaliated against him for his activities as chief steward and for filing grievances under the contract, in violation of Sections 10(1) (a) and (c) of PERA. The elements of a prima facie case of unlawful discrimination under these sections are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility towards the employee's exercise of his protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Southfield Pub Schs*, 22 MPER 26 (2009); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. See also, *Waterford Sch Dist*, 19 MPER 60 (2006), *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551-552. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981); See also, *City of St Clair Shores*, 17 MPER 27 (2004); *North Central Cmty Mental Health Services*, 1998 MERC Lab Op 427, 436.

Haudek was chief steward for a bargaining unit represented by SEIU Local 517 from late 2003 to his termination in May 2007. As such, he was responsible for filing grievances on behalf of members of his bargaining unit. However, it does not appear from the evidence in this record that Haudek was a notably active chief steward. The record contains evidence of only one grievance filed on behalf of another employee by Haudek, in February 2004, as well as one informal attempt to intervene on another employee's behalf, his complaint to Rassel about Morang's performing Todd Blair's work in March 2007. The other grievances mentioned in the record were filed by Haudek on his own behalf and addressed only two issues – Morang's alleged mistreatment of Haudek himself and the failure of Respondent's other supervisors to stop it. Of course, PERA protects the right of an employee to file grievances on his own behalf as well as the right of a union steward to do so on behalf of others. However, a public employer does not violate PERA simply by taking the side of a supervisor in a dispute between the supervisor and his subordinate, even if the subordinate is not, in fact, at fault. As noted above, an employee alleging unlawful discrimination under PERA must establish initially that the adverse actions taken against him were caused, at least in part, by his union or other protected activities, and not simply that they were unfair.

Anti-union animus can be established either by direct evidence or circumstantial evidence, including evidence of suspicious timing or pretext that fairly support the inference that the employer's motive was unlawful. There is no direct evidence of either anti-union animus or hostility toward Haudek's use of the grievance procedure on the part of Respondent or its agents in this case. Haudek asserts, however, that animus should be inferred because his problems with Morang began when he filed the grievances in February 2004 that led to Morang being disciplined. He argues that Morang disciplined or caused him to be disciplined in order to retaliate against him for these grievances. The major problem with this argument, however, is that Morang did not discipline Haudek until December 13, 2005, over eighteen months after Haudek filed the grievance that led to Morang's reprimand. There is no explanation in the record for why Morang would have waited this long to seek revenge. It also appears, from the allegations made in these grievances, that Morang was already behaving aggressively toward Haudek before he filed the February 2004 grievances.

Haudek also argues that the timing of his suspensions and discharge in relation to his grievances and other protected activity demonstrates that he was disciplined in retaliation for this activity. Haudek points out that on December 13, 2005, he filed a grievance regarding Morang's behavior on November 9, 2005, and that it was not until the following day that he was given a three day suspension for his own behavior on November 9. Similarly, on August 25, 2006, Haudek filed a grievance regarding Morang's conduct on August 24. Later that same day, Haudek was put on administrative leave and sent for a mental health assessment and, on his next day at work, he was given a ten day suspension. On March 15, 2007, Haudek attempted to meet with Russel regarding Morang's performance of unit work. About five days later, Haudek was suspended for three days. On April 11, 2007, Haudek filed a grievance. On April 12, he was suspended for one day and, four days later, suspended and then discharged for allegedly making threats. In both the December 2005 and April 2007 incidents, however, the suspensions were dated before Haudek filed his grievances, even though he did not receive them until after the grievances were filed. Moreover, most of these incidents began not with Haudek filing a grievance, but with a confrontation between Haudek and Morang on the shop floor. That is, Haudek's grievances were a response to these confrontations, not the other way around.

I also find that the discipline Haudek received was not merely a pretext to punish him for filing grievances. Rather, the evidence indicates that Respondent was truly exasperated by Haudek's inability to tolerate Morang, including his need to leave work when he and Morang had a confrontation. The issue before me, of course, is not whether Respondent acted fairly or reasonably, but whether it retaliated against Haudek for exercising his right to file grievances. I find that Haudek failed to meet his burden of demonstrating that his protected concerted activities, including the filing of grievances, caused Respondent to discipline or terminate him. I conclude, therefore, that Haudek's charge should be dismissed, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____