STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GENESEE TOWNSHIP POLICE DEPARTMENT,
Public Employer - Respondent,

Case No. C11 D-076

- and -

BRYAN DRINKWINE,
An Individual - Charging Party.
_____/

APPEARANCES:

Michael R. Kluck & Associates, by Thomas H. Derderian, for Respondent

Vinson F. Carter, for Charging Party

DECISION AND ORDER

On April 19, 2012, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

GENESEE TOWNSHIP (POLICE DEPT),
Public Employer-Respondent,

Case No. C11 D-076

-and-

BRYAN DRINKWINE,
An Individual-Charging Party.
_____/

APPEARANCES:

Michael R. Kluck & Associates, by Thomas H. Derderian, for Respondent

Vinson F. Carter, for Charging Party Bryan Drinkwine

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to §§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 November 17, 2011, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based on the evidence and arguments presented by the parties at the hearing, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge in this case was filed by Bryan Drinkwine against his employer, Genesee Township, on April 24, 2011. The charge was amended on May 20, 2011. The charge, as amended, alleges that Respondent "violated §9 by taking adverse employment action against me for lawful concerted activities within my local union by way of email." Drinkwine was laid off from his position as a full-time police officer for Respondent on June 10, 2010. Drinkwine asserts in his charge that Respondent refused to hire him for a part-time position in December 2010 because of an email Drinkwine sent to fellow police officers on December 9, 2010,

Findings of Fact:

Drinkwine was hired by Respondent as a full-time police officer in about 2002. Prior coming to work for Respondent, Drinkwine worked for about four years for the Genesee County

Sheriff's Department. Both full-time and part-time officers in Respondent's police department are represented by the Michigan Association of Police (hereinafter the Union).

In about 2008, Respondent had a change in the members of its Township Board and in January 2009 hired a new police chief. Drinkwine initially testified that between 2002 and 2009 he was disciplined only once. He testified that he received a written reprimand for transporting a male and female prisoner to the County jail at the same time. However, on cross-examination Drinkwine admitted that during this period he also received a written verbal reprimand in connection with an incident involving excessive use of force by another officer.

In 2009, after the new police chief was hired, Drinkwine was disciplined five times. On April 29, Drinkwine was given a written counseling notice for speeding in his department vehicle. On May 27, he received a written reprimand for failing to report an alleged incident of domestic violence. On July 27, Drinkwine received a written verbal reprimand after another officer reported to the police chief that Drinkwine had made disparaging comments about the chief. On October 15, Drinkwine was issued another written verbal reprimand for involving himself in a police chase outside Respondent's jurisdiction without being requested to do so or notifying his supervisor. On December 29, Drinkwine was given a three day suspension for misconduct during a police chase and subsequent stop. Drinkwine ultimately served only one day of the suspension, although the three day disciplinary suspension notice remained in his file. No other officer was disciplined as many times as Drinkwine under the new chief's tenure.

On June 10, 2010, Respondent eliminated six full-time police officer positions for budgetary reasons, and Drinkwine and five other full-time officers were laid off. The Union filed a grievance asserting that the collective bargaining agreement required Respondent to lay off all part-time officers before eliminating full-time positions. It also filed an unfair labor practice charge (Case No. C10 E-113) alleging that Respondent had repudiated its collective bargaining agreement by eliminating the full-time positions. The Union attempted, unsuccessfully, to obtain an injunction requiring Respondent to reinstate the full-time positions. The unfair labor practice charge was eventually dismissed on the grounds that it did not state a claim under PERA since the parties had a bona fide dispute over the proper interpretation of their contract. *Genesee Twp,* 23 MPER 90 (2010).

Respondent acknowledged that the contract required it to offer the laid off officers part-time positions, and it offered them these positions sometime in the summer of 2010. However, a dispute arose between the Union and Respondent over whether the laid off officers should be placed at the bottom of the part-time officer pay scale or be given credit for their years of service as full-time officers. All six of the laid off officers declined Respondent's offer of part-time work.

In July 2010, Drinkwine, his wife, other police officers, and some friends of Drinkwine who were not Respondent's employees attended a meeting of Respondent's Township Board. The record did not indicate what was discussed at this meeting. During the meeting, Kathy Sutton, a Board member, said something that Drinkwine's wife did not like. After the meeting, Drinkwine's wife confronted Sutton and the two got into an argument. Sutton later complained to Respondent's police department that Bryan Drinkwine had threatened her during the

argument. The department investigated and concluded that the evidence did not substantiate the allegation.

The Union made a demand to arbitrate the grievance filed over the June 2010 layoffs. In November 2010, Respondent made another offer of part-time employment to the six laid off officers in an attempt to settle the grievance. This offer was also rejected.

On or about December 6, 2010, an arbitrator issued an award denying the Union's grievance. On December 9, the local Union president sent the six laid off officers an email from his Respondent email address. The email said that the president had spoken with the police chief, and that if any of the six were now interested in part-time positions they should fill out job applications and submit them to Respondent as soon as possible.

About a half-hour later, Drinkwine sent the following reply to the Union president's email. Drinkwine's email went to the Union president as well as the five other laid off officers who had received the original email.

> I guess 11.6 and 11.4 don't exist in our contract … way to go map, keep up the good work … ha, what a joke of a union.
>
> Hey boys I have so[sic] stuff in the works right now, something isn't smellin right around here. I have a few calls out there and an attorney who is well known in the area is gonna look over this case.
>
> My advice is to fill out an app if you want to work part-time. One step at a time boys, don't screw yourself for future cash. I will contact each of you and let you know what going on after I talk to this attorney. I'm personally done with the union at this time, they will be notified what's going on when the time is right. (I don't want them to f—k it up).
>
> Any questions about whats going on call me, nothing is 100% but I don't feel comfortable going out like this without a fight . . obviously a certain person in our union don't give a f—k about our future or bank accounts, hes got his, its right under the chiefs desk.

Drinkwine explained that he was trying to convey in this last sentence that he felt that the Union president was "sucking up to the chief" and not doing his job. Drinkwine also explained that he was angry and frustrated after learning of the arbitration decision and that the email was his response.

The email was brought to Respondent's attention and, shortly thereafter, Drinkwine was given a disciplinary notice citing him for insubordination, conduct unbecoming an officer, and violation of the rule governing public statements and appearances. Drinkwine's disciplinary notice said that Drinkwine had sent an email to several members of the police department implying that there was a sexual relationship between the Union president and the police chief.

The notice said that no actual discipline was being administered because Drinkwine was in layoff status.

After sending the email, Drinkwine submitted an application for a part-time position. Around the middle of December, Drinkwine learned that his application was not being considered. Although Drinkwine stated in his charge that Respondent rehired other officers laid off in June, no evidence was presented on this point at the hearing. On December 28, 2010, at Drinkwine's insistence, the Union filed a grievance over Respondent's refusal to rehire him. However, in January 2011, the Union withdrew the grievance after Respondent denied it. On January 12, 2011, the Union's business agent sent Drinkwine a letter stating that the Union agreed with Respondent that Respondent had no contractual obligation to offer Drinkwine a part-time position in December 2010 since it had made two previous offers which had been rejected.

The collective bargaining agreement between the Union and Respondent states that disciplinary reprimands will be removed from an employee's file after twenty-one months except when a second similar infraction has been committed during this period. In that case, the original reprimand remains in the file for another twenty-one months. On April 26, 2011, Drinkwine telephoned the police chief and asked him if he (Drinkwine) could get his old disciplinary actions from 2009 removed from his file because he was trying to get another police job out of state. According to Drinkwine, the chief told him that all his previous disciplinary actions had been removed from his file. At the hearing, the chief recalled talking to Drinkwine about disciplinary actions Drinkwine wanted removed from his file because he had a contractual right to have them removed. However, the chief denied telling Drinkwine that he no longer had any disciplinary actions in his file. During this same conversation, according to Drinkwine, the chief allegedly told him that if it was up to the chief, Drinkwine would have been rehired, and that the decision not to rehire him had been made by the Township Board. At the hearing, however, the chief testified that he made the decision not to hire Drinkwine as a part-time employee. The chief testified that based on Drinkwine's past disciplinary record, he could not recommend to the Township Board that it rehire him.

Discussion and Conclusions of Law:

§10(l)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to employees under §9 of the Act. §9 states:

> It shall be lawful for public employees 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.

A public employer violates §10(1)(a) by discharging or taking any other adverse employment action against an employee because he or she has engaged in "lawful concerted activities for the purpose of collective negotiation…. or other mutual aid and protection."

As noted above, Drinkwine alleged in his charge that his December 9, 2010 email constituted activity protected by the Act. At the hearing, Drinkwine's counsel asserted that Drinkwine was "the mouthpiece" or "the one who made sure all the rules were followed," and suggested that this was the reason Drinkwine was repeatedly disciplined. However, Drinkwine did not present evidence that he engaged in concerted protected activities prior to being disciplined in 2009. Drinkwine also stated during his testimony that he believed that Respondent refused to rehire him in December 2010 because of the unsubstantiated allegation that he threatened a Board member in July 2010. However, Drinkwine did not present evidence of a connection between the Board member's allegation and any type of activity protected by the Act. I find the issues in this case to be limited to: (1) whether Drinkwine's December 9, 2010 email constituted activity protected by the Act, and (2) whether Respondent refused to rehire him because of this email.

To be protected by §9, employees' activities must be "concerted." Section 9 is patterned on §7 of the National Labor Relations Act (NLRA) 29 USC 150 et seq., The National Labor Relations Board (NLRB) has held that activity is concerted under §7 of the NLRA if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd sub non *Prill v. NLRB*, 755 F 2d 941 (CA DC 1985), cert denied 474 US 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd sub nom *Prill v NLRB*, 835 F 2d 1481 (DC Cir. 1987), cert denied 487 US 1205 (1988). According to the *Meyers* cases, concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action," and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887. In Drinkwine's December 9, 2010 email, he urged the other laid off officers to join him in taking further steps to fight the layoffs. Since the layoffs were an issue of mutual concern to employees, and Drinkwine was attempting to induce group action on this issue, I find that Drinkwine's email constituted concerted activity under §9.

The Commission, like the NLRB, finds rude, insulting, or offensive remarks, obstreperous comments, and other forms of rough language to be protected under PERA when made in the course of protected concerted activity. *Genesee County Sheriff's Dep't*, 18 MPER 4 (2005); *City of Detroit (Dept of Water and Sewerage)*, 1988 MERC Lab Op 1039; *Baldwin Comm Sch*, 1986 MERC Lab Op 513. It has long held that an employee engaged in protected concerted activity cannot be disciplined for misconduct arising out of such activity unless the employee's actions are so flagrant or extreme as to seriously impair the maintenance of discipline or render that individual unfit for future service. *Isabella Co Sheriff's Dept*, 1978 MERC Lab Op 168; *City of Saginaw*, 23 MPER 106 (2011). In determining whether an employee's actions cause him to lose the protection of the Act, the Commission considers the context in which the actions take place, including where they take place and, in the case of offensive remarks, whether they are made spontaneously in the course of a grievance discussion. For example, in *Baldwin*, a teacher who angrily accused his supervisor during a grievance meeting of being a homosexual, apparently in reaction to the supervisor's suggestion that the two men take a walk in the woods to try and resolve some of their differences privately, was held to be engaged in protected activity despite the offensive nature of his comment. However, the Commission held that the teacher was not engaged in protected conduct when he strode angrily

into his supervisor's office with a tape recorder and demanded to discuss his discipline. In his December 10, 2010 email, Drinkwine used a crude and offensive metaphor to express his view that the Union president had not worked hard enough on behalf of the laid off officers because he wanted to curry favor with the police chief. However, the email was sent only to a handful of other officers. Drinkwine neither confronted his supervisors with this crude metaphor nor broadcast it to the public. I conclude that Drinkwine's use of crude language did not remove his email from the protection of the Act. I find, therefore, that Respondent could not lawfully discipline him for sending this email.

Drinkwine's charge, however, alleges that Respondent's refusal to rehire him for a part-time position in December 2010 constituted unlawful discrimination in violation of §10(1)(a) of PERA. The elements of a prima facie case of unlawful discrimination under §§10(1)(c) or 10(1)(a) of PERA are, in addition to an adverse employment action: (1) employee union or other activity protected by the Act; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employees' 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. Where it is alleged that an employer is motivated by anti-union animus or hostility toward the employee's exercise of his protected rights, the burden is on the party making the claim to demonstrate that protected conduct was at least a motivating or substantial factor in the employer's decision. *Southfield Pub Schs*, 25 MPER 56 (2012)*; MESPA v Evart Pub Schs*, 125 Mich App 71, 74 (1983). If a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *Evart; Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981).

During the year before he was laid off, and after Respondent hired a new police chief, Drinkwine accumulated five disciplinary actions, including a three day suspension. While these incidents might not have placed Drinkwine's job in jeopardy, they established that Respondent considered Drinkwine a less than stellar employee at the time he was laid off for economic reasons. Respondent and the Union agreed that after the arbitration decision in 2010, Respondent had no further obligation to offer part-time positions to Drinkwine or the other laid off officers. I conclude that Respondent has demonstrated that, based on his disciplinary history, Drinkwine would not have been rehired even if he had not sent the December 9, 2010 email. I recommend, therefore, 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
Michigan Administrative Hearing System

Dated: _____