STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BENTON HARBOR PUBLIC SCHOOLS,
Public Employer-Respondent,

-and-

Case No. C12 H-163
Docket No. 12-001406-MERC

FREDDIE MCGEE,
An Individual-Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Gary A. Chamberlin, for the Respondent

Freddie McGee, appearing on his own behalf

DECISION AND ORDER

On August 9, 2013, Administrative Law Judge Doyle O'Connor 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

_____
Robert S. LaBrant, Commission Member

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Natalie P. Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Freddie McGee, Charging Party, appearing on his own behalf

Gary A. Chamberlin, Miller Johnson, for Respondent-Public Employer

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, MCL 423.201, *et seq*, as amended, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based upon the entire record:

The Unfair Labor Practice Charge:

On August 31, 2012, a Charge was filed in this matter by Freddie McGee (Charging Party) against the Benton Harbor Public Schools (Employer or Respondent). The Charge alleged that the Employer had violated PERA by terminating McGee from his position as a school principal, at the end of the school year in June 2012, in retaliation for his engaging in protected activity on behalf of the Benton Harbor Administrative Association. McGee asserted that he had resisted financial concessions sought by the Employer in bargaining; that he had an exemplary prior record; and that despite his record and because of his concerted activity, the Employer terminated his employment. The Employer filed an Answer in which it acknowledged that it had chosen not to renew McGee's individual employment contract, but denied any ill-motive or wrongdoing. The Employer's Answer noted that the parties had successfully negotiated a new collective bargaining agreement, but that the district had a deficit in excess of $16 million. The

Answer asserted that the district reorganized, including by closing some schools, thereby leaving it with an excess of school principals.

The matter was scheduled for trial on November 27, 2012. Shortly before trial, the Employer filed a motion for more definite statement and a motion to strike portions of the Charge. The motions were denied at trial and the evidentiary hearing proceeded as scheduled. The parties presented opening arguments. The parties submitted twenty-one documentary exhibits and McGee presented three witnesses: himself, the district's financial officer, and a member of the school board. At the conclusion of McGee's proofs, the Employer moved for summary dismissal and the parties argued the motion.

Positions of the Parties and Findings of Fact:

Counsel for the parties appeared for an evidentiary hearing on November 27, 2012. Preliminary to the presentation of proofs, I stated on the record my understanding of the position of the parties, as set forth below:1

JUDGE O'CONNOR:

> The charge was filed against Benton Harbor Schools by Freddie McGee and alleges that McGee was unlawfully terminated from employment in retaliation for his protected activity as the president of the Benton Harbor Administrative Association.
>
> McGee asserts that [his termination] was because of his union activity which included the examples given in his charge, that he acted as president of the Administrative Association; that in bargaining in 2011 and 2012 he opposed certain wage concessions; that in the same time frame he complained of extra contractual pay increases given to several Association members and that he opposed the continued interim appointment of one staff person allegedly done in violation of rules that were established at the workplace.
>
> McGee's charge also points to what he asserts are unusual aspects of the announcement that he was being terminated: First, that on March 7, 2012, the Employer said that McGee was being non-renewed in his position due to extreme financial exigency; number 2, that it should have been a layoff instead; number 3, that the contract requires a meeting with the union representative before such a decision is made; number 4, that interim positions are supposed to be eliminated first; number 5, that an individual eliminated in that fashion is normally

1 The transcript excerpt reproduced herein contains typographical corrections and other non-substantive edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.

offered a teaching position if they are a certified teacher, which McGee is; number 6, that there was no pre-termination evaluation which is allegedly required by policy; number 7, that although the Employer asserted that McGee's record was unblemished and that his return would be welcomed, another administrator later left and McGee was not contacted regarding refilling that vacancy. Now, these are Mr. McGee's allegations. Nothing has been proved yet.

The Employer's position, not surprisingly, is different. The Employer denies that McGee was fired for union activity and denies that he was discharged, rather that his contract was non-renewed. The Employer acknowledges that negotiations took place; that a new contract was reached; that there was some dispute over certain individual pay increases; that there was a dispute over an interim appointment and admits that McGee's contract was not renewed, but asserts that it was due to a significant budget shortage and the closing or consolidation of schools resulting in excess principals.

The Employer asserts that McGee failed to request a hearing before the school board; denies the assertion that McGee's record was impeccable; denies that it had a contractual obligation to meet with the union representative to plan a reduction in force; denies that McGee was laid off; denies that there was a practice of offering laid-off principals teaching positions and specifically notes that McGee was never a tenured teacher with Benton Harbor and therefore was not owed the offer of a teaching position; denies any obligation to conduct an evaluation; and further denies the claim that McGee never received an evaluation and asserts that the later vacancy was filled by recalling an individual administrator who had greater rights to the position.

The Employer filed a motion for more definite statement, which I am denying. The Employer had already filed an answer which largely addressed the charge. The Employer also filed a motion to strike portions of the charge, again to which an answer had already been filed. I'm denying the motion to strike for the same reason, partly that it was filed late in the process and stated no substantial reason for striking portions of the charge; however, the motion did highlight some particular issues that I should address. There are portions of the charge which I will take as a recitation of background facts or facts which, if proved, might negate an Employer defense of business justification.

Certain issues related to assertions that the collective bargaining agreement was violated or board policies were violated, those narrow questions are not really before me. I'm not here to rule on whether the contract was violated. Showing a clear contract violation could be

> relevant to showing that something wrong was done. It might be evidence of motive. I could only find a violation or recommend a remedy for a violation of the Public Employment Relations Act, not for a violation of the contract, not for a violation of board policy.
>
> The case remains one where Mr. McGee was obliged to factually prove that he was selected for termination of his employment because of his prior protected activity regardless of whether it might otherwise have been unfair or might otherwise have violated the contract, or might have been unreasonable even. The standard remains that the burden is on Charging Party to show that [the termination] was retaliatory [and based] on his prior union and protected activity.

After the presentation of Charging Party's case in chief, the Employer moved for summary dismissal for failure to present proofs sufficient to support a claim, with the Employer arguing that the proofs amounted to no more than "*speculation and circumstantial conjecture*".

Discussion and Conclusions of Law:

Where materially adverse employment action has occurred, the elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employees' protected activities; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Warren Con Schs*, 18 MPER 63 (2005); *City of St Clair Shores*, 17 MPER (2004); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686.

Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707. Once the prima facie case is met, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419. See also *MESPA v. Evart Public Schools*, 125 Mich App 71 (1983).

After considering the extensive arguments of both parties, I concluded that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165. See also *Detroit Public Schools,* 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc,* 282 Mich App 266

(2009). Accordingly, I rendered a bench decision, with the substantive portion of my findings of fact and conclusions of law from my bench opinion set forth below:

JUDGE O'CONNOR:

> The rules promulgated by MERC, in particular, Rule 423.165, do allow for motions for summary disposition at hearing. And we do sometimes issue bench decisions, which I'm prepared to do. The burden of proving a case is on the charging party. And you posited that [superintendent] Seawood, or someone in his position, would never openly say or show his emotion or his reaction.
>
> And to the contrary, I had a case in front of me involving the Detroit Public Schools where the chairman of the school board told another school board member that he was out to get a particular teacher because of his role with the union, and then they fired him. We ordered him reinstated. And [McGee] had a school board member testify today. She was clearly sympathetic to [McGee], didn't like that you were selected for termination, layoff, whatever one wants to call it. But she also forthrightly testified that nothing adverse was said about you, no indication that superintendent Seawood targeted you because of your union activity, and of some significance, no suggestion that Seawood said anything to the board to suggest that you were anything other than an exemplary employee.
>
> It's one of the things we look at in retaliation cases. It will sometimes happen that an employer doesn't say, "I want to fire this guy because of his union activity," but will say, "I want to fire this guy 'cause he's a lousy employee and has always been a lousy employee," when the records show that he's gotten excellent evaluations the whole time. And that's a particular type of retaliation case that we see, where a major decision maker convinces other decision makers that there is just cause for firing someone, that there is a basis for getting rid of a particular person because of their failings on the job. There's no evidence that Seawood did anything of that sort either.
>
> The evidence is uncontested on the core facts, which is that you've been employed in an administrative capacity as a principal; that you were perceived as a good performer subjectively and objectively, by the current and, seemingly, former leadership of the district; that you were active in the union, became the president, during a difficult period. We're seeing a lot of difficult periods, frankly, these days.

Of some significance, you were the local president during concessionary bargaining. And a significant factor regarding that is that the union and Employer were able to reach a concessionary agreement while you were president. It may not have given the Employer everything they wanted, and that's usually the case. Nobody gets everything they want most days.

There were a couple of issues that you focused on in your testimony: The sequence of events which struck you as unusual and it's also not unusual for us to find a sequence of events that are suspect. And I think you did prove that there were reasons for you to suspect the sequence of events. You received a notice required by statute by a certain date that the superintendent was going to recommend your non-renewal. It's not a final decision because it's not up to the superintendent; it's up to the school board. You then received a notice that he wanted to meet with you about this goal setting thing, which from the looks of it, should have happened much earlier in the year. And you want to argue that that shows bad faith or ill motive.

It just as likely shows that he was trying to clean up an omission or that he was hedging his bets because the school board hadn't approved non-renewing of your contract, and if you were renewed, he was supposed to have had this meeting with you and evaluate you. And it proves those two things equally. It's understandable why you would suspect one thing, but suspecting is not proof, and it could equally be either one of those things.

The board policy you read to mean one thing. The Employer's lawyer reads it to mean another. I'm not serving as a labor arbitrator, in which case I would decide which it meant. And this is a fine distinction. But as a judge, [the policy] is at best ambiguous what it means and, frankly, my reading of it leans towards the Employer's reading. It lists a number of things that the superintendent is supposed to do. And I think you correctly pointed out that he didn't do some of them.

I don't think [the document] clearly links the superintendent's obligation to do the evaluation with whether or not the superintendent can make a recommendation to not renew and whether the board can consider the non-renewal. In fact, it says the reverse of that. It gives a litany of what [the superintendent is] supposed to do and in, sort of, what order. It says, "However." Well, I think the "however" is significant because "however" modifies the preceding sentences. So you're supposed to do A, B and C,

however, should the superintendent decide to recommend non-renewal of a contract, such recommendation -- and I think that is the recommendation to not renew, not the recommendation based on the evaluation -- such recommendation shall be presented to the board before the regular March meeting.

Again, as part of the case law, if an Employer is proven to have gone far afield from its normal procedure, that can lead to an inference of ill motive. But for the Employer to have not done it the way you think he should have done it under the policy, where the Employer has at least as equally plausible explanation of how they think it should have been done, that doesn't really support any inference.

We'll get to the collective bargaining agreement here. Some contracts require layoff by seniority. If you bypass strict seniority to get at somebody, that could infer an ill motive if it's shown that you knowingly went outside of a rigid rule. The contract with the Administrators' Association gives very broad discretion to the superintendent and ultimately to the school board to select who gets the axe when they're reducing staff.

At page 18 of Exhibit 11 it says, *"In reducing staff, the following criteria shall be considered: Ability to perform the job, previous performance, qualification and length of service with the district,"* in that order. Then again, *"However, the decision concerning which administrator shall be laid off shall be within the sole discretion of the Board of Education."* And I understand there's a distinction between "layoff" and "non-renewal" in terms of terminology. In terms of outcome, it's pretty much the same. The board decides who gets axed.

There was no testimony that would support a finding that there was any acrimony or hostility exhibited by Seawood, expressed by him to anyone, including to you. The meetings you had with him about labor relations were seemingly, at least on the surface, cordial and ordinary. And we do see a lot of labor relations settings that are far less than cordial and far less than friendly, but still don't result in retaliation. We see people lose their temper, but then do the right thing. Here, we don't even have a losing of the temper.

I am particularly swayed by the fact that we have the testimony of a school board member and one of the officers of the school board who could not come up with the slightest suggestion that Seawood was out to get you

personally for any reason, much less for union activity. She opposed your termination based on her perception of your qualifications and, as she put it, you were an African-American male and the district needed such leadership. So she was clearly sympathetic to you. But what the evidence shows is that Seawood did nothing to turn the board against you other than make a recommendation that he asserted was based on finances.

It is undisputed that the district is in a deep financial hole. How deep doesn't really matter once you get to "pretty darned deep." And that is undisputed that it was pretty darned deep; that they were in a deep hole. They were in "severe financial stress," as the former Emergency Financial Manager Statute put it. But the collective bargaining agreement recognized that the Employer could choose particular positions to eliminate based on the financial circumstances. Here the -- I believe you said there were eight principals or nine school principals. Three of them lost their principal positions in the same time frame as you. Two of them landed better than you did. The woman ended up teaching, and the Employer offered a plausible explanation, which you don't dispute the plausibility of, which is that she was a certified teacher and was previously tenured with Benton Harbor Schools.

The other man, Davis, if I recall correctly, ended up laid off for six months and then recalled to a vacancy after another employee quit. Seawood has stated publically at the board meeting and the school district's counsel at this hearing stated that there was no impediment to your being recalled. Seawood is quoted in the paper, for what that's worth, again saying that you were basically a great employee and he would be delighted to call you back.

The Employer made a point of the fact that you didn't request a hearing before the board. You're not obliged to, and the fact that you didn't doesn't preclude pursuing this claim in this forum. However, I do think it's notable. Where the board voted unanimously to terminate the other two employees, it split on whether to terminate you. That split alone suggests that there wasn't pervasive animus on the part of the district; that some board members felt strongly enough about you and favorably enough to you to split their vote on a recommendation made by the superintendent. He said, "I want to get rid of these three people." And they said, "Hold on a minute. We want to divide off McGee." And two of the six board members voted in

your favor. Better for you if it had been more, but it was at least two. And they were unanimous in voting to dismiss Floyd and Davis.

There was no suggestion that at the board meeting Seawood took any different posture as to you than he did as to Floyd and Davis. He recommended that all three positions be eliminated; that your contracts not be renewed. There was no evidence that he resisted the effort by a clearly favorable board member to sever you off for the purpose of voting in favor of you. There was no evidence that he resisted that in any particular way or even argued against it.

The issues you raised regarding the salary increase and the athletic director, the evidence establishes that [your] conduct in raising those issues was protected activity. The disputes were of what I would characterize as a fairly ordinary workplace dispute: Who got a raise? Who didn't get a raise? Who got an appointment? Who did not get an appointment? And there was no evidence that those seemingly ordinary disputes became anything more than ordinary disputes; they didn't become acrimonious. It didn't hit the front pages of the paper, become an embarrassment to Seawood. It didn't cost the district a bunch of money because of litigation over it. It didn't go to the board where the board reversed Seawood. And those are sometimes things which will suggest motive or infer it.

There was the distinction made in the testimony about the 2011 and the 2012 Notices of Non-Renewal. And while you initially characterized yourself as the only one who got one in 2012, it's clear that three bargaining unit members got them and that the [non-renewals] were carried out. In 2011 everybody got them, and apparently some people left but nobody in your bargaining unit. But some administrative staff were cut.

The other piece that we often look to in a case where the assertion is that there was a retaliatory motive and that part of the proof is that there was discriminatory treatment, is whether there was some pretextual excuse by an employer. We will sometimes see an employer assert, "Well, we laid him off because of finances." Well, was he the only one laid off? The answer here is "no." The district was, in fact, going through a reorganization where major changes were made. The whole structure of the district was changed from having middle schools to not having middle schools. The number of principals, in fact, declined.

It's not a situation where the Employer said, "We're eliminating your position. Good-bye. Thanks a lot. You're out of here," and then the next year your position pops back up and somebody else has got it with a different title. The district, in fact, consolidated schools and, in fact, eliminated multiple positions.

The distinction between yourself and Davis in terms of a recall, I want to address that question. It appears that Davis was initially treated as being on layoff and then had his contract not renewed and you had your contract not renewed. The collective bargaining agreement language is less than stellarly clear, but it does provide that recall after layoff will be in inverse order of layoff to the first available position in the classification. And it does appear that Davis was laid off before your position was eliminated. And the testimony seemingly supported that he had a greater length of service with Benton Harbor Schools, both of which support the Employer's theory that [bringing him back] was an ordinary decision rather than your theory that it was a pretext bringing him back.

The contract does provide for a retention of reemployment rights for one year for administrators on layoff status. And Davis was within the year. If you both had been gone for several years, then there might not have been a contractual basis for clearly selecting between one of you versus the other. It's also not unusual for a collective bargaining agreement for administrators to not have the kind of strict seniority recall system that some other contracts do. It's not unusual for it to have significantly more leeway.

In sum, I'm granting the Employer's motion. I think you had sufficient proof to cause you to rationally suspect that you may have been unfairly targeted, but you did not have proof which survived trial that [discrimination] in fact, occurred. There is not always fire where there's smoke. Sometimes there's only smoke. I'm holding that you did not meet the burden of proof which you bore, which was to establish that, were it not for your union activity, you would not have been selected for the non-renewal of your contract. The proofs show that the Employer was legitimately in a reorganization; that multiple positions were eliminated; and that [McGee's] was one of them. That, ultimately, is all the proofs show.

Conclusion:

Charging Party did not meet his burden of proof, as the evidence offered amounted, ultimately, to no more than speculation and conjecture. I have carefully considered any additional arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 9, 2013