STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HAZEL PARK HARNESS RACEWAY,
Public Employer-Respondent,

-and-

Case No. C11 B-019
Docket No. 11-000829-MERC

DAVID BELL,
An Individual-Charging Party.
_____/

APPEARANCES:

Novara Tesija, PLLC, by Brett P. Huebner, for Respondent

Kevin J. O'Neill, P. C., by Kevin J. O'Neill, for Charging Party

DECISION AND ORDER

On December 4, 2013, Administrative Law Judge David M. Peltz 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

_____/s/_____
Edward D. Callaghan, Commission Chair

_____/s/_____
Robert S. LaBrant, Commission Member

_____/s/_____
Natalie P. Yaw, Commission Member

Dated: January 23, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Novara Tesija, P.L.L.C., by Brett Huebner, for Respondent

Kevin J. O'Neill, P.C., by Kevin J. O'Neill, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

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 assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of oral argument, I make the conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

This case arises from an unfair labor practice charge filed by David Bell against Hazel Park Harness Raceway, on February 4, 2011. Bell was employed in Respondent's track maintenance department and was a member of Teamsters Local 337. The charge alleges that Respondent violated PERA by retaliating against Bell for filing a series of grievances. The parties appeared before the undersigned for the purpose of an evidentiary hearing on May 31, 2011. The hearing was adjourned, however, in order to give Bell an opportunity to retain counsel and due to the fact there was a pending arbitration proceeding which was related, in part, to the allegations set forth by Bell in the instant charge.

Following the aborted hearing, Bell retained attorney Kevin J. O'Neill to represent him in connection with this matter. On October 20, 2011, Bell, with the assistance of O'Neill, filed an amended charge which attempted to clarify the allegations he previously set forth against Hazel Park Harness Raceway. In the amended charge, Bell contends that Respondent laid him off from his position at the Raceway effective January 22, 2011, and subsequently refused to recall him

for employment for the live racing seasons which commenced in the spring of 2011 and 2012. According to the amended charge, these actions were in direct response to Bell having filed grievances against Hazel Park Harness Raceway on October 13, 2010, January 7, 2011, January 26, 2011 and January 29, 2011.

One day after the amended charge was filed in this matter, Teamsters Local 337, via its attorney O'Neill, filed its own charge against Hazel Park Harness Raceway. The charge asserted that the Employer violated PERA by repudiating a provision in the parties' collective bargaining agreement which guaranteed members of the track maintenance department 28 weeks of employment each racing season. In addition, the Union claimed that management threatened employees if they grieved the issue and that Respondent unlawfully refused to recognize grievances filed by stewards or the Local 337 business representative. The charge was assigned Case No. C11 J-182; Docket No. 11-000829-MERC and consolidated with Bell's charge.

On October 16, 2012, Respondent filed a motion to dismiss Bell's charge in Case No. C11 B-019; Docket No. 11-000828-MERC and Local 337's charge in Case No. C11 J-182; Docket No. 11-000829-MERC. With respect to the former, Respondent asserts that Bell's layoff was consistent with the language of the collective bargaining agreement and that Charging Party failed to present any factually supported allegation which would establish that the Employer's actions were the result of anti-union animus. Attached to the motion was a copy of an arbitration award dismissing an October 7, 2010 grievance filed by Local 337 on behalf of the sweepers and a January 7, 2011 grievance filed by Bell. In addition, the Raceway's motion was supported by a sworn affidavit from Ken Marshall, the director of operations for Hazel Park Harness Raceway.

Bell and Local 337 filed a joint response to the Employer's motion for summary disposition on October 24, 2012. On October 30, 2012, the parties appeared before the undersigned for the purpose of oral argument on Respondent's motion. Both attorneys made extensive arguments in support of their respective positions concerning Bell's charge against the Raceway. With respect to the Union's charge, I concluded at the outset that there appeared to be material questions of fact and that an evidentiary hearing would likely be necessary. However, I encouraged the parties to attempt to resolve the matter as part of the ongoing negotiations on a successor collective bargaining agreement. For those reasons, the parties did not present any arguments at that time with respect to the charge filed by Local 337. The Union subsequently withdrew that charge by letter dated September 19, 2013.

Facts:

The following facts are derived from the unfair labor practice charge, the amended charge, and Charging Party's response to the Employer's motion for summary disposition, as well as the assertions set forth by the Employer at oral argument and in its motion for summary disposition, along with the attachments thereto, which were not specifically disputed by Charging Party. Hazel Park Harness Raceway conducts live horseracing onsite from approximately May to October of each year. When the live racing season ends, the facility remains open for simulcasts of out-of-town races.

Teamsters Local 337 represents a bargaining unit of nonsupervisory employees of Hazel Park Harness Raceway, including employees in the track maintenance department and the sweeping department. The work of the track maintenance employees, or "track crew", is related primarily to the live racing activities conducted on-site. The track crew is responsible for maintaining the racetrack surface and the areas in and around the barns in which the horses are stabled. The track maintenance employees are typically laid off at the conclusion of each live racing season and then called back to work the following spring. Employees assigned to the sweeping department work year round performing general maintenance on the remainder of Respondent's property. Although track maintenance employees and sweepers are in the same bargaining unit, there are separate seniority lists for each classification.

The most recent collective bargaining agreement between Hazel Park Harness Raceway and Teamsters Local 337 covered the period September 14, 2009 to December 13, 2012. Due to a reduction in length of the live racing season, the Employer and the Union negotiated an addendum to the contract which allows track maintenance employees to bump into positions within the sweeping department whenever the live racing season falls below a pre-determined number of weeks. The addendum provides, in pertinent part:

> 5. Expanded Work
>
> If the number of live racing weeks during the season falls below 28, any member of the track maintenance crew will be permitted to perform barn and ground work, or if no such work is available, other sweepers department work at Hazel Park Harness Raceway until he has worked 28 weeks dependent on workload requirements as determined solely by the employer and [in] conformance with the seniority status within each individual department. All work performed by the track maintenance crew will be at the [track maintenance wage rate], regardless of the department in which it is performed until he has worked 28 weeks. Any additional work will be performed at rates applicable to the department. Track maintenance workers employed by Hazel Park in 2009 will have seniority preference in the sweeping department over sweepers hired after April 1, 2010 during non-live [racing weeks] if [the live racing season] falls below 28 weeks.

David Bell began working for Hazel Park Harness Raceway as a track maintenance employee in 2006. Beginning that year and continuing through 2009, Bell was laid off at the conclusion of each live racing season and he did not return to work at the Raceway until the following spring. Bell was similarly laid off on October 3, 2010, prior to having completed 28 weeks of work for the 2010 racing season. However, due to the recently negotiated contract addendum, Bell was allowed to bump into the sweeper department where he continued to be paid at the track maintenance wage rate. Upon completion of his 28th week on or about November 27, 2010, Bell's compensation was changed to the sweeper rate.

Bell filed grievances against the Employer on October 13, 2010 and January 7, 2011. In the October 13, 2010 grievance, Bell asserted that he was laid off for two weeks in violation of the collective bargaining agreement. With respect to the January 7, 2011 grievance, Bell claimed that Respondent violated the contract by requiring him to perform track maintenance work while

paying him at the reduced sweeper rate. The grievance further asserted that the Employer improperly threatened to lay Bell off if he refused to perform certain work. Local 337 processed the January 7, 2011 grievance to arbitration. On December 30, 2011, arbitrator Richard N. Block issued an Opinion and Award denying the grievance based upon his conclusion that the Raceway's actions with respect to Bell were consistent with Section 5 of the addendum to the collective bargaining agreement. In the same opinion, Block also denied a grievance filed by Local 337 on October 7, 2010 on behalf of the sweepers.

Bell was laid off by the Respondent on January 22, 2011 after having worked approximately two months longer than he had in any of the previous four years. At the time he was laid off, Bell was the least senior employee in the track maintenance department. During the week following his layoff, Bell filed two additional grievances against the Raceway.

For the 2011 live racing season, Hazel Park Harness Raceway underwent a substantial change in its operations. In previous years, the horses remained stabled on site for the entire racing season. Beginning in the spring of 2011, Respondent changed to a "ship-in" operation pursuant to which horses were transferred to the facility prior to the beginning of the race and then taken off site that same day. According to Respondent, this change significantly reduced the amount of track maintenance work at the Raceway and resulted in the Raceway deciding not to recall Bell for the 2011 and 2012 live racing seasons. Bell was the only employee within the track maintenance department who was not recalled for those two seasons. However, a member of the track crew with more seniority than Bell retired in 2011 and was not replaced. Although Charging Party disagrees with the Employer's assertion that the move to a "ship-in" operation resulted in a reduction in work for the track crew, there is no dispute that the Raceway continued to operate with two fewer track maintenance employees after the change. Similarly, there is no dispute that the Raceway offered to bring Bell back to work as a sweeper in May of 2012, but he refused to accept the position.

Discussion and Conclusions of Law:

Charging Party contends that Respondent discriminated against him in violation of Section 10 of PERA by laying him off from his position at the Raceway effective January 22, 2011, and subsequently refusing to recall him for employment for the live racing seasons which commenced in the spring of 2011 and 2012. According to Charging Party, these actions were in retaliation for Bell having filed a series of grievances against Hazel Park Harness Raceway beginning in the fall of 2010 through January of 2011.

Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. The elements of a prima facie case of unlawful discrimination under PERA 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 toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Univ of Michigan,* 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. 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. 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. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA, supra*.

In the instant case, the record establishes that Charging Party engaged in protected activity of which Respondent was aware when he filed grievances in late 2010 and early 2011. Nevertheless, I find that Bell has failed to set forth any factually specific allegations which, if true, would prove the remaining elements necessary to establish a prima facie case of unlawful discrimination under PERA. Based upon the undisputed facts set forth by the parties, it is apparent that Respondent acted in a manner consistent with the terms of the collective bargaining agreement with respect to Bell's employment. There is no dispute that employees within the track maintenance department, including Bell, have historically been laid off at the conclusion of each live racing season and that such a practice continued at the end of 2010. However, due to the addendum entered into between Respondent and the Union, Bell actually worked a full two months longer than he had in prior years. Although he was ultimately laid off in early 2011 and was not recalled for the 2011 racing season, it is uncontested that he was the least senior member of the track maintenance crew during this period. The record further establishes that the Raceway underwent a change in operation at the beginning of 2011 which substantially changed the way horses were stabled. Although Bell asserts that the change did not reduce the work of the track maintenance department, there is no dispute that another more senior member of the track crew retired around the same time and was not replaced. Further belying the notion that the Employer harbored animus against Charging Party is the fact that the Raceway gave Bell the opportunity to return to work in 2012, albeit in a different position, and that Bell declined the offer.

In an attempt to establish anti-union animus, Charging Party relies primarily on the fact that the layoff occurred not long after he filed grievances against the Raceway in October of 2010 and January 7, 2011. The Commission has recognized that the timing of the adverse employment action in relation to the employee's union activity may be circumstantial evidence of unlawful motive, and the closer the employer's action follows upon its learning of the union activity, the stronger that evidence becomes. *Mid-Michigan Comm Coll*, 26 MPER 4 (2012) (no exceptions). However, it is well established that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result of anti-union animus. As the Commission stated in *Southfield Public Schools*, 22 MPER 26 (2009), "[a] temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation." See also *University of Michigan*, 1990 MERC Lab Op 242, 249; *Plainwell Schools*, 1989 MERC Lab Op 464; *Traverse City Bd of Ed*, 1989 MERC Lab Op 556; *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003).

Although Bell was laid off less than three months after filing his first grievance against Respondent and fifteen days after he filed a second grievance, Charging Party has failed to show that he is capable of producing competent evidence to establish that the timing of the layoff was anything more than mere coincidence. Bell asserts that immediately after he learned that he was being laid off, two employees, Tim Brown and "Sam", told him that they had heard that the layoff was in retaliation for him having filed grievances against the Raceway. However, Charging Party has not alleged that his fellow employees heard this information directly from management and there is nothing in the record to suggest that any witness would be able to provide such attribution if an evidentiary hearing were to be held. To this end, it should be noted the purpose of oral argument was to consider the merits of Respondent's motion for summary disposition. In that motion, the Employer denied that there was any discriminatory motive to its actions and asserted that at all times it acted properly and consistent with the requirements of the collective bargaining agreement. In support of that contention, Respondent offered a sworn affidavit from its director of operations. Notably, Charging Party did not respond in kind with affidavits from either of the two employees which would establish the basis for their belief that Bell was being retaliating against for filing grievances. To conclude that the Employer harbored anti-union animus solely from unattributed statements allegedly conveyed to Bell would be to engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra, supra*.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I find that Charging Party has failed to present any factually specific allegation which, if true, would establish that Hazel Park Harness Raceway violated Section 10(1)(c) of PERA by discriminating against Bell for filing grievances. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by David Bell against Hazel Park Harness Raceway in Case No. C11 B-019; Docket No. 11-000828-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 4, 2013