STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB COUNTY (JUVENILE JUSTICE CENTER),
Public Employer-Respondent,

Case No. C07 F-122

-and-

CHRISTINA PELTIER,
An Individual-Charging Party.
_____/

APPEARANCES:

James S. Meyerand, Macomb County Corporation Counsel, for Respondent

Christina Peltier, appearing on her own behalf

DECISION AND ORDER

On December 13, 2011, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter, finding that Respondent Macomb County Juvenile Justice Center, did not violate § 10(1)(a), (c) or (d) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1) (a), (c) or (d), when it disciplined and ultimately terminated Charging Party Christina Peltier's employment due to excessive and unexcused absenteeism. The ALJ found that Respondent's actions were not based on anti-union animus and were not discriminatory; therefore, the ALJ recommended that the charge be dismissed. The Decision and Recommended Order of the ALJ was served on the parties in accordance with § 16 of PERA.

Charging Party filed a motion for extension of time in which to file exceptions to the ALJ's Decision and Recommended Order. The motion was granted, and the time was extended until February 6, 2012. She subsequently requested a second extension of time and was informed that she needed to either show good cause for the extension or obtain a stipulation from Respondent for the second extension. Respondent informed the Bureau of Employment Relations that it did not object and Charging Party was granted an extension to March 7, 2012. When Charging Party later moved for a third extension of time, Respondent would not stipulate to a third extension and Charging Party's motion was denied on March 7, 2012. On March 14, 2012, Charging Party filed a Motion for Reconsideration of her motion for a third extension of time and sought permission to file exceptions no later than March 21, 2012. On March 21, 2012, she filed exceptions together with a Motion for Retroactive Extension of Time.

On reconsideration, the Commission determined that Charging Party had demonstrated good cause for the third extension and, finding that she had filed exceptions within the time requested in her motion for the third extension, granted the extension to March 21, 2012, in an order issued on April 11, 2012.

Rule 423.176(6) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R423.176(6) states that "[w]ithin 10 days after service of exceptions, a party may file 1 original and 4 copies of cross exceptions . . . or . . . a brief or legal memorandum in support of the decision and recommended order." In accordance with Rule 423.176(6), the Commission's order directed Respondent to file its response to Charging Party's exceptions within ten days of the date of the order. Accordingly, the Commission's April 11, 2012 order granting the extension of time to Charging Party notified Respondent of the time within which it was to file its response to the exceptions stating: "Respondent is permitted to serve and file a response to Charging Party's exceptions within 10 days of the date of this order." Pursuant to Rule 183, three days are added to the ten days to allow for the mailing of the Commission's order. Respondent's response to Charging Party's exceptions was, thus, due on April 24, 2012, thirteen days after the Commission's order granting the third extension of time.

Respondent filed its response to the exceptions on April 25, 2012. The response was untimely, and Respondent did not request an extension of time in which to file either cross exceptions or a brief in support of the ALJ's decision. Accordingly, Respondent's response to the exceptions was not considered by the Commission in reaching our decision.

On March 26, 2012, Charging Party filed a motion for oral argument and to extend the page limit accompanied by a statement of service. On March 29, 2012, she filed a motion to amend exceptions, together with amended exceptions accompanied by a statement of service. Respondent did not file an answer to any of these motions.

We find that oral argument would not materially assist us in deciding this case, and Charging Party's motion for oral argument is accordingly denied.

Charging Party's motion to file amended exceptions and Charging Party's motion to extend the page limit are granted. The record reveals that the motions were served upon Respondent, but it did not respond. By failing to file timely responses, Respondent has waived the opportunity to oppose the motions. Accordingly, Charging Party's amended exceptions were considered in reaching our decision.

In her exceptions, Charging Party alleges several errors by the ALJ. She argues that the ALJ erred by refusing to admit relevant evidence (the testimony of several Macomb County Commissioners) and by failing to consider the entire record in reaching her decision. She asserts that the ALJ also erred by determining that collateral estoppel applied to this case and the ALJ was, thus, bound by the factual and legal findings of a federal court in a collateral case filed in the United States District Court for the Eastern District of Michigan. (See below). Charging Party also alleges that the ALJ erred by adding documents from the collateral federal case into

the record in this case because the ALJ lacked the authority to *sua sponte* add evidence into the record.

We have carefully reviewed the record and Charging Party's exceptions and we find the exceptions to be without merit.

Charging Party's Concurrent Federal Court Action:

The hearing before the ALJ took place over the course of fourteen days between December 2008 and September 2010. The record closed on April 24, 2012. On February 26, 2010, Charging Party had filed a federal court complaint against Respondent, alleging that she was disciplined and terminated in retaliation for exercising her rights under the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (FMLA) and the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4334 (USERRA). On March 25, 2011, Magistrate Judge Virginia Morgan issued a Report and Recommendation to grant Respondent's motion for summary judgment and dismiss Charging Party's case. Judge Gerald Rosen adopted the Report and Recommendation and issued an Opinion and Order, and a judgment, dismissing Charging Party's complaint with prejudice on September 30, 2011. Judge Rosen ruled that the absences relied upon by Respondent in disciplining and ultimately terminating Charging Party were not excused absences under either FMLA or USERRA. He held that the large number of absences Charging Party accumulated because of reasons unrelated to either her FMLA leave or her military service, constituted a legitimate, non-pretextual and non-discriminatory reason for Respondents' adverse employment actions – a verbal reprimand, a written reprimand, a suspension, and termination.

After Judge Rosen issued his opinion and judgment, Respondent moved to reopen the record in this matter on June 30, 2011, and requested that the ALJ admit Judge Rosen's opinion, order and judgment into evidence. Respondent argued that the entire record of the MERC hearing was admitted into evidence in the federal case and was relied upon by both parties in their briefs, in addition to being cited by Judge Rosen in his opinion. Respondent further argued that Judge Rosen's opinion should be admitted on the basis of collateral estoppel because the Commission is estopped from making any findings of fact or law on any issues which were before and decided by Judge Rosen, such as his conclusion that Charging Party's absences were not excused and that Respondent did not retaliate or discriminate against Charging Party for exercising her rights under FMLA and USERRA.

The ALJ denied the motion to reopen the record on June 30, 2011. However, in her Decision and Recommended Order, she found that collateral estoppel applied to certain of Judge Rosen's findings, and she made Judge Rosen's Opinion, Order and Judgment part of the record. Charging Party, in her response to Respondent's motion to reopen the record, attached additional documents from the federal court case and requested that those documents be made part of the record if the ALJ admitted the federal Court's Opinion, Order and Judgment. The ALJ granted the request and made additional federal court documents part of the record. Charging Party then moved that this case be held in abeyance while she appealed Judge Rosen's judgment. The ALJ denied the motion.

Factual Summary:

The facts are stated at length in the ALJ's Opinion and Recommended Order and will be repeated here only as needed. Charging Party was employed by Respondent as a Youth Specialist from 1998 to 2008. She was also a member of the Army National Guard from 2002 until she was honorably discharged on January 23, 2008. The National Guard required that she appear annually for two weeks of training.

Charging Party belonged to a bargaining unit consisting of youth specialists and served as the bargaining unit chairperson, after having served as union steward for UAW Local 889 for two years. In the course of discharging her union duties, she filed numerous grievances on behalf of union members and participated in contract negotiations. Prior to the events giving rise to this case, Charging Party had not been disciplined.

In April 2007, Charging Party notified Respondent that her young son was ill. She requested, and was granted, intermittent FMLA leave for the purpose of caring for her son.[1] Her FMLA leave began on April 20, 2007 and ended on October 20, 2007. The collective bargaining agreement and Respondent's staffing needs[2] required employees to call in whenever the employee wished to utilize an intermittent FMLA leave day. Charging Party, as detailed below, either called in and reported she would be absent for reasons unrelated to her FMLA leave, or she failed to call in at all on days she did not appear for work. Those absences occurred during the period covered by her intermittent FMLA leave and continued beyond the expiration date of the leave.

Respondent has a written attendance policy that utilizes progressive discipline for excessive absenteeism. Excessive absenteeism is defined as "a total of four or more occurrences of unexcused absences in any three-month period or a pattern of abuse." The record (attendance notices and other documents) demonstrates that Charging Party was absent, and did not call in to report her absences, on May 1, May 12-14, May 17-18, August 16-17, August 20, August 23-25 and August 27 of 2007. She called in claiming she, and not her son, was ill on May 20, July 7, July 22-23, July 28-29, September 2-3, September 6 and September 12, 2007. On August 30, 2007, Charging Party called in, but gave no reason for her absence. On September 1, 2007, she called in claiming "family illness."

Charging Party called in claiming to be on military duty on May 21, August 12, August 15, August 31, September 8-9, September 11 and October 6 of 2007. When she called on August 12, Charging Party informed Respondent she would be out for military service for the next three weeks. Her August 15 call claimed that the military paperwork had not been processed, so Respondent could select either her son or car problems as the reason for her absence.

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[1] Respondent initially denied the request for FMLA leave due to insufficient medical documentation. Once the required documentation was received, the record reveals that Respondent granted the leave retroactively and the leave was for the period of April 20, 2007 through October 20, 2007.

[2] Respondent Macomb County Juvenile Justice Center is a high security residential detention center for youth and requires staff on the premises twenty-four hours a day, seven days a week. It is licensed and regulated by the State of Michigan. The minimum staffing requirements are established by the State.

The record also demonstrates that while Charging Party claimed that she was absent for military training from August 13, 2007 – August 31, 2007, her commanding officer testified that she was not engaged in military service on any of those dates. In addition, Respondent received a memorandum on September 11, 2007 from Charging Party's unit commander which noted that Charging Party had been unable to complete her military obligation in August 2007.[3] Respondent concluded that Charging Party had falsely reported that she was absent for military service, and Respondent scheduled a *Loudermill* hearing for November 29, 2007.[4]

Charging Party received a verbal reprimand on September 11, 2007 for the August 27, 30 and 31 absences, and for the September 1, 2, 3 and 6 absences. She received a written reprimand on September 17, 2007 for excessive absences, which stated that "[i]n a three month period you have accumulated ten (10) days of unexcused absences as follows: 9/12/07, 9/6/07, 9/3/07, 9/2/07, 7/29/07, 7/28/07, 7/23/07, 7/22/07, 7/7/07, 7/1/07. To date, we have not received medical excuses for any of the above absences." The attendance notices demonstrate that Charging Party called in sick on all of those dates; she did not state that she was taking those days off in order to care for her son.

On January 10, 2008, Respondent notified Charging Party by letter that she was being suspended without pay. The letter stated that the suspension was for being "in a no call no show status for an extended period of time and . . . you have been less than truthful . . . regarding your absences from work. Based on these issues and your prior disciplinary record, you are placed on an unpaid disciplinary suspension for 15 days beginning January 11, 2008. You are to return to work on January 31, 2008."

The record reveals that Charging Party did not return to work on January 31, 2008. She called in and refused to give a reason for her absence; the attendance notice states that she informed Respondent that "the administration would know why." Charging Party was absent from work, came to work late, or left work early on February 1, 5, 9, 11, 17, 24, 27-29, also March 3-4 and 6-10 of 2008. The reasons given for these absences included lack of child care, taking her son to the doctor, illness, nerves, stress, car trouble, and "harassment by Respondent." On some of those dates, as revealed by attendance notices in the record, Charging Party did not call in to report she would be absent.

Charging Party was informed on March 5, 2008, that another *Loudermill* hearing would be scheduled to discuss excessive and unexcused absences. She was informed on March 10, 2008, that she must apply for a leave of absence if absent for six or more days, and she must provide medical documentation to support absences from February 27, 2008 to March 10, 2008. Charging Party waived her right to the hearing. On March 19, 2008, she received a letter informing her that her employment had been terminated for excessive and unexcused absences.

[3] In addition to that memorandum, Respondent received two letters from the military providing the dates Charging Party had attended military training in 2007. The letters stated that Charging Party did not attend any military training in August of 2007.

[4] Charging Party admitted at the hearing that she had not attended military training in August or September of 2007.

The ALJ noted that there were some dates where Charging Party was initially denied FMLA leave or where Respondent considered an absence unexcused, when it should have been excused. However, after proper documentation was received, or discrepancies were resolved, Charging Party was credited for all FMLA leave to which she was entitled and all absences that should have been excused. The adverse employment actions at issue here were based on the many absences that were documented as unexcused. The record reveals that for the entire period of her FMLA leave, Charging Party was given all of the FMLA days for which she reported she would be absent due to having to care for her son.

During the period of time when these events were occurring, Charging Party contacted various county commissioners and provided them with documents concerning her absences and discipline. However, as noted by the ALJ, the commissioners took no part in any of the activities at issue and played no role in the management of county personnel. For this reason, Charging Party's request that county commissioners be permitted to testify at the hearing was denied.

Charging Party's union filed grievances over the suspension and the discharge. After a three day hearing, an arbitrator denied the grievances.

Discussion and Conclusions of Law:

Collateral Estoppel:

The ALJ found that Charging Party was bound by certain factual and legal findings made by Judge Rosen due to the doctrine of collateral estoppel. Collateral estoppel holds that an issue may not be litigated in a subsequent cause of action between the same parties where the prior proceeding culminated in a final judgment and the issue was actually and necessarily determined in the prior proceeding. *Leahy v Orion Twp,* 269 Mich App 527 (2006). Collateral estoppel applies where the issues in both the first and the subsequent cases are identical and the prior litigation presented the parties with a full and fair opportunity to litigate the issue. *Keywell v Rosenfeld*, 254 Mich App 300 (2003).

We adopt the conclusions of the ALJ regarding collateral estoppel. The ALJ found that Judge Rosen's finding that Respondent had legitimate, non-pretextual and non-discriminatory reasons for reprimanding, suspending, and discharging Charging Party was essential to the Court's decision in that case and is essential to our decision in this case. The federal court's opinion and order dismissing Charging Party's case is a valid, final judgment. Accordingly, the ALJ found, and we agree, that this Commission is bound by Judge Rosen's findings.

The Unfair Labor Practice Charge:

Charging Party alleges that Respondent retaliated against her and discriminated against her due to her union activities, when it disciplined and ultimately discharged her. She claims that all of her absences should have been excused because she was either caring for her ill son, thus using FMLA leave, or was performing her annual Army National Guard service. She also contends that Respondent's procedure for calling in to report absences was faulty and, therefore,

many of her absences were incorrectly documented.[5] She argued that had Respondent not harbored hostility toward her union activities and her filing of unfair labor practice charges, her absences would have been excused.

Having found that we are bound by the doctrine of collateral estoppel, we conclude, as did Judge Rosen, that Respondent had a legitimate, non-discriminatory, and non-pretextual reason for reprimanding, suspending, and discharging Charging Party and thus, Respondent did not violate PERA by taking those adverse employment actions.

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain, or coerce a public employee where that employee is engaged in lawful union activity. Section 10(1)(c) of PERA prohibits a public employer from discriminating against employees in the terms and conditions of employment 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. 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); *City of St. Clair Shores*, 17 MPER 27 (2004). The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA.*

In this case, the record establishes that Charging Party engaged in protected activity and Respondent was aware of her union activity, which included her participation in contract negotiations and her filing several grievances and unfair labor practice charges on behalf of bargaining unit members. However, she has failed to set forth any facts that, if true, would establish that Respondent discriminated against her because of those activities. More importantly, Respondent has produced a plethora of credible evidence to demonstrate that it would have taken the same adverse employment actions even if Charging Party had not engaged in protected union activity.

In an attempt to establish anti-union animus, Charging Party states that on January 21, 2007, Respondent refused to allow her, as union representative, to participate in a meeting between Respondent and a bargaining unit member and, at the meeting, made "inappropriate" statements to her. She additionally alleges that on three occasions Respondent informed her that she could not carry out her duties as unit chairperson while on sick leave to care for her son. She

[5] The ALJ noted, and we agree, that there is no evidence to support the allegation that Respondent's procedure for reporting absences was inadequate, faulty, or resulted in errors being made on any of the call in slips or attendance notices regarding Charging Party's absences.

claims that she was ordered to conduct all union business in the Juvenile Justice Center (JJC) facility from an office designated by Respondent, that she was denied union release time which the collective bargaining agreement grants to the unit chairperson, that her pay was docked for time spent on union activities during her union release time, and that she was singled out when Respondent made a record of time she spent in the JJC's control room looking for a replacement battery for her radio. She also claims that Respondent failed to conduct a thorough and complete investigation of harassment complaints she made against co-workers, supervisors, and the JJC Director. She asserts that she was reprimanded for failing to get a required tuberculosis test. She also claims that after April 20, 2007, Respondent repeatedly denied or refused to take any action on her request for intermittent FMLA leave and denied her request for a leave of absence to perform her National Guard service. Charging Party accuses Respondent of making "inappropriate and rude" comments during the *Loudermill* hearing held to investigate her alleged misuse of military leave time. Finally, she claims that the reprimands, suspension, and termination are all evidence of anti-union animus, coercion, and discrimination.

The ALJ found that other employees also received reprimands for failing to get tuberculosis tests done on their own time and timely submit the results of such tests. Before 2007, Respondent brought in a health professional to conduct the tests at the job site. Charging Party filed a grievance over the reprimands. However, the union and Respondent subsequently reached an agreement that employees could be required to get the tests on their own time; all the reprimands were rescinded. The ALJ also found that Charging Party was not allowed to use her union release time only when Respondent had no one to cover for her and not because of her union activities. The ALJ also noted that while Charging Party was told that she could not conduct union activities while on leave, she continued to do so without being disciplined. As the ALJ noted, "Peltier continued to communicate with both members of her unit and Respondent representatives on union matters on days that she had called in sick because of her son." Accordingly, the tuberculosis test issue and the issue of whether Charging Party could conduct union business while on FMLA leave cannot support an allegation of anti-union animus. The ALJ so held, and we concur.

Charging Party also claimed that on days Respondent claims she was a no call, no show, she actually called in and Respondent's claim that she did not are evidence of animus. However, citing the procedure used to process call in slips, the ALJ stated: "I do not credit Peltier's testimony that she called in on these dates." The ALJ determined that Charging Party's testimony was not credible, and we will not overturn an ALJ's determinations of witness credibility unless we are presented with clear evidence to the contrary. The ALJ is in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. *City of Inkster,* 26 MPER 5 (2012). See also *Redford Union Sch Dist,* 23 MPER 32 (2010); *Eaton Co Transp Auth*, 21 MPER 35 (2008). The ALJ also noted that for the absences included in the written reprimand issued to Charging Party, none of the call-in slips mention Charging Party's son; rather they state "personal illness" or "sick" without any explanation. Respondent's conclusion that the absences were unexcused is, thus, not evidence of anti-union animus.

The ALJ found that Respondent did not violate § 10(1)(a) of PERA when, at the *Loudermill* hearing, one of Respondent's agents said that Charging Party was always

complaining about something. The ALJ found that a reasonable employee would not have interpreted the remark as a threat and therefore, the remark is not evidence of anti-union animus. We agree.

The ALJ discussed all other instances claimed by Charging Party to constitute anti-union animus, interference, coercion and/or discrimination and found none of them to be supported by the evidence or by the testimony of Charging Party. She discounted Charging Party's efforts to rebut Respondent's finding that Charging Party falsely claimed to be on military leave during August 13-31, 2007. The ALJ found Charging Party's testimony that she called in every day to say she was absent because of her son to be not credible. As noted above, we will not disturb credibility determinations made by the ALJ, who was in the best position to observe and evaluate Charging Party's testimony. The ALJ also noted that at the *Loudermill* hearing, which Charging Party did attend, Respondent "decided to consider any day Peltier claimed … to have been absent because of her son to be an excused absence. Some of the dates listed [as unexcused] were, therefore, taken off the list." This is another instance where we agree with the ALJ that Respondent's actions were not based on anti-union animus and were neither coercive nor discriminatory.

We find no merit in Charging Party's argument that the ALJ lacked the authority to accept the federal court documents into the record. Pursuant to Rule 172(h) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.172(h), an ALJ may "take official notice of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either generally recognized or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.". In addition, an ALJ may "take official notice of common law, administrative law, constitutions, public statutes, private acts, resolutions of public bodies, ordinances and regulations." Rule 423.172(i). The federal court opinion, order and judgment are not subject to reasonable dispute. It is a matter of public record, and its accuracy cannot reasonably be questioned.

We also disagree with Charging Party's assertion that the ALJ erred by refusing to permit Macomb County Commissioners to testify. After hearing Charging Party's testimony concerning conversations Charging Party had with various commissioners, the ALJ concluded that their testimony was not relevant to any material issue in dispute. Charging Party wanted the commissioners to testify about complaints she made to them that she believed she was being harassed by Respondent. We agree with the ALJ that Respondent was well aware of Charging Party's claims that it was harassing and discriminating against her, and whether the commissioners also knew that she believed she was being harassed because of her union activities is irrelevant.

We have carefully considered all other issues raised by Charging Party in her exceptions and amended exceptions and find that they would not change the result.

We, therefore, affirm the ALJ's recommended dismissal of Charging Party's unfair labor practice charge and issue the following Order:

ORDER

The unfair labor practice charge is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant. Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: June 11, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MACOMB COUNTY (JUVENILE JUSTICE CENTER)
Public Employer-Respondent,

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-and-

CHRISTINA PELTIER,
An Individual-Charging Party.
_____/

APPEARANCES:

James S. Meyerand, Macomb County Corporation Counsel, for Respondent

Christina Peltier, appearing for herself

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 in Detroit on fourteen days between December 2008 and September 2010 by Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before January 26, 2011, a reply brief filed by Charging Party on February 28, 2011, a motion filed by Respondent to reopen the record filed on October 7, 2011, Peltier's response to this motion filed on October 31, 2011, and additional documents submitted by Respondent on November 29, 2011 and by Peltier on November 30, 2011, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge and History of the Proceeding:

On June 7, 2007, Christina Peltier, then employed by Macomb County as a youth specialist at its Juvenile Justice Center (JJC), filed eight unfair labor practice charges, including this one, on behalf of UAW Local 889 (hereinafter Local 889). Local 889 was then the collective bargaining representative for a unit of employees at the JJC that included youth specialists. When these charges were filed, Peltier was the bargaining unit chairperson for this unit. Shortly after the charges were filed, however, the Police Officers Association of Michigan (POAM) filed a petition for a representation election with the Commission. On January 4, 2008, the POAM replaced Local 889 as the bargaining agent for this unit.

The instant charge originally alleged that on or about February 6, 2007, Respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by the Act and "had acted in a retaliatory manner toward unit chairperson Christina Peltier because of her representation of bargaining unit employees." The other unfair labor practice charges filed by Peltier in June 2007 alleged that Respondent violated its duty to bargain by implementing unilateral changes in various terms and conditions of employment between January and June 2007, by refusing to bargain over these changes and/or their impact on employees, and by refusing to provide Local 889 with information it had requested relating to these changes.

The charges were initially consolidated for hearing, but the hearing was adjourned while Peltier confirmed that she was authorized by the president of Local 889 to file the charges alleging a refusal to bargain in good faith. On January 10, 2008, Respondent filed a motion to dismiss the charges on the grounds that they were moot due to the change in the bargaining representative. On this same date, January 10, 2008, Peltier was issued a fifteen day suspension. The suspension stated that Peltier had falsely claimed to be on military leave on twenty-two dates between July 14 and October 11, 2007. Respondent informed Peltier that her absences on these dates had been deemed unexcused and that she was being disciplined for violating the JJC's attendance policy, which provided for discipline after three unexcused absences within a three month period, and for being "untruthful" regarding the reasons for her absences. On March 19, 2008, Peltier was terminated after incurring additional unexcused absences in January and February 2008.

At a pre-trial conference held on April 9, 2008, Peltier asserted that her discharge was in retaliation for her activities as unit chairperson and her filing of the unfair labor practice charges. She maintained that but for Respondent's hostility toward her union activities and her filing of the charges, her absences would have been excused. After the conference, I severed the instant charge from the bargaining charges and scheduled it to be heard separately. [6]

After the pre-trial conference, Peltier amended the instant charge to substitute herself for Local 889 as the Charging Party. The charge was amended three times after the pretrial conference, with the third and final amended charge filed on June 12, 2008. The charge, as amended, alleges that Respondent interfered with, restrained or coerced employees in the exercise of their Section 9 rights in violation of Section 10(1)(a) of PERA by: (1) on or about January 21, 2007, refusing to allow Peltier, as union representative, to participate in a meeting between Respondent and employee Mike Farah and making "inappropriate" statements to her at this meeting, (2) on June 4, June 6, and July 6, 2007, informing Peltier that she could not carry out her duties as unit chairperson while on sick leave to care for her son; (3) on or about June 4 and again on September 13, 2007, ordering Peltier to conduct all union business in the JJC facility from an office designated by Respondent for this purpose, and denying Peltier the union release time provided to the unit chairperson by the collective bargaining agreement; (4) on or about September 14, 2007, docking her pay for time spent on union activities during her union release time; (5) on or about November 15, 2007, singling Peltier out by making a record of the time she spent in the JJC's control room looking for a replacement battery for her radio; (6)

[6] The other charges (Case Nos. C07 F-119 through C07 F-125, and Case No. C07 F-131), were adjourned without date.

failing to conduct a thorough and complete investigation of harassment complaints made by Peltier against co-workers, supervisors, and JJC Director Charles Seidelman; (7) on or about November 29, 2007, making "inappropriate and rude" comments during a meeting, or so-called "*Loudermill* hearing," held to investigate her alleged misuse of military leave time; and (8) on or about January 7, 2008, refusing to recognize Peltier as a representative of the union and denying her union time after Local 889 was replaced as collective bargaining representative by the POAM.

The charge, as amended, also alleges that Respondent discriminated against Peltier in violation of Sections 10(1)(a), (c) and/or (d) of PERA by: (1) on or about February 9, 2007, issuing her a reprimand for failing to get a tuberculosis test; (2) on or about March 22, 2007, issuing her a reprimand for an alleged work rule violation; (3) on and after April 20, 2007, repeatedly denying or refusing to act on her request for an intermittent leave of absence to care for her ill son under the Family Medical Leave Act (FMLA), 29 USC 2601 et seq; (4) on or about August 13, 2007, denying her request for a leave of absence to perform her required service with the National Guard; (5) on or about September 11, 2007, issuing her a verbal reprimand allegedly for poor attendance; (6) on or about September 17, 2007, issuing her a written reprimand allegedly for poor attendance; (7) on or about November 24, 2007, issuing her a verbal reprimand allegedly for insubordination; (8) issuing her the fifteen day suspension on January 10, 2008; and (9) terminating her on March 18, 2008.

II. Peltier's Concurrent Federal Court Action:

On February 26, 2010, Peltier filed a complaint in federal district court against the Respondent Employer which alleged that the Employer violated her rights under the FMLA by depriving her of information related to her rights under that statute, interfering with and impairing her exercise of these rights, and disciplining her in retaliation for exercising her FMLA rights. Peltier's complaint also alleged that the Employer violated her rights under the Uniformed Services Employment and Reemployment Act (USERRA), 38 USC 4301-4334 by denying her request for military leave and by disciplining her in retaliation for her exercise of her rights under USERRA. The Employer's motion for summary disposition of the federal complaint was referred to a magistrate. The evidence submitted to the magistrate included some of the transcripts from the unfair labor practice hearing, and many of the exhibits admitted in the unfair labor practice case were also part of the federal court record. On March 25, 2011, the magistrate issued a report and recommendation recommending that the Employer's motion for summary disposition be granted. On September 30, 2011, the Court issued an opinion and order adopting the magistrate's report and recommendation and a judgment dismissing Peltier's complaint. Peltier filed a motion for reconsideration/clarification, which the Court denied on November 1, 2011.

On October 7, 2011, Respondent filed a motion to reopen the record to admit the Court's opinion and order, including the magistrate's report and recommendation, and the Court's judgment dismissing the complaint. Respondent asserts that the Commission is collaterally estopped from making any finding of fact or law contrary to the federal court's order. This includes, according to Respondent, that any of the absences for which Peltier was disciplined were excused under either the FMLA or USERRA, or that Respondent discriminated or

retaliated against her in violation of these statutes. Peltier filed a response to this motion on October 31, 2011. With her response, Peltier submitted additional documents from the federal court action and asked that these documents also be included in the record if the Court's opinion was admitted. She also requested that this decision be held in abeyance pending a ruling by the federal court of appeals on her appeal of the Court's judgment. As indicated in the discussion section of this opinion, I find that collateral estoppel effect should be given in this case to certain findings of the Court. Accordingly, the Court's September 30, 2011 opinion and order and the documents from the federal court file submitted by Peltier and the Respondent Employer are made part of the record in this case. If the Court's findings are set aside on appeal, Peltier may have grounds for setting aside the decision in her unfair labor practice case. However, Peltier's request that the case be held in abeyance during her appeal of the Court's judgment is denied.

III. Findings of Fact:

A. Background

1. Peltier's Employment and Union History and Military Obligations:

Peltier was employed by Respondent as youth specialist at the JJC from 1998 until her termination in March 2008. Until the period covered by this charge, Peltier had never been disciplined.

The JJC is a high security residential facility operated by Macomb County for juveniles between eleven and seventeen years of age who are awaiting court dates, are in court-ordered treatment programs, and are waiting to be returned to their parents' care. The JJC is licensed and regulated by the State of Michigan. During 2007 and 2008, Peltier worked the day shift from 7 a.m. to 3:00 p.m. Because she was an experienced employee, she had a regular assignment supervising a secured unit of girls who were deemed high risk or were newly admitted to the facility.

In August 2005, Peltier was elected unit chairperson for a bargaining unit of approximately 90 JJC employees represented by Local 889. Peltier had previously served as one of the stewards for this unit. A collective bargaining agreement between Local 889 and Respondent covering the unit at the JJC was in effect when Peltier was elected unit chairperson and remained in effect through December 31, 2007. In mid-2006, the JJC acquired a new director, Charles Seidelman. As discussed in the facts below, in 2007 Seidelman determined to implement certain changes at the JJC, some of which were related to accreditation standards.

Between 2002 and January 2008, Peltier served in a military police unit of the National Guard. Her military obligations required her to be absent from work for training for two continuous weeks per year, and to be absent on other days throughout the year for training and other military functions. For her days of military service, Peltier was paid by the military. However, she accrued benefits from Respondent, including annual leave, for her military service dates. Each year, the military gave Peltier a schedule of the dates that she was expected to be absent for her military service. Peltier gave this schedule to the JJC, which passed it along to Respondent's human resources department (hereinafter HR). Drill dates were changed during the

course of the year, and the military periodically provided Peltier with a revised schedule. Occasionally, however, military days were added to the schedule without advance written notice.

In 2006, Peltier gave birth to a son. After she returned from her maternity leave, Peltier's son developed chronic asthma and other respiratory problems. Peltier began missing work and using her sick leave to care for her son. As discussed more fully below, this continued throughout most of 2007, and Peltier was eventually granted intermittent FMLA leave for a period of time to care for her son. According to Respondent's records, between January 2007 and her termination in March 2008 Peltier worked less than one-third of her regularly scheduled workdays. Peltier acknowledged that she probably had the worst attendance record of any youth specialist in 2007. In early 2007, Peltier also began to have difficulty meeting her military service obligations. Because her son's father was at that time on active duty with the military in Iraq, Peltier's military superiors permitted her to reschedule her training dates when her son was ill, and sometimes made special arrangements for Peltier to fulfill her military obligations. As a result, Peltier's military schedule in 2007 underwent frequent changes. In January 2008, Peltier completed her military service and was honorably discharged.

2. JJC Attendance Policies

In early 2007, the JJC had a written attendance policy that provided for progressive discipline for excessive absenteeism. The policy defined excessive absenteeism as "a total of four or more occurrences of unexcused absences in any three-month period or a pattern of abuse." It stated that unless a leave of absence had been granted, all excused absences had to be covered by sick leave, annual leave or personal business days. However, despite the written policy, in early 2007 employees were regularly allowed to take unpaid days off ("dock time") after they had exhausted their paid leave without being subject to discipline.

When youth specialists call in to report unscheduled absences, the shift supervisors fill out forms known as "call-in slips" or "attendance notices." The shift supervisors note on the slips the reasons given by the employees for their absences, sign the slips, and turn them over to the JJC's attendance secretary, Mary Cavanaugh. Copies of the slips are eventually placed in the employees' mailboxes at work. If a youth specialist does not show up for a scheduled shift and does not call in, the shift supervisor fills out the form indicating "no-call/no show." Until sometime in late 2007, youth specialists calling in sick were not required to tell shift supervisors the nature of their illness or when they expected to return to work.

The JJC must follow minimum staffing requirements established by the State of Michigan. Although the JJC employs substitutes to cover scheduled absences, when a youth specialist calls in before his shift to report an unscheduled absence, it is the JJC's policy to require a youth specialist from the previous shift to work a double shift to cover the absence. Throughout most of 2007, youth specialists were being "forced over" so frequently that morale was affected, and complaints about forced overtime were constant. According to JJC Director Seidelman, the likelihood of being "forced over" was so great that some youth specialists called in sick for their regular shifts just because they had plans for later in the day, resulting in even more forced overtime. Seidelman testified that in his opinion the primary cause of the forced

overtime problem at the JJC in 2007 was widespread abuse of "dock time," i.e., employees calling in for unscheduled absences when they had exhausted all their paid leave time.

B. January through July 2007 - Proposed New JJC Attendance Policy, Peltier's Union Activities and Verbal Reprimands

On January 4, 2007, Seidelman sent a letter with a draft of a new attendance policy for the JJC to three Local 889 representatives, including Peltier. Among other changes, Seidelman proposed to replace the division of absences into excused and unexcused with a fixed number of "unplanned absence" days. Seidelman asked the recipients of the letter to call and make an appointment with him to discuss the draft. Shortly thereafter, Peltier and Seidelman had a conversation about his letter. According to Peltier, Seidelman told her that he intended to implement the policy without giving the union the opportunity to bargain over it. Peltier told Seidelman that he should have discussed the policy with the union earlier. She also complained that he had sent the letter to union representatives who had no jurisdiction over the JJC. Peltier also discussed the letter with Local 889's executive board. The executive board agreed that changes to the policy needed to be negotiated with the union, especially since Local 889 and Respondent were going to be bargaining a new contract that year.

On or about January 21, youth specialist Mike Farah asked Peltier to accompany him to a meeting with Seidelman and several other Respondent representatives, including Macomb County counsel James Meyerand. Farah was returning from sick leave after an extended illness, and the purpose of the meeting was to discuss his doctor's request that he be excused from mandatory overtime. Meyerand told Peltier that since this was not a disciplinary meeting, she could not be present during the meeting with Farah. Peltier testified without contradiction that she had previously accompanied employees to meetings involving matters other than discipline and had never been told that she could not attend if the employee wanted her to be there.

On February 2, Seidelman emailed a copy of the proposed new attendance policy to all JJC employees and invited them to a series of meetings on February 7 to discuss the policy. On February 5, Peltier accused Seidelman in an email of committing an unfair labor practice by scheduling a meeting directly with the union's membership instead of bargaining with the union. On this same date, Peltier sent HR Director Eric Herppich a formal demand to bargain over changes to the attendance policy and warned him against implementing the policy without giving the union an opportunity to bargain. Shortly thereafter, Peltier was told by Seidelman and Meyerand that the attendance policy was "not a bargainable item."

Seidelman did not meet with the JJC staff to discuss the new attendance policy. However, sometime between February 5 and February 13, Seidelman sent an email to six or seven stewards and other Local 889 representatives, including Peltier, inviting them to a meeting with him to discuss the attendance policy. There was a division of opinion among the union representatives as to whether they should attend this meeting. Peltier was opposed, and told Seidelman that he did not have the right to select the union's negotiating committee. However, three of the union representatives Seidelman had invited to the meeting, including steward Erick Acres, decided to attend. On or about February 13, Seidelman sent an email to all JJC employees summarizing

what he characterized as productive discussions that had taken place at the meeting and thanking the three stewards who had attended by name. After Peltier received the February 13 email, she accused Seidelman of committing an unfair labor practice by meeting with representatives that the union had not designated.[7] The attendance policy drafted by Seidelman in January 2007 was never implemented. However, as discussed below, other changes were made to the attendance policy in August 2007.

Youth specialists are required by law to have a tuberculosis test done annually. Before 2007, Respondent brought in a health professional to do the tests at the JJC. In December 2006, it announced that employees were to have the tests done on their own time. On February 12 or 13, 2007, Peltier and several other youth specialists received verbal reprimands for failing to submit their test results in a timely fashion. Peltier filed a grievance over these reprimands and also demanded to negotiate over the requirement that employees get the test on their own time. All the reprimands, including Peltier's, were later rescinded as part of an agreement between Local 889 and Respondent that employees could be required to get the test done on their own time.

Prior to receiving her reprimand, Peltier had a conversation with JJC Assistant Director Mark Emerick during which she explained that she had planned to have her tuberculosis test done as part of her annual military physical, but that the physical had been postponed. Peltier gave Emerick the number of her sergeant to confirm this, and Emerick told her that if this was the case she would not be disciplined. Emerick confirmed with the sergeant that the military physical had been postponed. However, when Emerick told Seidelman about Peltier's circumstances, Seidelman told him to include her in the group receiving reprimands.

The collective bargaining agreement between Local 889 and Respondent allowed Peltier, as the unit chairperson, up to two hours of paid union release time per day.[8] Peltier testified that during the first half of 2007, Respondent implemented so many changes at the JJC that she needed to use the full two hours of release time granted her by contract every day. Throughout the period between January and June of that year, Peltier had a standing request to be released from her duties to conduct union business between 1 pm and 3 pm every work day. In general, Peltier was allowed to leave her unit at or about 1 pm, although Peltier was frequently told by her shift supervisor she could not use her release time because the JJC had no one to cover for her.

In early 2007, there was no policy or practice prohibiting the unit chairperson from leaving the JJC during his or her release time. Victor Kress, Peltier's predecessor as unit chairperson, testified that he sometimes left the facility to perform union duties. Since Peltier lived not far from the JJC, she frequently went home during her release time to work on union business there and often left the JJC to meet with employees from other shifts during her release time. Another youth specialist, Makieta Armstrong, testified that many employees resented

[7] Sometime later, in May, Peltier notified Acres that she was removing him from his position as steward because he had attended the meeting with Seidelman. After the POAM replaced Local 889 as the bargaining representative in January 2008, Acres was elected president of the POAM's local association.

[8] The collective bargaining agreement stated: "The Unit chairperson shall be permitted a maximum of two (2) hours per day during working hours, without loss of time or pay, for the purpose of conducting labor relations related union business to include, but not limited to, investigating grievances referred to the Chairperson."

Peltier's use of union release time during a period when other employees were frequently being required to work mandatory overtime. According to Armstrong, employees asked each other why Peltier was allowed to leave the facility at 1 pm nearly every day when they were being forced to work double shifts.

On February 11, Peltier called shift supervisor Pat Hanson and asked for a "runner" to supervise her unit while she left for union business at 1 pm. She also asked Hanson who would be relieving her. Hansen told her that it would be Makieta Armstrong. Shortly thereafter, another youth specialist, Allyson Rick, entered Peltier's unit and went into the restroom. According to Peltier, when she left the unit Armstrong was standing in the door of the unit and the girls in the unit were all "locked down," i.e. locked in their rooms. Peltier told Armstrong that she was leaving before she left. Armstrong substantiated Peltier's testimony, but testified that she never actually entered Peltier's unit because, after she spoke to Peltier, Hansen changed her mind and told Rick to cover for Peltier and Armstrong to relieve the youth specialist supervising the unit across the hall for a break. Rick reported to Hansen that when she came out of the restroom, Peltier's unit was unsupervised, and that Peltier had left without giving her a change of shift report. On February 12, Hansen handed Peltier a written "misconduct report" stating that she had left the unit unsupervised. A misconduct report is not discipline, but can result in discipline. Peltier wrote on the misconduct report that she did not agree with the facts and wanted to speak to someone in management about the incident. No one contacted Peltier to get her version of events.

In late February or early March 2007, the JJC day shift supervisors sent an email to youth specialists asking for volunteers to help cover Peltier's release time. Arovel Fielder, at that time a youth specialist on the second shift, volunteered to come in early and work overtime on eight specific dates in March. Fielder volunteered because she believed that she would be assigned to cover Peltier's unit. However, according to Fielder, she came in early six times and was assigned to Peltier's unit only once. On the other five days, she was told by Hanson that coverage was not needed for Peltier's unit, and she was assigned as a runner. Fielder testified that Hanson told her not to check in by radio when she arrived at the JJC so that Peltier would not know that Fielder was in the building. When Fielder asked why, Hanson said, "She needs to stay right where she is, and we're just going to assign you somewhere else." Hanson did not testify in this matter. Whatever Hanson meant by this statement, the JJC's time records indicate that Peltier used her release time on three of the five dates Fielder came in to work for her and was not at work at all on the other two days.

On March 22, 2007, Peltier was called to the office of JJC Assistant Director Robert Whitehead and given a verbal reprimand for the incident detailed in the February 12 misconduct report. At the meeting with Whitehead, Peltier maintained that she had spoken to Armstrong, whom she thought was covering for her, before she left the unit. She asked to see the surveillance tape in the hall that would show them talking and also Ricks' report of the incident. She also argued that she had not violated the work rules because the JJC's policy allowed staff to leave the unit when residents were locked down as long as they were checked every fifteen minutes. There was a policy in effect at that time that allowed youth specialists to leave individual residents locked down for disciplinary purposes in their rooms for brief periods without supervision when the other residents were out of the unit. However, according to the

testimony of Peltier's witness, former unit chairperson Victor Kress, it was a rule violation to leave an entire unit unsupervised, even if the residents were locked in their rooms. Whitehead told Peltier that she could not see the tape or incident report because Seidelman had decided that it was not necessary.

Peltier filed a grievance over the March verbal reprimand, but it is not clear what happened to this grievance. On April 11, Peltier made a request in writing to HR to see her personnel file and a copy of the investigation, including the surveillance tape, relating to the incident leading to her March 22 reprimand. She did not receive a response to this request.

Sometime in late March, a group of JJC employees met with the POAM to discuss the POAM's becoming the new bargaining representative after Local 889's contract expired in December. Erick Acres, who later became active in the effort to replace Local 889, testified that dissatisfaction among employees with the UAW at that time was high, and that JJC employees felt that Local 889 did not give it enough attention. Acres also testified that many employees blamed Peltier for some of what was happening, although he did not elaborate.

Sometime between January and late April, Peltier filed a grievance over the appointment of a youth specialist as temporary shift supervisor. The grievance asserted that the youth specialist did not meet the qualifications for the position. Peltier testified without contradiction that when she and Acres met with Seidelman to discuss this grievance, Seidelman spoke only to Acres and ignored her.

On April 20, Peltier left work early to take her son to the doctor. She returned to the JJC at 2:30 pm, with her son, to handle some union business. On April 23, Seidelman sent her an email stating that she would not be granted release time for April 20. Peltier responded that she had not expected to receive release time, but expected her pay to be docked for the absence (since she had no banked sick leave.) She also told Seidelman that Hansen knew that she had taken her son to the doctor, and asked Seidelman if he expected her "to inform him directly when she did not take union time."

On May 16, the JJC notified employees that it had appointed youth specialists to fill two new assignments/positions. These new assignments/positions were part of Seidelman's efforts to meet the standards necessary for the JJC to become a fully-accredited facility. On May 22, Peltier, who had called in sick that day because of her son, came to the JJC to talk to Seidelman about the appointments. Peltier objected to the creation of the new positions on the grounds that if youth specialists were assigned to these jobs, there would be fewer youth specialists to supervise the units and the forced overtime problem would become worse. Peltier also told Seidelman that there was an agreement between Local 889 and Respondent that one of these positions would be filled by posting it for bid, and demanded to bargain over the wages and conditions of employment of both positions.

After the May 16 meeting, Peltier filed a grievance over the creation of the new positions. She also sent Seidelman an email, with a copy to HR and several Macomb County

Commissioners, repeating the union's objections to the new assignments and demanding to bargain over the wages and conditions of employment of these assignments.[9]

As discussed in the section below, in May 2007, Peltier was frequently absent from work because of her son's illness. On these days, Peltier often conducted union business by email and phone from home. She also attended disciplinary and grievance meetings for other employees at the JJC on days that she had called in sick, sometimes bringing her son with her and leaving him in the car with her niece. On June 4, Seidelman sent Peltier a letter stating she was "not to perform work of any kind for Macomb County while on leave status or for other reasons you have not reported to work. This would include telephone calls, e-mails, on-site visits, or any other type of work related to your employments at the JJC." Peltier responded with an email asking if he meant she was not to conduct union business while on leave, and if so, what policy stated this. Seidelman told her that if the "task relates to our employment at the JJC it is not appropriate to be done on leave, with the exception of communications regarding your personal personnel communications, e.g., calling in to report when you are reporting to work."

After this exchange with Seidelman, Peltier called Assistant JJC Director Emerick from home on a union matter and Emerick told her that he had been instructed not to speak to her. However, the record indicates that Peltier continued to communicate with both members of her unit and Respondent representatives on union matters on days that she had called in sick because of her son. She also continued, on occasion, to attend grievance and disciplinary meetings at the JJC on days that she had not come to work. The record also indicates that after the exchange with Emerick above, Respondent representatives resumed responding to union-related communications Peltier sent them on dates when she had called in sick because of her son and that they also allowed her to participate in grievance and disciplinary meetings on these dates.

On June 5, Peltier attended a grievance meeting with HR representatives. After that meeting, Peltier prepared and mailed the unfair labor practice charges which were received by the Commission on June 7. These charges alleged that Respondent had violated its duty to bargain by unilaterally announcing a new attendance policy in February 2007; by unilaterally creating new unit positions/assignments in February and May 2007 and refusing to bargain over the effects of these new positions on unit employees; by unilaterally changing established working conditions by assigning employees additional job duties in areas of the JJC where they did not normally work; by unilaterally altering established practices regarding shift transfers; and by unilaterally altering established conditions of employment by ordering employees to attend mandatory training after their normal work hours. The charges also alleged Respondent had retaliated against Peltier because of her representation of other employees.

Shortly after or before she filed the charges, Peltier met with Keith Rengert, a Macomb County Commissioner, to show him the unfair labor practice charges, discuss the staffing issues at the JJC and "explain what was happening, what I was encountering at the JJC with

[9] Sometimes later in 2007, Respondent and Local 889 president Wright entered into an agreement that Respondent could appoint youth specialists to fill these assignment and that individuals with these assignments would be paid the same as other youth specialists.

harassment." Rengert promised to have a conversation with Seidelman to see what he could do to rectify the situation.

On the morning of June 7, Peltier informed her supervisor that she would be leaving work at noon on June 8 to "conduct County business at HR" and would be conducting union business from 1 pm to 3 pm. What Peltier planned to do was meet with an HR employee, Lisa Weber, to discuss filing an internal complaint that Seidelman was harassing Peltier because of her union activities. Peltier had spoken to Weber on the phone a few days earlier and had made an appointment to meet with her at the HR offices. Two hours after notifying her supervisor that she would be leaving work at noon, Peltier received an email from Seidelman stating that she was "not approved for county business at noon." Peltier emailed back asking why, but did not get a response.

On or about June 19, Peltier asked her supervisor for permission to go to the HR office, but was told that the JJC was too short staffed for her to leave. Peltier then learned that Weber had gone on a maternity leave. Somewhat later, Peltier was notified by HR that another HR representative, Karlyn Semlow, had been assigned to handle her complaints, and Peltier spoke to Semlow on the phone.

On or about June 16, Peltier was notified by Seidelman that his second step answer to a grievance she had filed was ready to be picked up. The contractual grievance procedure stated that a second step meeting "shall be held between the parties within ten (10) days, unless mutually waived in writing." Peltier sent Seidelman an email reminding him that there had not been a second step meeting on the grievance. Shortly thereafter, Seidelman sent Peltier a letter stating that he waived his right to participate in any future second step meetings. Peltier filed a grievance asserting that this violated the contract because the waiver had to be mutual. After June 16, however, Seidelman did not meet with Peltier to discuss any grievances at the second step. Instead, Seidelman gave Peltier written grievance answers. Meetings were then held at the third step between Peltier and HR representatives. Seidelman usually attended these meetings, but did not meet with Peltier alone.

On July 12, a third step meeting was held on the grievance Peltier had filed over her March 22 verbal reprimand and over other matters also addressed in the unfair labor practice charges. Attending this meeting were Peltier, Local 889 President Thomas Wright, HR Director Eric Herppich, Seidelman, and Respondent counsel Meyerand. Meyerand told the union that Respondent would not discuss grievances over matters that were also the subject of pending charges. Wright told Peltier that he would seek legal advice regarding Respondent's position. The grievance filed over Peltier's March 22 verbal reprimand was not advanced to the next step. It is not clear from the record what happened to the other grievances.

On July 19, Peltier sent HR Director Herppich an email which read:

> I would just like to say that I am very uncomfortable working at the JJC. Due to the behavior and actions I have received from management and my co-workers, I honestly believe that my job is in jeopardy. With this being said I would just like to say that all I have done is my job. Being the unit chairperson representing the

employees at the JJC has obviously caused me more grief than anyone should sustain. I should not be a nervous wreck when coming to work and wonder if I make a simple mistake I will be fired. I have a sick son I am caring for and doing everything by myself. The last thing I need is my employer harassing me because I have done my job as the Unit Chair.

If you would please inform me of the status of my FML request. Why am I still wondering if it has been approved? Could you please send me any BIR's written on me or referencing me at the JJC for the last 3 months? I ask again for a complete copy of my medical file and personnel files (both at the JJC and HR.) Again, I request a copy of the investigation that was conducted regarding the alleged work rule I violated. [10]

I canceled my appointment with Lisa Weber for good reason. I was going to reschedule; however, I am not sure that is what the County wants since all issues concerning the MERC charges are on hold. Do you want me to meet with her? I would like to resolve this matter. What is the best avenue to take?

Peltier did not receive a reply to this email.

C. January through July 2007 - Peltier's Absences and FMLA Leave Request

In October 2006, Peltier's military unit provided her with a list of her military drill dates between October 2006 and October 2007. Peltier gave a copy of the memo from her military commander to Mary Cavanaugh, the JJC's attendance secretary.

As noted above, in late 2006 Peltier's infant son developed health problems and Peltier began using her sick leave to care for him. Peltier called in sick between January 25 and January 31, and again on February 1 and 2, 2007. While she was off work, Peltier submitted a request to Cavanaugh to be released for military duty on February 5, a date that was not listed on the schedule of military duty dates she had provided in October 2006. Cavanaugh emailed Peltier asking for documentation for the unscheduled military leave. Peltier replied by email on February 1. Peltier told Cavanaugh that she had a military funeral to attend on that date. She also mentioned that on the last date she had been scheduled to do military training she had not gone to this training, but instead had taken her son to the doctor.

On February 6, Seidelman, after a discussion with Cavanaugh about Peltier's February 1 email, sent Peltier a letter stating that it had been brought to his attention that she had not submitted documentation from the military to support her requests for time off for military leave on six dates between October 12, 2006, and February 5, 2007. Most of these dates were not listed in the October 2006 drill schedule memo, and it is not clear from the record by what method Peltier had requested military leave for these dates. The letter told her that she needed to provide documentation from the military for these dates and to provide this documentation in the future

[10] There is no explanation of the term "BIR" in the record.

prior to taking military leave. Peltier testified that she did not receive this letter. [11] There is no indication in the record that Peltier provided this documentation, or that Respondent asked for it again.

In January, February and March 2007, Peltier called in sick frequently because of her son's illness. Peltier did not have sick leave to cover all of these absences, but she was not disciplined for her absences during these months. On March 26, Peltier asked the JJC to provide her with documentation of her absences to help support a request for hardship leave from the military for her son's father.

On April 20, 2007, according to Peltier, she submitted a request to the JJC for intermittent leave under the FMLA to care for her son's chronic asthma. According to Peltier, Cavanaugh told her that the request needed to be submitted to HR for approval. HR, however, has no record of a request filed on that date.

Between April 25 and May 7, Peltier called in every day and told the shift supervisors that she would not be in because her son was sick. On April 30, Cavanaugh emailed Peltier that she had noted on the call-in slips that Peltier had stated that she was on some type of leave; Cavanaugh told Peltier that if she was on leave, Cavanaugh needed documentation from her as soon as possible. On May 1, the JJC sent Peltier a letter stating that since she had been absent for five or more consecutive working days, she had to apply for a leave of absence under the collective bargaining agreement. On May 1 or May 2, Peltier called Cavanaugh and faxed her a copy of an FMLA request form for intermittent leave filled out by her son's pediatrician and signed by Peltier herself on April 28. The form stated that Peltier's son had chronic asthma that had begun in 2006. However, many sections of the medical form were left blank. Cavanaugh sent this form to HR.

On May 2, Cavanaugh, apparently at HR's direction, emailed Peltier to tell her that the medical information on the FMLA form was insufficient and that her son's doctor had to provide both a more recent start date and an end date for her intermittent leave and to state how many treatments were required per month. Stephanie Dobson, the HR representative who handles FMLA leaves for Respondent, testified that this information was necessary because FMLA intermittent leave is only approved for periods up to six months; if at the end of the six months the employee has not used all the days allowed him by law under the FMLA, he can request an extension. Therefore, according to Dobson, Respondent had to have a date to begin Peltier's intermittent leave and a date to end it. In the same email on May 2, Cavanaugh told Peltier that since she had been off continuously since April 25, she also had to also apply for regular family leave of absence under the collective bargaining agreement for that period.

On May 4, Peltier sent the JJC another FMLA medical form from her son's doctor. The form, again, stated that it was a request for intermittent leave. The doctor wrote on the form that

[11] As Respondent later discovered, USERRA does not give employers the right to deny military leave, and does not allow them to require documentation from the military for leaves of less than 30 days in length. However, according to a letter from an Army ombudsman entered into the record in this case, employers are not prohibited from contacting their employees' military units to confirm that the employees are in fact performing military duties on the dates that they claim to be.

her son's condition had begun in September 2006 and that its duration was unknown. Under the heading "likely duration and frequency of episodes of incapacity," the doctor wrote, "episodes are _____ (illegible.)" Peltier also sent Cavanaugh a doctor's note stating that her son was being treated for allergies and rhinitis from April 25 through May 7. Cavanaugh later asked Peltier to bring in the originals of what she had faxed the JCC on May 4 because the faxed copies were not legible.

According to the memo she had given Respondent in October 2006, Peltier was to have military duty on the weekend of May 4, 5, and 6, dates she was scheduled to work. On May 4, Peltier emailed Cavanaugh and told her that she was not going on military leave that weekend, but would have military duty on May 7 instead. On May 11, Peltier called in to the JJC and told the shift supervisor that "she would not be in until further notice because of her son's illness. " Peltier returned to work on May 19, but worked only two days – May 19 and May 24 – in May 2007.

On May 22, Peltier came to the JJC to attend a grievance meeting. During this meeting, Peltier told Seidelman that she had submitted forms for an intermittent FMLA leave, but that her leave had not been approved. Peltier complained that because the JJC was refusing to take her off the work schedule, she had to call in every day and another youth specialist had to be forced over to cover for her absence.

On May 25, Peltier received a letter from Dobson instructing her to complete a Respondent leave of absence form for the period April 25 through May 19. Peltier filled out the form, attached to it another, still not very legible, copy of the doctor's note she had given the JJC on May 4, and submitted these documents on May 29. Her request for a leave of absence for the period April 25 through May 19 was sent back to her from HR as not approved; the reason given was "improper medical."

On May 29, Peltier also sent HR yet another FMLA medical form requesting intermittent leave. This time, her son's doctor indicated that her son required periodic visits to health care providers and treatments at home by his mother because of his chronic asthma. The doctor stated that Peltier needed "blocks of time off work in order to stabilize his condition." The doctor said again that the duration of the condition was unknown.

On June 5, Dobson informed Peltier that the documentation for her intermittent leave of absence request was still insufficient because it did not include sufficient information to determine the length of Peltier's leave, including the start date of her son's serious illness or the probable duration of her need for intermittent leave. Dobson also said that the documentation for her leave of absence between April 25 and May 19 was insufficient, in part because the doctor's note was not legible.

On June 22, Peltier submitted another medical form from her son's doctor. This time, the doctor wrote: "Peltier's son's current problem started on April 20, 2007. Exacerbations are variable and may require aggressive respiratory treatment for 1-5 days. Condition is expected to be intermittent through at least 6 months. Mother is required to provide necessary treatments

through exacerbations." On July 12, Peltier submitted yet another form, this one signed by an allergist.

On July 25, HR sent Peltier a letter reminding her that her request for a leave of absence between April 25 and May 19 had not been approved. The letter stated, "As of today, Human Resources has not received the proper medical documentation to cover the period of April 25, 2007 to May 19, 2007." The letter told Peltier that if she wanted her request to be reevaluated, she could provide new medical documentation within seven working days.

Shortly thereafter, Respondent decided to grant Peltier's request for intermittent leave based on the information cumulatively provided on the June 22 and July 12 FMLA medical forms. On August 1, HR sent Peltier the following letter, signed by Dobson, approving her for FMLA leave:

> On May 29, 2007, Human Resources received your request for an intermittent family sick leave of absence. Since all the required documentation has been provided, your intermittent leave has been approved retroactive to April 20, 2007. The medical documentation does support a serious health condition of a family member, your son, which requires continuing treatment by a health care provider. It is noted that one to fifteen times a month episodes may occur. Please be advised, the Family Medical Leave Act does indicate that an "employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave."
>
> In addition, even though your intermittent leave request has been approved under the Family Medical Leave Act (FMLA), the law does state "employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operation. " With this in mind, absences should be scheduled in advance as much as possible. Macomb County understands there are emergencies, but emergencies should happen infrequently. Your Department, Juvenile Justice Center, has state mandated staffing regulations, therefore, a 24 hour advance notice is requested to properly staff the facility and not cause disruption.
>
> Furthermore, as of April 20, 2007, you have 45 FMLA days (360 hours) available. Once you have exhausted these hours, please be advised you must maintain full-time employment status to maintain County paid healthcare benefits. Please note that there are no provisions for an intermittent leave of absence in your collective bargaining agreement.

Peltier was not disciplined for any absence that occurred prior to July 1, 2007. However, as discussed below, in September 2007 she received reprimands for absences in July, August and September which Peltier claimed were covered by her FMLA leave.

D. August 2007- Peltier's Union Activities and Her Request for a Three-Week Military Leave of Absence

On August 1, Peltier sent an email to the County Board of Commissioners requesting information regarding their hiring practices, including how positions were created. The impetus for this request was the JJC's method of filling a new position, training coordinator, over which Peltier had filed a grievance.

On August 4, Peltier sent the following email to members of her bargaining unit:

> I would like to thank all the staff who have been supportive during the time my son has been ill. This time has been very trying for me and my family, but with the help from God and good people things can only get better.
>
> For all those who have not been supportive, and act as if I am vacationing on the beach, you really need to focus on why you need to blame one person for the forced rate at the JJC. Anyone who feels that I am responsible for all the problems at the facility needs to open their eyes. Management does the scheduling, correct? We have staff who are classified as Youth Specialists yet they are filling newly created positions. We have people running all over the facility doing jobs they were never hired to do. I am home caring for my son. Not that it's anyone's business, but I have an approved Family Medical Leave. So, if you want to blame someone for the lack of manpower here at the JJC, you might look to management and how they are staffing our facility.

On August 8, the POAM filed a petition for representation election to replace Local 889 as the bargaining representative in Peltier's bargaining unit. The parties entered into an agreement for a consent election to be held in December 2007.

In 2007, Peltier's military unit was scheduled to attend out-of-town training between July 28 and August 11. The drill schedule Peltier provided HR in October 2006 included this two week training. However, Peltier did not want to leave her ill son to attend the out-of-town training. In May 2007, Peltier asked for and was granted permission from the military to do alternate service at her unit's regular location. Peltier was to perform the alternate service on fourteen week days beginning on August 14 and concluding on August 31. On June 19, 2007, Peltier sent Cavanaugh at the JJC an email informing her that she would be doing her two-week military service between August 14 and August 31 instead of between July 28 and August 11.

At some point, however, Peltier contacted her military unit and was given permission to postpone her alternate service because her son was ill. Peltier did not do military service on any date between August 13 and September 1. Whether Peltier properly notified Respondent of this fact is in dispute.

Peltier's call-in slips for the dates between August 12 and August 31, 2007 were made part of the record in this case. Peltier testified that the call-in slips produced by Respondent for these dates through August 31 "pretty much" reflected what she said to the shift supervisor on

each date, although she testified that she did, in fact, call in on the dates that the call-in slips said that she was no call-no-show. The August 12 call-in slip reads:

> August 12 – called in at 5 am and stated that "she would not be in on 8/12/07 and it is not because of her son." C. Peltier also stated that she will be on military leave for the next 3 weeks and she will not be in. See email 6/19/07.

On August 13, either Cavanaugh or the shift supervisor submitted a written form requesting a military leave of absence for Peltier for August 13 through August 31. The document does not have Peltier's signature, but says that it was "verified by CP telephone." August 13 was Peltier's scheduled day off. The August 13 leave of absence request was denied by JJC Assistant Director Whitehead on the grounds that no documentation had been submitted from the military to support the request.

On August 14, the shift supervisor submitted a no call-no-show slip for Peltier, although Peltier testified that she called in and told the shift supervisor that her son was ill.

Peltier's call-in slip for August 15 reads:

> Call at 8:30 am on 8/15/07 and stated that she is supposed to be on military duty, paperwork not processed. However, I could take my pick on the reason she is not in today, her son or her car.

On August 15, Peltier came to the JJC to attend a disciplinary hearing for another employee with JJC assistant director Whitehead and HR representative Semlow. Peltier told Whitehead and Semlow that she "was on military leave that day, but unable to attend due to her son's illness," and that she had approved FMLA for the absence. Whitehead told her that her military leave had not been approved, and that she needed to call the JJC every day whether her son was sick or she was doing military training.

On August 16, 17, 20, 21, 23, 24, 25 and 27, the shift supervisors submitted no call-no show slips for Peltier. Peltier testified that she called the JJC on each of these dates and told a shift supervisor that her son was sick, but she did not testify to seeing call-in slips for any of those dates reflecting her calls. I do not credit Peltier's testimony that she called in on these dates. As discussed above, the record indicates that copies of employees' call-in slips are eventually put in their mail boxes at work. Peltier, therefore, would have seen her call-in slips for those dates. The fact that Peltier did not bring it to Respondent's attention, in a timely fashion, that her call-in slips improperly listed her as no call-no show on dates that she called in seriously undercuts her testimony that she called in and told the shift supervisor that her son was sick on these dates.

Call-in slips for Peltier for August 30 and August 31 read:

> August 30 – stated that she will not be in this day

> August 31 – Chris called in for 8/31/07. I asked what type, she stated military. Called on 8/30/07 at 6:15 p.m.

Peltier testified that she had phone conversations with several Macomb County Commissioners about the problems she was having at the JJC on dates that she would have been doing military, but could not because her son was ill. However, she did not recall any specific conversation on any specific date. Moreover, Peltier did not testify that she specifically told any commissioner that on the date of their conversation she had applied for military leave but could not perform military duties that day because her son was ill. Instead, she merely testified that she told the commissioners that she was not able to do her military duty because her son was sick.

On August 28, Dobson sent Peltier a letter stating that she had requested a military leave of absence for the period August 14 through August 31 and that in order to be approved for a military leave of absence she was required to submit official orders that included the beginning and ending dates of the leave. The letter threatened Peltier with discipline if she did not produce these orders on or before September 7. On September 17, Seidelman sent a letter to HR asking that a so-called *Loudermill* hearing be scheduled to determine whether Peltier had abandoned her position by failing to come to work between August 14 and September 1.The letter stated that Peltier had claimed to be on military leave for those dates, but had not provided documentation.

On September 11, 2007, Peltier's military unit commander gave her a memo for her employer stating that she "had been originally scheduled to do alternate annual training from August 13 through August 31, but that since she was not able to complete her military commitment in August, she was now making up the time during the weeks of September 24-28 and October 1-5." The memo also stated that Peltier was making up a drill day on September 11. Peltier testified that on or about September 18, she faxed HR a copy of the September 11 memo, along with the a copy of the military's approval of her request to be allowed to perform alternate training from August 13-Aug 31 in place of her unit's annual training in late July to early August. However, Respondent maintains that it did not receive the memo dated September 11, but only the military's approval of her request to do alternative service from August 13 through August 31. As discussed below, on or about October 16, Respondent received another memo from Peltier's military unit stating that Peltier "was not been able to complete her military commitment in August." Since Seidelman immediately called Peltier's unit to ask for clarification when it received the October 16 memo, I credit Seidelman's testimony that he did not receive the September 11 memo.

E. <u>September 2007 – Changes in Attendance Policy, Institution of a "Union Office," and Peltier is Disciplined for Her Attendance</u>

On August 27, the JJC announced changes to its existing attendance policy. For the first time, employees calling in sick were required to state, and the shift supervisors taking their calls were required to ask, the general nature of the employees' illness or injury and their expected return dates. The attendance policy was also changed to include the following:

> Docked leave not approved in advance will be subject to progressive discipline, up to and including discharge. For example – a leave of absence and/or FMLA

leaves, once approved, would not be included, but a staff member calling in sick would be expected to have time in their bank to cover the hours missed.

On September 4, Peltier sent Seidelman an email stating that she had been told that "she would not be afforded union time anymore during work hours," and complained that this was a violation of the contract. There was no testimony indicating who told Peltier this. Seidelman's reply, by email, was that Peltier could not do "county business," while on sick leave. Peltier testified that the following day, she was "denied union time by Hanson between 1 pm and 3 pm."

On or around September 13, Peltier received an email from Seidelman notifying her that the JJC had set up a union office within the JJC and that she was to conduct all union business in that office and was not to leave the premises of the JJC during her union release time. As discussed above, Peltier often left the facility during her union release time and often went home during that period. The designated office was in the suite where the JJC's administrators had their offices. After Peltier received the email, she complained to Assistant Director Emerick that she was uncomfortable using an office in the administrative area and that she had appointments scheduled outside the JJC on September 13. He told her that the individuals should come to the JJC instead. That day, Peltier went outside into the parking lot during her union release period. When she returned to work at 1:45 pm., she was notified that her time would be docked twenty minutes for "returning late from break." Peltier was subsequently told by someone in the JJC administration that she was not to go outside the building during her union release period. Peltier testified that she never used the union office because members were uncomfortable meeting with her there. It was not clear from the record whether Peltier continued to leave her unit between 1 and 3 p.m. for union business and, if so, where she went during that time.

On September 11, Peltier was issued a verbal reprimand for using "dock time" without preapproval during the pay period ending September 7. As discussed above, under the new policy announced on August 27, FMLA leave was to be considered as approved in advance. According to the verbal reprimand, Peltier was "docked," i.e., had absences not covered by paid leave, on August 27, August 30, August 31, September 1, September 2, September 3, September 6 and September 7. Three other youth specialists were also issued verbal reprimands for unauthorized use of dock time during that pay period.

According to Respondent, all four verbal reprimands issued for unapproved dock time on September 11 were rescinded on September 19 and were not reissued. However, Peltier was not notified that the verbal reprimands had been rescinded. Moreover, in November 2007, Seidelman gave Peltier a written answer to a grievance she filed over her reprimand denying the grievance on the basis that "dock time was not covered by the contract" without mentioning that the reprimand had been rescinded.

On September 17, 2007, Peltier received a written reprimand for accumulating an excessive number of unexcused absences. The reprimand stated that she had ten unexcused absences in a three-month period: July 1, July 7, July 22, July 23, July 28, July 29, September 2, September 3, September 6, and September 12, and that Respondent had not received any medical excuses for these absences. Respondent attached to the reprimand the call-in slips for each of these dates indicating what Peltier said to the shift supervisor when she called in. Some of the

call-in slips say "personal illness," several say "sick" without any explanation, and one states that Peltier said she was leaving early because she was ill. None of the call-in slips for these dates mention Peltier's son.

Around this time, Peltier filed grievances over the restrictions placed on her release time, the promulgation of the new attendance policy and verbal reprimands given employees under it, Seidelman's continuing refusal to meet with her at the second step, and the "alleged harassment of union officials and union members of the UAW."

F. October and November 2007 – Investigation of Peltier's Military Leave

On September 28, Seidelman, at HR's direction, sent Peltier a letter stating that her absences from August 15 through August 31, and on eight listed days in September, were under investigation because she claimed to have been on military leave, but no military orders for that period had been provided to management. The letter further stated that a *Loudermill* hearing would be conducted on October 5 to discuss these allegations, and that the County was considering disciplinary action up to and including discharge.

Since Peltier was scheduled to perform military duties on October 5, the *Loudermill* hearing was rescheduled to October 10. On October 5, an email exchange took place between Peltier and Seidelman regarding whether Respondent was entitled under USERRA to demand military orders or require Peltier to fill out a leave of absence request for military leave.

Peltier did not attend the *Loudermill* hearing on October 10, and it was rescheduled. On October 11, she emailed Herppich asking him what military time he needed verified, and he referred her to the September 28 letter/*Loudermill* notice.

On or about October 16, Peltier gave HR a memo signed by her commander regarding the rescheduling of her military training dates in September, October and November. Like the memo from Peltier's commander dated September 11, the October 16 memo stated that Peltier had not been able to complete her military commitment in August, and was making up her military time from September 24-28 and from October 1-5. It then stated that since Peltier was unable to be there on those dates, she was scheduled to be at the unit on October 15-19 and October 22-26. [12]

When Seidelman was given a copy of the October memo from Peltier's commander, memo, he decided to call the Sergeant Butler whose phone number was listed in the memo. Butler told Seidelman that Peltier had missed a lot of training dates during the year. Seidelman asked Butler if he would send Seidelman a list of the dates that Peltier was at military training, and Butler agreed. On or about October 29, Seidelman received a letter from Sergeant Meyers, the training officer for Peltier's unit, with a list of the dates Peltier attended training from January 1 to October 26, 2007. According to this letter, Peltier attended training on eight days in September (including dates that fell on her scheduled days off) and four days in October, but did not attend any training in August or in the first week of September. The list contained some

[12] There are two versions of this memo in the record. One is dated October 14 and the other is dated October 16. Seidelman testified that the one he received was dated October 14. However, the content of these two memos is identical.

errors; for example, Peltier attended training on three dates in October that were not on this list. On December 7, Seidelman received another letter, with the same dates, signed by both Meyers and Butler.

When Seidelman received the list of Peltier's military dates from Butler, he discussed with Herppich the fact that Peltier had not done any military training in August. As noted above, HR had a form requesting a military leave of absence for Peltier from August 13-August 31 which Cavanaugh had submitted on Peltier's behalf after Peltier had told her that she would be attending military on those dates. Seidelman reviewed Peltier's call-in sheets for these dates and concluded that Peltier had falsely represented that she was on military leave for that period.

On October 29, Seidelman sent the letter he had received from Butler to Herppich with a cover letter stating that it appeared that Peltier had submitted a request for military leave, received military leave benefits, and then actively attempted to cover up the fact that she did not attend military training between August 16[sic] and August 31. Seidelman attached copies of the call-in sheets for these dates. On November 2, after comparing the dates that Peltier had actually attended military training, according to Butler's letter, with the JJC's records, he sent Herppich a follow up letter asserting that Peltier had "claimed military," but had not attended military training on eleven other dates between January 18 and October 12, 2007.

Seidelman sent Peltier two different letters, both dated November 8, notifying her that a *Loudermill* hearing would be held on November 19. The first one stated that Peltier had claimed to be on military leave on twenty dates between August 15 and September 25, but had not provided documentation and that, therefore, these absences were unexcused. This letter also stated that the County had received confirmation that she had no military time in August. The second letter omitted most of the September dates in the first letter, but added dates in January, May, July and October 2007.

On November 13, Peltier requested a postponement of her *Loudermill* hearing because she wanted to bring Sergeant James Ratliff, her immediate supervisor in her military unit, to the hearing and Ratliff was not available on November 19. Peltier did not receive a response to her postponement request. On the morning of November 19, Peltier called in to say that she would not be reporting to work. She emailed Seidelman to say that she would not be attending her *Loudermill* hearing at 10 am, but would attend, as a union representative, a *Loudermill* hearing for another employee scheduled for 11 a.m. The *Loudermill* hearing was rescheduled for November 29.

G. Peltier's November 29 *Loudermill* Hearing

Peltier attended her November 29 *Loudermill* hearing with Sergeant Ratliff, but without a union representative. HR representative Semlow, Seidelman, and Meyerand attended the meeting for Respondent. Semlow, Peltier and Ratliff all testified at the unfair labor practice hearing regarding what took place at the November 29 meeting. Semlow and Ratliff both took notes to which they referred during their testimony. All three witnesses agreed that Semlow went through with Peltier the dates listed in the second letter HR sent Peltier on November 8. She also asked about September 8 and 9, two dates listed on the first November 8 letter but not the second. All

thirty dates were dates that, according to the letter Respondent had received from Sergeant Butler at Peltier's military unit, Peltier was not doing military duty. Peltier had brought copies of the letters from her military commander dated September 11, October 14 and October 16. Semlow told Peltier that Respondent had received documentation from her military unit that she had not been doing military service on the dates listed in the November 8 letters, but did not show Peltier the letter from Butler. Meyerand told Peltier that Respondent needed orders for all her military duty dates. Ratliff told Meyerand that the military didn't produce orders for periods of less than 30 days. He also said that the military was working with Peltier because of her son being ill.

The witnesses agreed that the first two dates discussed were January 18 and May 23, 2007. Peltier told Semlow that she had called the JJC to say that she was doing military on January 18, but then called back and said that she could not work because her son was sick. Peltier said that May 23, 2007 was her scheduled day off.

Semlow and Peltier then discussed her absences between August 12 and August 31, 2007. Peltier said that she must have been sick on August 12, not her son. According to Semlow, Peltier said that she was on military leave from August 13 to August 31. She said that she did not work at the military unit each day but was on military leave, i.e. under military orders at that time. Semlow testified that Peltier also said that she didn't know what days she worked for the military during that period and what days she called in sick. Peltier testified that she told Semlow that August 13 was her day off, and that she was not doing military training between August 13 and August 31. According to Peltier, she told Semlow that she had called and told the JJC that she was not going to be able to come to work, that "she was doing military, but actually wasn't doing military" because her son was sick. Ratliff testified that Peltier told Semlow on November 29 that she had military leave for annual training from August 13 through August 31, but "had absences" due to her son, and that this was why it took more days to fulfill her military obligations. According to Ratliff, Peltier said that when she was on military leave and her son was sick, she called in and said that she was "still in military, but her son was sick." Peltier also told Semlow, according to Ratliff, that she "was protected under the FMLA for the dates in question."

What Peltier said at the *Loudermill* about her absences became an issue at the hearing because, according to Respondent, it decided to consider any day Peltier claimed at the *Loudermill* to have been absent because of her son to be an excused absence. Some of the dates listed in the November 8 letters were, therefore, taken off the list. According to Semlow's testimony, because Peltier could not identify any dates between August 13 and August 31 that she was absent because of her son, none of these dates were deemed excused. However, Peltier was disciplined for claiming to be on military leave on those dates, not merely because her absences were deemed unexcused. As discussed above, I do not credit Peltier's testimony that she called in between August 13 and August 31, 2007 and told the shift supervisors that she was absent because her son was sick. Whether Peltier told Semlow on November 29, 2007 that she had called in on those dates is, therefore, irrelevant.

Semlow testified that Peltier claimed that she was doing her military service on three of the other dates listed in the November 8 *Loudermill* letters - July 14, July 15, and July 27. For July 14 and July 15, according to Semlow, Peltier said that she was doing military "according to

my sheets" and that she "looked it up." Peltier testified that she told Semlow that the drill dates scheduled for July 14 and July 15 had been cancelled. Ratliff recalled Peltier telling Semlow that she was doing military on July 14, but not July 15. In fact, an updated drill schedule from the military which Peltier gave the JJC in June indicated that the July 14 and July 15 drill dates were cancelled for Peltier's entire unit; it was not clear from the record why Respondent believed that Peltier's absences on those dates were for military duty. On July 27, according to Semlow, Peltier said that she was doing military but "believed order was for 1800 (i.e. 6 pm), was working at 0700." Peltier and Ratliff both testified that they told Semlow that Peltier had shown up for military training on July 27 with her son but had been sent home. According to Semlow, Peltier told her that September 8 and September 9 were "drill dates of the military." Peltier and Ratliff testified that Peltier told Semlow that she did not attend military training on September 8 because of her son's illness, and that on September 9 she did show up but had to leave immediately because of her son. Peltier did not claim, however, that she had called in on either of these dates and explained to the shift supervisors that she was absent because of her son.

The November 8 *Loudermill* letters listed six dates in October as unexcused. According to Semlow, Peltier said that her son was sick on October 1 and that she had a doctor's note for that illness. Peltier's call-in slips for October 4, 6, 9, 10, and 11 stated "military leave," although Peltier's military unit said that she was not there on those dates. According to Semlow, at the Loudermill hearing Peltier "indicated military" for October 4, but believed that her son may have been sick. On October 6, according to Semlow, Peltier again "indicated military" but also told Semlow that she had a doctor's note that her son was sick and had pneumonia. For October 9, 10 and 11, Semlow testified that Peltier told her that she was supposed to be on military leave, but could not say if she was there or not.

Peltier testified that she told Semlow at the *Loudermill* that she believed she originally called in around October 4 to say that she was on military leave, but then later her son became ill. At the unfair labor practice hearing, Peltier stated that she believed that she did not call in on October 6 at all, but that the supervisor merely put military on the call-in sheet because Peltier had called in to say she was on military leave on October 4. Peltier had a note from her son's doctor indicating that he had been treated for pneumonia between September 25 and October 8, and testified that she believed she faxed the JJC this doctor's slip. Peltier did not claim, either at the *Loudermill* hearing or during the unfair labor practice hearing, that she called in on either October 4 or October 6 and said that she would be absent because her son was sick. Peltier testified that she told Semlow at the *Loudermill* hearing that she was supposed to be at the military on October 9, 10, and 11 but, as indicated in the October 16 letter from Commander Butler, she was not able to make it because her son was sick. Peltier did not say, however, that she called in on those dates and told the shift supervisor that she would not be in because her son was sick.

Sometime during the *Loudermill* hearing on November 29, Peltier mentioned that she had made harassment complaints against Seidelman and others. Meyerand said something to the effect that Peltier was always complaining about something.

On or about December 14, Peltier filed a complaint with the Employer Support of the Guard and Reserve (ESGR) asserting that her rights under the USERRA had been violated. An

ombudsman investigated the complaint, and issued a report finding that the County's policy of requiring employees to request a leave of absence prior to taking military leave was contrary to USERRA. The ombudsman stated that the County also could not require written documentation from the military for periods of military service less than 30 days in length, and that employees were not required to do any more than notify their employer prior to taking leave. The ombudsmen noted, however, that it was unclear whether Peltier had in fact provided the County with notification of all her service dates, and he also affirmed that the County could lawfully confirm whether a service member had actually performed service on any particular date by calling the unit for verification.

H. October through December 2007 – Alleged Harassment by JJC Employees and Supervisors

Sometime around October 24, Peltier used the last of her intermittent FMLA leave. Around this time, Peltier also renewed her request for a copy of the investigation of events behind the verbal reprimand she received on March 22 for leaving her unit unattended.

On October 22, a day on which she was not at work, Peltier contacted Assistant Director Emerick by phone and filed eight grievances at the first (oral) step, including one regarding the enforcement of the "dock time" amendment to the attendance policy, one regarding employees being forced to take a drug test, one involving the restriction on her leaving the building during her release time, and one involving her September 11 discipline for violating the new dock time rule. On or about November 7, Peltier put the grievances in written form and mailed them to Seidelman. Seidelman denied them in writing, without meeting with her, on or around November 13. As noted above, Seidelman's response to her grievance over her dock time reprimand does not mention the fact that her reprimand, as well as those issued to other employees, had been rescinded in September.

According to Peltier, around this time shift supervisor Hanson was watching Peltier closely. Armstrong testified that whenever Peltier and Hanson were together the atmosphere was tense, and both Armstrong and youth specialist Jeff McDowell testified that when Hanson saw them talking to Peltier in a hallway she told them to move along. On November 15, Peltier went into the JJC's central control room to get a battery for her radio and spoke with McDowell, who was manning the communication equipment there. At that time youth specialists not assigned to the control room would sometimes go there while they were on break, or when they were waiting to be called for assistance, although they were not supposed to do this. On November 15, Hanson entered the control room as Peltier was leaving and wrote in the room's logbook that Peltier had been in the control room for twenty minutes. Sometime later Hanson instructed McDowell to make sure he wrote in the log book whenever an employee came in or out of the control room, something that he had not been required to do before.

On November 21, Peltier called Semlow at HR to complain about Hanson's logging her in when she went into the control room. Peltier also complained to Semlow that three youth specialists had refused to relieve her for breaks and had made negative remarks about her, including remarks to the residents in Peltier's unit. One of these youth specialists was later reprimanded for making disparaging comments about Peltier to residents. No action was taken

on the other complaints. Peltier felt that this investigation was not complete since Semlow never interviewed her, other than during their initial phone conversation, and Peltier was told by witnesses to the events in her complaint that Semlow did not interview them either.

On November 24, Hanson gave Peltier a written verbal counseling. A counseling is not considered discipline under Respondent's disciplinary system. According to the verbal counseling, Peltier screamed at Hanson during a phone conversation and then yelled at her and threatened to tape record their conversation when Hanson came to give her a verbal counseling for screaming on the telephone. Peltier and witnesses Armstrong and McDowell, testified that Peltier was upset during both conversations but that she did not act inappropriately. Around this same time, Hanson removed Peltier from her regular assignment supervising a unit and assigned her to be a runner, an assignment for less experienced youth specialists. After Peltier complained to Emerick, however, she was returned to her unit.

Sometime in mid December 2007, Peltier radioed for assistance in her unit. When two co-workers arrived to help and reported to Hanson, Hanson told them, "This is her situation, she can handle it," and told them to leave the unit. Peltier complained to Semlow that Hanson's conduct constituted harassment.

I. January through March 2008 – Fifteen Day Suspension and Termination

On January 4, 2008, the POAM was certified as the bargaining agent for Peltier's bargaining unit. On January 7, Peltier was scheduled to attend a disciplinary interview of a member of the unit during her release time between 1 pm and 3 pm. That morning, Seidelman sent Peltier an email message stating that since the POAM did not yet have local officers, she would "have to make arrangements to cover her release time." Peltier emailed Seidelman asking what he meant. When she did not get a reply she attempted to speak to him about this, but he refused to speak to her. Peltier then contacted the POAM, which told Seidelman that Peltier would be considered its representative until elections for new officers were held. Later the same day, but after the disciplinary interview had taken place, Seidelman emailed Peltier that "the union time is considered county time," i.e. her release time would be paid.

On January 8, Peltier sent an email to HR coordinator Lisa Weber stating that she wanted to make a formal complaint that Seidelman was harassing her because of her union activities. Peltier also told Weber that she felt that her previous complaint that she was being harassed by her co-workers had not been adequately investigated, and asked Weber what her options were. Semlow replied to the email and asked Peltier to provide specific information about her complaint, including the details of events, dates they occurred, and names of witnesses. Peltier did not respond to Semlow, and cancelled a subsequent meeting with Weber.

Around this time, Peltier spoke to Macomb County Commissioner Susan Doherty about "what had happened with her Family Medical leave and military leave." Doherty told her that she had to go through the process and, if she was disciplined, file a grievance.

On January 10, Peltier received notice that she was being suspended for fifteen days. The suspension notice stated that the County had conducted an investigation and concluded that

Peltier had twenty-two unexcused absences between July 13 and October 12, dates that she had indicated that she was on military duty and the military had confirmed that she did not serve. Semlow explained that of the thirty dates discussed at Peltier's November 29 *Loudermill* hearing, Respondent counted as excused any date that Peltier said positively that her son was sick, and that Peltier had been correct that May 23, 2007 was a scheduled day off. This left twenty-two dates remaining: July 14, 15, 27; August 13-31; September 8, 9; October 6,9,10, 11. Peltier's suspension notice also stated that she had been in "no-call no show status for an extended period of time and had been less than truthful with the JJC regarding her absences from work." Peltier was suspended from January 11 until January 31. Because of what he considered Peltier's untruthfulness, Herppich decided that Peltier's conduct justified skipping the two day suspension step in the progressive discipline process.

During her suspension, Peltier contacted County Commissioner Sarah Roberts to discuss her suspension and the fact that she believed that she was the victim of retaliation for her union activities. Peltier faxed Roberts twenty-three pages of documents that described "what was happening with my military and my Family Medical Leave and the harassment and, of course, the unfair labor practices." Peltier testified that she explained to Roberts that she was not performing military duties at the time she was supposed to be doing her military service because her son was sick. Peltier also told Roberts that she did not have daycare for her son when she was scheduled to return to work on January 31. Roberts referred to her to a local church.

On January 29, Peltier sent an email to Emerick asking for "approved dock time" January 31 and February 1 because she was unable to pay for day care due to her suspension. Emerick replied that he could not approve non-paid time off unless she qualified for a leave of absence. The JJC's attendance policy allows employees who have exhausted their paid business leave to apply to have an unexcused absence for unpredictable events, including problems with childcare, changed to an excused absence. However, it also states that this will not be automatically granted. On both January 31 and February 1, according to the call-in sheets, Peltier told the shift supervisors that she would not be in and "administration knew why."

Peltier testified that around this time she began to experience symptoms of stress. She sought counseling and medical attention and was put on medication. The medication or her reaction to it made it difficult to work. On one day, she had to call the shift supervisor to watch her unit in the middle of her shift because she was unable to work. Peltier informed her supervisors of her problem.

Peltier worked nine of her fifteen scheduled workdays during the first three weeks of February 2008, and was on military leave for two days. Peltier called in on February 11 and said that she had no one to watch her son and was medically stressed, and on February 17 said that her car had gone off the road. Peltier worked on February 25. However, on February 24 and 29, she called in sick and told the shift supervisors that she did not know the nature of her illness but that it was due to stress and harassment from the JJC. On February 27, someone else called in and told the shift supervisor that Peltier was ill and unable to call herself in; the shift supervisor told the person calling to tell Peltier to provide medical documentation.[13]

[13] Peltier affirmed that the call-in sheets for these dates accurately reflected what she told the shift supervisors when she called in.

On February 29, Seidelman sent Herppich a letter stating that Peltier had accumulated seventeen unexcused absences since the absences for which she had been previously disciplined, and asking that another *Loudermill* hearing be conducted regarding Peltier's time and attendance. The seventeen included dates between November 1 and December 3, 2007, (including two days for which Peltier had claimed to be on military leave but had not submitted orders), January 31, 2008, and eight days in February 2008.

Between March 3 and March 11, Peltier called in, or had someone call in for her, every day that she was scheduled to work. According to the call-in slips, Peltier said that she had a problem with her medication, was stressed, wasn't feeling well, or was not coming in because she was being harassed. For example, the call-in slip for March 3 reads:

> She has a problem with her medication. Doesn't feel comfortable working here. Unsure of the date expected to return to work.

On March 11, Peltier received a letter notifying her that a *Loudermill* hearing was scheduled for March 18 to discuss "allegations of excessive and unexcused absences." The letter listed seventeen absences as unexcused, including the dates in January and February 2008 mentioned in Seidelman's February 29 letter to Herppich and March 3-10 2008. The *Loudermill* letter did not mention any dates in 2007.

Around the same time, Peltier received a letter from Emerick noting that County policy required an employee to apply for a leave of absence if absent for six or more working days. The letter directed Peltier to provide medical documentation to support her absences beginning on February 27. The letter, quoting the leave of absence language in Article 19 of the collective bargaining agreement, stated that the medical documentation had to include the general nature of the personal illness/injury, the dates of incapacity, including the anticipated date of return to work, and the physician's name, signature, address and phone number. A leave of absence form was enclosed, and Peltier was instructed to return the form, along with medical documentation for her medical condition if applicable, by March 14.

On March 11, Peltier obtained a "return to work/school letter" signed by a doctor stating that she had been treated in the doctor's clinic on March 11. The letter read, in its entirety, "Patient is on medications for stress which could may her fatigue [sic] and tired and cause her to miss work. The medication was started on 2/15/2008." The form did not have the doctor's address or phone number. Peltier faxed this letter to HR. Peltier also spoke with Emerick and told him that she was unable to come back to work until the doctor released her.

Peltier testified that she and Erick Acres, who by then was the president of the POAM local organization, agreed that because she was under the care of her physician, she would not attend her *Loudermill* hearing. However, Peltier testified that she believed that the *Loudermill* hearing would be rescheduled after she was able to return to work. On March 17, Acres sent Seidelman a letter indicating that Peltier had stated that she had turned in documentation for all of her absences and wished to waive the *Loudermill* hearing.

On March 18, the day of Peltier's scheduled *Loudermill* hearing, Semlow read the note from Peltier's doctor dated March 11 to Herppich over the phone. Herppich concluded that this note was insufficient to substantiate Peltier's need for a personal medical leave of absence under Article 19 of the collective bargaining agreement because it did not specifically address any of the seventeen dates listed in the March 11 letter, did not indicate that she could not work on those dates, did not clearly state that the doctor had even seen Peltier on any of the dates in the March 11 letter or at any time prior to March 11, and did not indicate when she might be able to return to work.[14] Herppich explained that if Peltier had appeared at the March 18 *Loudermill* hearing, it would have been explained to her that this letter was insufficient. However, according to Herppich, because Peltier did not appear at the Loudermill, Respondent based its decision on the information it had available to it at the time. After Peltier did not appear at the *Loudermill* hearing, Herppich made the decision to terminate Peltier and communicated this decision to Seidelman. On March 19, Respondent sent Peltier a termination letter. The letter stated that the County had conducted an investigation regarding her excessive and unexcused absences, and, based on its investigation, had concluded that Peltier had fifteen unexcused absences after January 30, 2008.

On March 24, Peltier sent HR a "return to work/school letter" signed by a physician's assistant from the same clinic as the doctor who signed the March 11 letter. The physician's assistant's letter stated that Peltier had been seen in his clinic on March 20 and had been unable to work due to "stress reaction, depressive mood, sleep impairment results in daytime sleepiness as well as medication reaction," on specific dates between February 5 and March 10. The letter also stated that she could return to work on March 24. The letter did not have the physician's assistant's address or phone number. Herppich determined that this statement was also insufficient to excuse her absences or to grant her a leave of absence. According to Herppich, this was, in part, because it was signed by a physician's assistant rather than a doctor, and also because the letter did not state that the physician's assistant had seen Peltier on any of the dates listed in the letter or at any time prior to March 20. Herppich also compared these dates with the call-in slips for these days and noted that on many of the dates listed in the note from the physician's assistant, Peltier had called in and given the shift supervisor a reason other than illness for her absence.

The POAM filed a grievance over Peltier's discharge, and that grievance was consolidated with the grievance it had filed over her 15-day suspension. The grievances were heard by an arbitrator over three days – June 18 and September 14, 2009 and January 29, 2010. In March, the arbitrator issued a decision denying both grievances. With respect to the suspension, the arbitrator concluded that Peltier's claim that the absences on which that suspension was based were attributable to her son was not credible, in part because of the call-in sheets indicating that Peltier said that she was on military leave for those dates, and in part because Peltier had been unable to substantiate her testimony by bringing in documentation that her son had been seen or treated by a doctor on these dates. The arbitrator also concluded that Peltier's March 2008 discharge was for just cause because she had accumulated additional

[14] Herppich testified that Peltier was not eligible for an FMLA leave for a personal illness in February and March 2008. Although he did not make this clear in his testimony, this was presumably because Peltier had not worked 1250 hours during the preceding 12 months. In any case, Peltier did not apply for a FMLA leave for her personal illness.

unexcused absences; he agreed with Respondent that the medical documentation which Peltier provided was insufficient to justify granting her a leave of absence for all the numerous days she was absent between January 31, 2008 and her termination date.

IV. Discussion and Conclusions of Law:

A. Collateral Estoppel Effect of Federal Court Opinion and Order

Collateral estoppel and res judicata are separate, although related, doctrines. Res judicata, sometimes called "claims preclusion," bars a subsequent action between the same parties when the evidence or essential facts are identical, the first action was decided by a final judgment on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies. *Eaton Co. Bd. of Co Rd Comm'rs v Schultz,* 205 Mich App 371, 375, (1994); *Solution Source, Inc v LPR Assoc. Ltd. Partnership,* 252 Mich App. 368, 376 (2002). Peltier could not have filed a single action covering both her unfair labor practice claim under PERA and her claims under the federal statutes FMLA and USERRA. Res judicata, therefore, does not bar Peltier's unfair labor practice claim.

The doctrine of collateral estoppel precludes relitigation of an *issue* in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Leahy v Orion Twp,* 269 Mich App 527, 530 (2006); *Porter v Royal Oak,* 214 Mich App 478, 485 (1995). For collateral estoppel to apply, the issues in the first and subsequent cases must be identical, not merely similar, and the previous litigation must have presented a full and fair opportunity to litigate the issues presented in the subsequent case. *Keywell & Rosenfeld,* 254 Mich App 300, 340 (2003). Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel; estoppel is mutual if the party taking advantage of the earlier adjudication would have been bound by it, had it gone against it. *Monat v State Farm Ins Co.,* 469 Mich. 679, 682-685 (2004)

Under Michigan law, the Federal District Court's September 30, 2011 opinion and order and judgment dismissing Peltier's federal court action is a valid final judgment for purposes of collateral estoppel, even though it is currently on appeal. See *City of Troy Bldg Inspector v Hershberger,* 27 Mich App 123, 127-128 (1970); *VanVorous v Burmeister,* 262 Mich App 467, 480 (2004). The parties to the federal court action were the same as the parties in this case, and Respondent would clearly have been bound by the Court's decision if it had gone against it. Peltier argues that she was not given a full and fair opportunity to litigate the issue because the Court denied her the opportunity to present all her evidence. However, the pleadings she attached to her response to the motion to reopen indicate that the Court allowed her to submit evidence in response to the motion for summary disposition. The Court merely denied her request to submit additional evidence after the magistrate's report and recommendation had issued on the grounds that her request was untimely. I conclude that the Commission is bound by the Federal Court's decision on issues of fact or law essential to both decisions under the doctrine of collateral estoppel.

The Court found that Peltier did not meet her burden of demonstrating that Respondent disciplined her "for opposing a practice made unlawful by the FMLA." This finding is not essential to the decision in the instant case because Peltier's claim here is that Respondent disciplined her because she exercised her rights under Section 9 of PERA, not the FMLA. However, Peltier's claim that her unexcused absences were covered by her intermittent FMLA leave is an important part of her argument in her unfair labor practice case. To support her argument that Respondent used these absences as a pretext to punish her for her union activities, she asserts that Respondent had no legitimate reason to consider these absences unexcused. The federal court magistrate concluded, and the Court agreed, that dates on which Peltier failed to call in and specifically identify the reason for her absence as her son's illness were not covered by her FMLA leave. That is, despite Peltier's claim that Respondent's call-in policy at the time did not require her to give details when she called in "sick," the Court held that days on which Peltier called in, or had someone else call in for her, and gave as reasons "personal illness," or "sick," or told her supervisor that she was leaving early because she was sick, were not covered by her intermittent leave to care for her son's illness. It also held that dates on which Peltier failed to call in at all were not covered by her FMLA leave, despite Peltier's claim that the shift supervisors knew that she was absent on these days because of her son. The Court found that, aside from two dates cited in Peltier's September 11, 2007 oral reprimand, Peltier either failed to give a reason for her absence or gave some reason other than her son's illness on the dates covered by the oral reprimand and her September 17, 2007 written reprimand. It concluded that Respondent had legitimate, non-pretextual reasons for issuing these reprimands. Since the findings above were essential to the Court's decision and are essential to the decision in the instant case, I conclude that the Commission is bound by these findings.[15]

Peltier also appeared to argue in both actions that it was a violation of USERRA for Respondent to discipline her for missing work between August 13 and August 31, 2007, because she had been scheduled for military training for that period. According to Peltier, if she missed that training, it was a matter between her and the military. The magistrate concluded, and the Court agreed, that this argument was unsupported by military policy or logic and that Peltier was not entitled to seek military leave for dates that she did not attend military training. The magistrate also found, and the Court agreed, that Peltier led Respondent to conclude that she had attended military training between August 13 and August 31, 2007 when she had not done so. The Court concluded, therefore, that Respondent had a legitimate, non-pretextual reason for suspending Peltier on January 10, 2008. Since these findings were essential to the Court's decision and are essential to the decision in the instant case, I conclude that the Commission is bound by them.

Rule 166 of the Commission's General Rules, 2002 AACS, R 423.157, allows a party to a proceeding to move for reopening of the record following the close of a hearing to admit additional evidence when the additional evidence could not, with reasonable diligence, have been

[15] The Court, in the magistrate's report, also addressed Peltier's claim that Respondent interfered with her rights under the FMLA by unreasonably delaying its decision on her April 2007 request for FMLA leave. The Court made no finding on the lawfulness of Respondent's actions, however, because it concluded that since Peltier's intermittent leave had been made retroactive, she had not been harmed by the delay.

discovered and produced at the original hearing and the additional evidence, if adduced and credited, would require a different result. It is questionable whether the Court's opinion and order and judgment should even be considered "additional evidence" under this rule. In any case, however, these documents must become part of the record in this case because of the collateral estoppel effect of the Court's findings, as discussed above. I will also include in the record, at Peltier's request, the documents from the federal court file upon which the Court's opinion and order was based.

B. Evidentiary Effect of Peltier's Testimony Regarding her Conversations with Individual Macomb County Commissioners

Over Respondent's objection that the knowledge of any individual Macomb County Commissioner about any aspect of Peltier's case should not be attributed to Respondent, I permitted Peltier to testify regarding a series of conversations she had in 2007 and early 2008 with individual members of the Macomb County Commission. However, I denied Peltier's request to subpoena these commissioners to testify because I concluded, after hearing her testimony, that their testimony would not be relevant to any material issue in dispute. Respondent addressed the issue of imputed knowledge in its post-hearing brief, and I permitted Peltier to file a reply brief addressing this issue.

As set out the in finding of facts, Peltier testified that either right before or right after she filed the unfair labor practice charges in June 2007, she met with Macomb County Commissioner Keith Rengert. Peltier showed Rengert the charges and "explained what was happening, what I was encountering at the JJC with harassment." Rengert promised to have a conversation with Seidelman to see what he could do to rectify the situation. Peltier also had conversations with Commissioners Susan Doherty and Sarah Roberts around the time that she received her fifteen-day suspension in January 2008. During these conversations, she told them, or at least Roberts, that she had not been able to do her military service when she was supposed to do it because her son was sick. Peltier also testified, without providing specifics, that during the period that she was supposed to be doing her military service in August 2007 she had conversations with Commissioners in which she told them that she was supposed to be doing military training but could not because her son was ill.

In its post-hearing brief, Respondent argues that any knowledge individual Commissioners had regarding the circumstances of Peltier's case should not be imputed to Respondent because, pursuant to MCL 46.1(2), the Board of Commissioners acts only through its official resolutions and proceedings. In her reply brief, Peltier asserts that the Commission should take note of the fact that Macomb County Commissioners Rengert and Roberts were aware of her complaints that she was being harassed because of her union activities.

As discussed in the discrimination section below, in order to establish that Respondent's motive for disciplining her was retaliatory under PERA, Peltier must show that Respondent had knowledge of Peltier's protected activities when it disciplined her. However, Respondent's knowledge of these activities is not in dispute. Peltier is not required to prove that Respondent knew that she believed that she was being harassed for her union activities when it disciplined

her in order to establish that this discipline was unlawful under PERA. [16] In any case, Respondent's HR was aware that Peltier believed that she was being harassed for her union activities; Peltier made these complaints to HR in June and November and also in the unfair labor practice charge she filed in June 2007. Whether individual Macomb County Commissioners also knew that Peltier believed that she was being harassed because of her union activities is irrelevant.

Peltier also asserts in her reply brief that individual Macomb County Commissioners knew that she was not doing military duty in August 2007 because her son was sick, and that this knowledge should be imputed to Respondent. I note that Peltier did not testify to any specific conversation she had with any Commissioner between August 13 and August 31, 2007, the period for which she was accused of falsely claiming to be on military leave. Even if she had, I find that Peltier could not fulfill her obligation to correctly report the reason for her absences by mentioning, in conversations with individual Commissioners, that she was supposed to be performing military service at the time but instead was home because her son was sick. As Peltier was aware, she was required to report the reasons for her absences to the JJC. Peltier had no reason to assume that a statement to an individual Commissioner that her son was sick on a particular day would be passed along to the JJC or to anyone else responsible for keeping her attendance records. I find no reason to attribute this "knowledge" to Respondent.

C. Allegations of Unlawful Interference

It is a violation of Section 10(1) (a) of PERA for a public employer or officer or agent of a public employer to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed by Section 9 of PERA. Section 9 gives public employees the right 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 or protection, and to negotiate or bargaining collectively with their public employers through representatives of their own free choice. Filing, processing, investigating and discussing grievances and making demands to bargain are activities protected by Section 9. The test of whether Section 10(1)(a), or its identical provision in the National Labor Relations Act (NLRA), 29 U.S.C § 150, et al., has been violated is whether the employer engaged in conduct which it may reasonably be said tends to interfere with the free exercise of employee rights under the Act. *City of Detroit (Police Dept)*, 19 MPER 15 (2006); *St Clair Co Intermediate Sch Dist*, 1999 MERC Lab Op 38, 45-46. A finding of union animus is a necessary element of a violation of Section 10(1)(c) of PERA, but is not necessary for a violation of Section 10(1) (a). *City of Detroit Water & Sewerage Dept*., 1983 MERC Lab Op 157, 167.

Peltier's first allegation of unlawful interference is that Respondent refused to permit her to participate in a meeting between it and youth specialist Mike Farah on January 21, 2007 and that it made "inappropriate" statements to her at this meeting. In her brief, Peltier concedes that Farah had no right under Section 10(1)(a) to union representation at this meeting because he had no reasonable basis to believe that the meeting would result in discipline. There was no

[16] Peltier appears to argue that because Respondent knew that she was claiming that she was being harassed because of her union activities, it had an affirmative duty to take action to remedy her "hostile work environment." This claim, however, is unsupported by any pertinent legal authority.

indication in the record that Respondent said anything to Peltier at this meeting except that she did not have the right to be present. I find no violation of Section 10(1)(a) in Respondent's conduct on January 21, 2007.

Peltier's second allegation is that Seidelman interfered with her exercise of her Section 9 rights by telling her, on June 4, June 6 and July 6, 2007, that she could not carry out her duties as unit chairperson while on sick leave or on her own time. According to the record, on June 4, Seidelman told her, by letter, that she was not to "perform work" while on leave status or when she had not reported to work for some other reason. When Peltier asked if he meant union business, Seidelman replied, somewhat ambiguously, that if a "task relates to our employment at the JJC it is not appropriate to be done on leave." The record does not indicate what Seidelman said to Peltier about this issue on either June 6 or July 6. The evidence indicates, however, that after July 6, 2007 Peltier continued to file grievances and conduct other union-related business by email when she was not at work, and she also came to the JJC on days when she had called in sick because of her son to attend grievance and disciplinary meetings for other employees. There is no indication that Respondent rejected or ignored her union-related communications or refused to hold grievance meetings with her these days. Since Respondent neither disciplined Peltier for conducting union business when she was not at work nor refused to meet or deal with her, I find that Seidelman's statement, or statements, that Peltier was not to engage in union business while leave status did not interfere with Peltier's exercise of her Section 9 rights.

The third allegation of unlawful interference involves Respondent's designation, on September 13, 2007, of a union office on the JJC for Peltier's use and its directive that Peltier not leave the JJC during her paid union release time. Insofar as I can determine from the record, after September 13 Peltier was not allowed to leave the JJC's premises during her paid release time, although she never used the union office.

Union release time is a mandatory subject of bargaining under PERA. *Central Michigan Univ*, 1994 MERC Lab Op 527, *aff'd* 217 Mich App 136 (1996). However, as the Commission stated in *City of Detroit, Dept of Transportation,* 1990 MERC Lab Op 254, 256, Section 9 does not give employees the right to engage in union business on an employer's time, with or without compensation. Although a union and an employer may agree to paid or unpaid release time for union officers or members, this is a negotiated benefit and not a right guaranteed by the Act. Accordingly, absent evidence of a discriminatory motive, an employer may legitimately monitor the use of its time for union business, for example, by requiring union officers to seek permission before leaving work to perform union business. *Berrien Co (Riverwood Center),* 1993 MERC Lab Op 681 (no exceptions); *City of Grand Rapids,* 1980 MERC Lab Op 18 (no exceptions). Here, the collective bargaining agreement did not explicitly give the unit chairperson the right to leave the facility during his or her union release time. The past practice was that unit chairpersons would sometimes leave the facility to conduct union business elsewhere. However, Peltier routinely left the JJC during her union release time and purportedly went home to take care of union business from her house. As Peltier's witnesses testified, Peltier's leaving the JJC before the end of her shift caused grumbling among youth specialists who were being forced to work double shifts. I find that, under these circumstances, Respondent's directive that Peltier not leave the JJC during her paid release time was a legitimate action aimed at ensuring that Peltier

was using her release time for union purposes and that Respondent's action did not constitute unlawful interference with Peltier's exercise of her Section 9 rights.

Peltier had appointments scheduled during her union release time on the day she was notified by Seidelman that she was not to leave the premises of the JJC. Peltier left her unit, apparently with permission, and went outside the building to conduct her meetings during her release time. When she returned, she was notified that her pay would be docked twenty minutes for "returning late from break." Peltier alleges that Respondent violated Section 10(1)(a) by docking her pay on that occasion. There is no explanation in the record for Peltier's pay being docked on that day. However, this is the only occasion, according to the charge, on which Respondent improperly docked Peltier's pay when she was using her union release time. I conclude that the docking of her pay on that one occasion cannot be reasonably said to have interfered with Peltier's exercise of her Section 9 rights.

Peltier's fifth allegation is that shift supervisor Hanson unlawfully interfered with her Section 9 rights on November 15, 2007, when she entered the JJC's control room as Peltier was leaving it and wrote in the logbook that Peltier had been in the room for twenty minutes. The record indicated that at that time youth specialists sometimes went into the control room to "hang out," even though this was against the rules. However, Peltier had gone into the room that day to get a battery for her radio. Aside from treating her unfairly, Peltier's claim appears to be that Hanson was keeping her under surveillance. Peltier also testified that around this time Hanson appeared to be watching where she went during her shift, and other employees testified that Hanson told them to move along when she saw them talking to Peltier. It is well established under both PERA and the NLRA that an employer interferes with the exercise of its employees' protected rights either by keeping their protected activities under surveillance or giving them the impression that their protected activities are under surveillance. *Tillie's Restaurant,* 1972 MERC Lab Op 445; *Brighton Area Schs,* 1982 MERC Lab Op 1607 (no exceptions); *Bessemer Twp Sch Dist,* 1980 MERC Lab Op 1047 (no exceptions). See also *Ivy Steel & Wire, Inc,* 346 NLRB 404 (2006). In order for the Commission to find unlawful surveillance under Section 10(1)(a), however, it must find that the employer or its supervisors kept the employee's union or other protected activities under surveillance. In this case, Peltier did not assert that Hanson kept on eye on her during her union release time or when she was performing her union duties at other times of the day, but merely that Hanson singled her out for special attention. I conclude that the evidence here is insufficient to establish that Respondent unlawfully engaged in the surveillance of surveilled or created the impression that it was surveilling Peltier's union activities.

The sixth allegation is that Respondent interfered with Peltier's exercise of protected rights by failing to conduct a thorough and complete investigation of harassment complaints she made against co-workers, supervisors, and Seidelman. It appears from Peltier's brief that her argument is that Respondent treated her differently and did not thoroughly investigate her complaints because of its animus toward her union activities. Therefore, I have discussed this allegation with the other allegations of unlawful discrimination below.

The seventh allegation is that Respondent violated Section 10(1)(a) by making inappropriate and rude comments to Peltier during her November 29, 2007 *Loudermill* hearing. Peltier, however, does not identify these comments in her brief. Peltier testified that Meyerand

told her, after she mentioned that she had filed a harassment complaint, that she was always complaining about something. I find that a reasonable employee could not have interpreted this remark as a threat, and I conclude that it did not violate Section 10(1)(a).

The incident giving rise to final allegation of unlawful interference took place on January 7, 2008. The POAM had been certified as the new bargaining representative for employees as the JJC, replacing Local 889, three days earlier Peltier was scheduled to be present at another employee's disciplinary interview during her release time in the afternoon of January 7, but received an ambiguous message from Seidelman that morning that seemed to convey that she was not to attend the meeting. Later that day, after a phone call from Peltier, the POAM notified Seidelman that Peltier was authorized to serve as its representative until it conducted elections for new officers. Peltier was not permitted to have union release time on January 7. However, after the POAM clarified that Peltier was its designated representative, Respondent acknowledged her as the unit chairperson and Peltier was again permitted to take the union release time provided for in the contract. I find that Seidelman's refusal to allow Peltier to take union release time on January 7, 2008 did not, under the circumstances, interfere with Peltier's exercise of her Section 9 rights, and that the refusal did not violate Section 10(1)(a).

D. Allegations of Unlawful Discrimination

It is a violation of Section 10(1)(c) of PERA for a public employer or officer of agent of a public employer to "discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in labor organization." Section 10(1)(d) of PERA makes it unlawful for a public employer to "discriminate against a public employee because he has given testimony or instituted proceedings under the act." Unlike Section 10(1)(a), Section 10(1)(c) and 10(1)(d) require a finding of unlawful motive. The elements of a prima facie case of discrimination are, in addition to an adverse employment action or actions: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the exercise of protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. *Southfield Pub Schs*, 22 MPER 26 *(2009); See also Waterford Sch Dist*, 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551-552. After 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 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.

I note that in addition to filing and processing grievances under a collective bargaining agreement on behalf of oneself or others, activities Peltier clearly engaged in throughout 2007, union activity also includes good faith attempts by employees to enforce rights claimed under a collective bargaining agreement. *MERC v Reeths-Puffer School Dist*, 391 Mich 253, 264 (1964). In the instant case, I find that Peltier was also engaged in union activity protected by the Act when she accused Seidelman of violating Respondent's duty to bargain and committing other unfair labor practices in his attempt to promulgate a new attendance policy for the JJC, and when

she demanded on behalf of Local 889 that Respondent bargain over this new policy. In the absence of any evidence of bad faith, e.g., that Peltier was using the union release time for personal purposes, Peltier was also engaged in union activity protected by PERA when she used or attempted to use the union release time provided to her as unit chairperson under the collective bargaining agreement. In addition, Peltier's complaints to individual county commissioners about Seidelman's creation of new positions and assignment of work at the JJC were also protected, as they were made on behalf of the union and constituted complaints about working conditions. See, e.g., *City of Menominee*, 1982 MERC Lab Op 585.

The third element of a prima facie case of unlawful discrimination, anti-union animus or hostility toward the employee's exercise of his or her protected rights, can be established either by direct evidence or circumstantial evidence, including evidence of suspicious timing or pretext that fairly supports the inference that the employer's motive was unlawful. *City of Royal Oak*, 22 MPER 67 (2009) (no exceptions). See also *Fluor Daniel, Inc*. 304 NLRB 970 (1991); *Real Foods Co*, 350 NLRB 309, 312 fn. 17 (2007)(unlawful motive demonstrated not only by direct, but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action).

When there is direct evidence of anti-union animus, the question generally becomes whether there is a causal link between the anti-union animus and the adverse employment action. When there is no direct evidence of anti-union animus, the question is broader, i.e., it becomes whether circumstantial evidence fairly supports the inference that the employer's motive was unlawful. There is no direct evidence of anti-union animus in this case. However, I find that there is circumstantial evidence which supports Peltier's claims of anti-union animus.

Among this circumstantial evidence is the fact that while Peltier worked for the JJC between 1998 and February 2007 without even once being disciplined, she received two verbal reprimands, for unrelated incidents, within two months after she raised objections to Seidelman's proposed new attendance policy, made a demand to bargain over it, and accused Seidelman of engaging in unfair labor practices by attempting to go around the union's leadership to implement it. As Respondent points out, it did not implement the proposed new attendance policy. However, it is clear that when Seidelman proposed the new policy on January 4, 2007, he believed that a new policy was urgently needed because sick leave abuse was contributing to the high rates of forced overtime and urgently needed to be addressed.

The timing of the incident involving unit member Mike Farah is also suspicious. In January 2007, Peltier had been unit chairperson for about eighteen months. She testified without contradiction that Respondent's practice had been to let her attend its meetings with members of her unit when the member wanted her there. However, on January 27, in the midst of the controversy over the proposed new attendance policy, Peltier was told she could not be present during a meeting between Respondent representatives and unit member Mike Farah. Even if Peltier had no legal right to be present at the meeting, the timing of it its decision to suddenly enforce its right to exclude her is unexplained.

Other incidents occurring later in 2007 suggest that Seidelman was angered by Peltier's performance of her duties of unit chairperson. Peltier testified, without contradiction, that Seidelman ignored her and spoke only to steward Acres during a grievance meeting in the spring of 2007. After June 16, 2007, Seidelman refused to meet with Peltier to discuss grievances at all without the presence of HR representatives, despite the fact that meetings between them were part of the second step of the grievance procedure. In early June 2007, Seidelman tried unsuccessfully to stop Peltier from conducting union business from home and coming in to the JCC for grievance and disciplinary meetings for other employees on days that she had called in sick to care for her son. There are also indications that Seidelman kept a close eye on Peltier's use of union release time. On April 20, 2007, Seidelman emailed Peltier to tell her that she would not be paid for returning to the JCC a half hour before the end of her shift to handle some union business, even though Peltier had not sought payment for that time. On June 7, 2007, Seidelman denied Peltier's request to her supervisor to visit HR on the same day that she also asked to use her two hour release time, without asking her why she was going to HR. Seidelman's behavior must be viewed in the context of events, which included Peltier's dismal attendance record during this period. Had Peltier not been absent from her regular duties so often, her use of union release time and her energetic opposition to Seidelman's efforts to implement changes at the JJC might not have produced the same effect. I find, nevertheless, that Peltier has established that Seidelman became angry at Peltier's efforts in early 2007 to block the implementation of a new attendance policy at the JJC and that he continued to be angry at her union activities up to the date of her discharge in March 2008. I conclude, therefore, that Peltier has met her burden of showing anti-union animus in this case.

Section 10(1)(c) of PERA prohibits acts of discrimination by public employers or their agents. It is not unlawful for an employer or employer representative to dislike or resent a union officer because of his or her union activities. It is unlawful to punish the union officer for that conduct unless it is so egregious that it loses the protection of the Act. In this case, Respondent asserts that the actions alleged by Peltier to constitute unlawful discrimination against her were motivated solely by legitimate reasons. As discussed above, if the Respondent is able to demonstrate that there were legitimate reasons for an action and the same action would have been taken even if Peltier had not engaged in union activities, there is no violation of Section 10(1)(c). I will, therefore, discuss each action separately below.

1. Allegations Nos. 1 and 2 – Verbal Reprimands:

The first two allegations of unlawful discrimination involve the verbal reprimands Peltier received in February and March 2007. As noted above, the timing of these reprimands is suspicious since these were the first reprimands Peltier had received in nine years of employment. However, in both instances, Peltier was guilty of the offense for which she was reprimanded. Peltier failed to get a tuberculosis test within the time period she was required to do so. On February 11, 2007, Peltier she left her unit unsupervised. Respondent, therefore, had legitimate reasons for disciplining her. In both cases, there were mitigating circumstances that might have excused her conduct. In the case of the tuberculosis test, Peltier expected to get the test as part of her military physical, but that physical was postponed. When she left her unit on February 11, she thought that Armstrong, to whom she had spoken before she left, would be relieving her. However, there is no evidence that the Respondent treated Peltier differently from

other employees in disciplining her for these incidents, or that it had a past practice of excusing employees under similar circumstances. Even given Respondent's anti-union animus and the suspicious timing of the reprimands, I conclude, based on the evidence as a whole, that these reprimands did not constitute retaliation against Peltier for her union activities. I conclude, therefore, that Respondent did not violate Sections 10(1)(a) and 10(1)(c) of PERA by issuing these reprimands.

2. Allegation No. 3 – Repeatedly Denying or Refusing to Act on Peltier's Request for FMLA Leave

Peltier first submitted her request for intermittent FMLA leave on or sometime after April 20, 2007. On August 1, 2007, Respondent notified her that it was granting the leave retroactive to the date of her request. Peltier alleges that she was harmed by the delay because, during the period her request was under consideration, she was required to call in every day. In addition, she was placed on the work schedule, so that whenever she called in to report that she would not be in because her son was sick, another youth specialist was forced to work overtime to cover for her unscheduled absence.

According to the medical documents Peltier submitted to support her FMLA leave request, Peltier did not want a part-time or reduced work schedule. Her son had a chronic condition. What she sought was leave that would allow her to stay home with her son during periods when his condition became acute and he required frequent treatments during the day, but permitted her to work when his condition was stable. If Peltier was to work at all, Respondent had to put her on the work schedule. Peltier asserts that while her FMLA leave request was pending, Respondent repeatedly put her on the work schedule when it knew in advance that she would not be coming to work because of her son. Even if this were true, however, it is not clear why this constituted an adverse employment action.

In any case, I find that the evidence does not support a finding that Respondent's anti-union animus caused, even in part, the delay in approving Peltier's FMLA leave. The type of leave Peltier was requesting was difficult for the JJC to accommodate given its minimum staffing requirements and scheduling practices. HR wanted very specific information from Peltier's son's doctor before approving the leave, including an anticipated end date for the leave. HR representative Dobson explained on the record why HR felt it needed this information. The earlier medical forms submitted by Peltier's son's doctor were incomplete, and indicate that the doctor had difficulty understanding what Respondent wanted. The doctor's writing on the forms was sometimes illegible. I find it significant that Respondent did not attempt to discipline Peltier for her attendance while she was attempting to get the medical documentation that would satisfy HR, and that it did eventually approve the leave retroactive to the date that Peltier claimed to have initially requested it. I conclude that Respondent did not violate Sections 10(1)(a), 10(1)(c), or 10(1)(d) by its delay in approving Peltier's FMLA leave.

3. Allegation No. 4 – Denial of Peltier's Request for a Military Leave of Absence Between August 13 and August 31, 2007

On the drill schedule Peltier provided to Respondent in October 2006, she was scheduled to do her annual two-week out-of-town military training between July 28 and August 11, 2007. On June 19, 2007, Peltier notified Cavanaugh at the JCC by email that she would instead be performing alternate service at her unit for three weeks, between August 14 and August 31, 2007. On August 13, a day that Peltier was not scheduled to work, Cavanaugh or a shift supervisor at the JJC filled out and submitted a leave of absence form for Peltier covering this period. Respondent denied the leave request on the grounds that Peltier had not provided documentation from her military unit that her service obligation had been rescheduled for these dates. However, Peltier was unable to perform any military service between August 14 and August 31 because of her son's illness. Peltier argues that the denial of her leave request was part of Respondent's pattern of retaliation against her for her union activities. She argues that until 2007 she had never been required to provide documentation from her unit when her military service schedule changed, although there was no indication in her testimony that these previous schedule changes involved a change in her two-week training leave - her major military obligation. However, I find that Respondent's refusal to approve Peltier's request for a military leave between August 14 and August 31, 2007 did not constitute an adverse employment action or act of discrimination since Peltier did not need military leave for this period. I conclude that Respondent did not violate Sections 10(1)(a), 10(1)(c), or 10(1) (d) of PERA by denying her request for a military leave of absence between August 14 and August 31, 2007.

4. Allegation Nos. 5 and 6 – The September 2007 Verbal and Written Reprimands

On September 11, 2007, Respondent issued Peltier a verbal reprimand for using "dock time" without preapproval on eight days during the pay period ending September 7, 2007 - August 27, August 30, August 31, September 1, September 2, September 3, September 6 and September 7. On August 27, 2007, the JJC had revised its attendance policy to make "docked leave not approved in advance" an offense subject to progressive discipline. Three other youth specialists were given verbal reprimands for this same offense on the same day. Respondent maintains that the verbal reprimands, including Peltier's, were rescinded on September 19 and never reissued. Peltier disputes this claim, pointing out that several months later Respondent denied her grievance over the September 11 reprimand without mentioning that it had been rescinded. On September 17, Respondent issued Peltier a written reprimand for having ten unexcused absences between July 1 and September 12, 2007. The dates listed in the written reprimand are July 1, July 7, July 22, July 23, July 28, July 29, September 2, September 3, September 6, and September 12. That is, three dates – September 2, 3, and 6 – are mentioned in both reprimands. As Respondent later acknowledged, Peltier was at work on September 2 and performing military service on July 23. It is unclear from the record whether the September 17 discipline was issued as a written reprimand because Peltier had received the verbal reprimand the week before, or whether Respondent considered the "docked leave not approved in advance" and excessive absences to be separate offenses.

Peltier does not dispute that she was not at work on the dates, other than September 2, listed in the two reprimands. She also does not dispute that she did not have leave in her paid

banks to cover the dates listed in the verbal reprimand. Peltier had submitted a request for military leave for August 27, August 30 and August 31. However, Respondent never approved the request, and Peltier did not perform military service on these dates. Peltier claimed, both in this case and in her federal action, that the dates covered by these reprimands should have been deemed excused absences because of her FMLA leave. The Court held, however, that dates on which Peltier did not call in and specifically identify her absences as related to her son's illness were not covered by her FMLA leave. It also found that except for September 1 and September 7, Peltier did not call in to her supervisor and specifically identify her absences on these dates as being related to her son's illness. It concluded that the large number of absences Peltier accumulated because of reasons unrelated to her FMLA leave constituted a legitimate, non-pretextual reason for the reprimands. As discussed in Section A above, I conclude that the Commission is bound by these findings.

I also conclude that Respondent would have issued these reprimands even in the absence of Peltier's union activities and despite its hostility toward these activities. In the roughly two months between July 1 and September 12, 2007, Peltier accumulated an enormous number of unexcused absences. Even without her absence from work between August 14 and August 31, she had more than double the number of unexcused absences necessary to justify her discipline under the JJC's attendance policy. It is not credible that Respondent would have failed to discipline her under these circumstances. I conclude that Respondent did not violate Section 10(1) (a), 10(1) (c), or 10(1) (d) of PERA when it issued Peltier the September 11 and September 17, 2007 reprimands.

5. Allegation No. 7 – November 24 Verbal Reprimand and Respondent's Failure to Adequately Investigate Claims of Harassment

The "verbal reprimand" which Peltier received from Hanson on November 24, 2007, was, in fact, a "written verbal counseling" which is not considered discipline under Respondent's disciplinary system. According to the "written verbal counseling," Peltier screamed at Hanson, her supervisor, on the telephone and afterward when they met to discuss the counseling. Hanson did not testify in this matter, but Peltier and her witnesses testified that Peltier was angry, but "did not act inappropriately."

In the late fall of 2007, Hanson paid special attention to Peltier's movements and to whom she spoke during the course of her shift, and, on November 15, 2007, Hanson came into the control room after Peltier had left it and pointedly wrote in the logbook that Peltier had been in the room for twenty minutes. In addition to giving her the "written verbal counseling" on November 24, Hanson removed Peltier from her unit and assigned her to be a runner, an assignment usually given to less experienced employees, until Hanson's decision was overturned by Assistant Director Emerick. In mid December, Hanson sent away the youth specialists Peltier had called to help her with an incident on her unit.

By November 2007, Peltier had already received two reprimands for her attendance, and her use of military leave was under investigation. Hanson may have been paying special attention to Peltier's movements around this time because she was hoping to catch Peltier doing something that would provide cause to discipline her, but there is insufficient evidence to

connect Hanson's conduct to Peltier's union activity. Moreover, the November 24 "written verbal counseling," was not discipline. I find that Hanson's issuance of the "written verbal counseling" did not constitute an adverse employment action and that giving Peltier this document did not violate Section 10 (1)(a), 10(1)(c), or 10(1)(d) of PERA.

Peltier alleges that Respondent interfered with her exercise of her Section 9 rights by failing to conduct a thorough and complete investigation of harassment complaints she made against co-workers, Hanson, and Seidelman. Peltier's complaints about her co-workers resulted in discipline being issued to two youth specialists. Her complaints about her supervisors, Hanson and Seidelman, did not result in any action. It appears from Peltier's brief that her argument is that Respondent treated her differently and did not thoroughly investigate her complaints because of its animus toward her union activities. Specifically, Peltier complains that HR did not talk to all the witnesses whose names she gave them. However, there is no evidence in the record to suggest that Respondent had handled other employees' complaints of harassment by their supervisors any differently. I find that Respondent did not violate Section 10 (1)(a), 10(1)(c), or 10(1)(d) of PERA in its investigation of Peltier's complaints that she was being harassed because of her union activities.

6. Allegation No. 8 – Peltier's Fifteen Day Suspension

On January 10, 2008, Peltier was issued a fifteen day suspension for having twenty-two unexcused absences between July 13 and October 12, 2007. The dates listed as unexcused were July 14, 15, 27; August 13-31; September 8, 9; and October 6,9,10, and 11. All these absences occurred on dates that, according to Respondent, Peltier had informed Respondent that she was on military leave even though she did not perform any military duties on these dates. In addition to having these absences deemed unexcused, Peltier was accused of being untruthful with Respondent about the reasons for her absences.

Respondent's argument that Peltier was untruthful about her military leave, and would have been disciplined for her absences and this untruthfulness under any circumstances, centers on the period between August 13 and August 31, 2007. According to the memo from her military commander Peltier gave Respondent in October 2006, Peltier was to do her annual out-of-town training with her military unit for two weeks in late July and early August 2007. In June 2007, Peltier told Cavanaugh that instead of doing the training with her unit, she would be performing alternate service at the unit between August 13 and August 31. Peltier was absent from work for this entire period, but did not perform any military service, allegedly because her son was sick. However, she did not tell Respondent until much later that she had performed no military service during this period.

As I noted in Section A of the discussion section of this opinion, the magistrate in Peltier's federal court action found, and the Court agreed, that Peltier led Respondent to conclude that she had attended military training between August 13 and August 31, 2007. The magistrate found that Peltier knew that she had not attended military training, yet still sought military leave for this period, either in an attempt to deceive Respondent or because of a mistaken belief that she should still receive it. The magistrate concluded, and the Court agreed, that the fact that Peltier misled it gave Respondent a legitimate, non-pretextual reason for suspending Peltier on

January 10, 2008. As discussed above, I have concluded that I am bound by these findings under the doctrine of collateral estoppel.

The Court did not address the July, September and October dates listed in the suspension as unexcused absences. Peltier argues that these absences, like her absences between August 13 and August 31, should not have been deemed unexcused because, if she was absent, it was because of her son. However, according to Peltier's call-in sheets, and her testimony regarding what she told Respondent about these absences at her *Loudermill* hearing on November 29, 2007, Peltier did not call in and tell the shift supervisor on any of these dates that the reason she was absent was her son's illness. As the record indicates, the JJC did not have a policy in effect at the time requiring employees to provide details of their illnesses when they called in sick. I find, nevertheless, that it should have been obvious to Peltier that she needed to tell her supervisors when she called in that her absence was due to her son's illness and not some other reason. As Respondent reminded Peltier in its July 31, 2007 letter granting her leave request, employees are entitled under the FMLA to a limited number of leave days within a particular year, even if their need for such leave exceeds their eligibility. In fact, Peltier exhausted her FMLA leave on or about October 24, 2007, and was thereafter not eligible for intermittent leave to care for her son under either the FMLA or the collective bargaining agreement. Since Respondent had the right to keep track of Peltier's FMLA leave days, it also had the right to expect Peltier to notify it when she used an FMLA day, just as it had the right to expect her to notify it when she was, or was not, performing military service on days that she was scheduled to work.

Peltier argues that Respondent knew, from sources other than the call in sheets, that she was not performing military duties on dates for which she had requested military leave. For example, when Peltier came to the JJC on August 15, 2007 to attend a disciplinary meeting for another employee, she told Assistant JJC Director Whitehead and Semlow that she was supposed to be on military duty that day, but was not attending because of her son's illness. The record indicates, however, that in determining the reasons for her absences Respondent reasonably relied on Peltier's statements to the shift supervisors when she called in.

As indicated in her September 2007 verbal reprimands and January 2008 notice of suspension, between July 1 and October 12, 2007, Peltier had approximately thirty-two unexcused absences, eight times the number triggering discipline under the JJC's attendance policy. In addition, Respondent had discovered that Peltier had failed to correctly report that she was not performing military duties on dates for which she had requested military leave. I find that Respondent would have disciplined any employee in these circumstances. Moreover, I also find that the fifteen day suspension Peltier received was reasonable given her very large number of unexcused absences within a short period. I conclude that Peltier received the same discipline that she would have received for the misconduct had she not engaged in any union or other protected activities or filed the unfair labor practice charge. I conclude, therefore, that Respondent did not violate Section 10(1)(a), 10(1)(c), or 10(1)(d) when it issued her a fifteen day suspension on January 10, 2008.

7. Allegation No. 9 – Peltier's Termination

After returning from her fifteen day suspension, Peltier asserts that she began experiencing physical symptoms from the stress of working at the JJC, sought medical attention, and was put on medication to deal with these symptoms. Due to her stress symptoms, combined with the reaction to the medication, Peltier had difficulty working. After the beginning of February, Peltier was frequently absent and did not work at all between February 27 and March 10. Peltier reported her absences, and their cause, to the shift supervisors. However, she did not even attempt to provide Respondent with medical documentation of her illness until March 11, after she had been put on notice that she was again about to be disciplined for excessive unexcused absences. The doctor and physician assistant "return to work/school" letters that Peltier then gave Respondent were woefully inadequate. For example, neither letter indicated that Peltier had been seen by a medical provider in the clinic before March 11, even though the second letter stated that she was incapacitated on specific dates going back to February 5, and neither letter provided a phone number that Respondent could use to obtain additional information.

Peltier seems to argue in her brief that Respondent should have excused her absences in February and March 2008 because she told it that her absences were caused by the stress of working in the hostile atmosphere of the JJC. She also asserts that when Seidelman read the call-in slips for the dates she was absent, he should have "done an investigation." Stress, however, is not itself an excuse for absenteeism, even though it may trigger physical symptoms that lead to an inability to work. If Peltier could not work because of her physical symptoms, she had the responsibility to provide Respondent with medical documentation. When she did not do so, her absences were considered unexcused. Since she had already been given a fifteen day suspension for unexcused absences, she was terminated. As I indicated at the beginning of my discussion of Peltier's discrimination allegations, I agree with Peltier that Respondent was angry at Peltier, at least in part, because of her union and other protected activities, including the fact that she had filed multiple unfair labor practice charges. I conclude, however, that Peltier would have been terminated even if she had not engaged in any of these activities because her inadequate reporting and documentation of the reasons for her enormous number of absences between January 2007 and March 2008 resulted in many of them being unexcused. I conclude that Respondent did not violate Section 10(1)(a), 10(1)(c), or 10(1)(d) when it terminated Peltier on March 19, 2008.

As set forth in the findings of fact and conclusions of law above, I find that Respondent did not commit unfair labor practices in violation of Sections 10(1)(a), 10(1)(c) or 10(1)(d) of PERA, and I recommend that the Commission take the following action.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____