

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

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

-and-

STEVEN ZENONI,
An Individual Charging Party.

Case No. C14 K-138
Docket No. 14-000072-MERC

APPEARANCES:

Daryl Adams, for Respondent

Steven Zenoni, appearing for himself

DECISION AND ORDER

On April 1, 2015, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: May 5, 2015

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C14 K-138
Docket No. 14-000072-MERC

-and-

STEVEN ZENONI,
An Individual-Charging Party.

APPEARANCES:

Daryl Adams, for Respondent

Steven Zenoni, appearing for himself

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION**

On November 26, 2014, Steven Zenoni filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against his employer, the Detroit Public Schools pursuant to §§10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and MCL 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On December 17, 2014, pursuant to Rule 165 of the Commission's General Rules, 2002 AACRS, R 423.165, I issued an order directing Zenoni to show cause in writing why his charge should not be dismissed for failure to state a claim upon which relief could be granted under PERA. Zenoni was granted an extension until February 17, 2015, to respond to my order. He did not file a response. Based upon the facts as alleged by Zenoni in his charge, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Zenoni is employed by Respondent as a special education teacher. According to his charge, Zenoni was attacked by a student on May 22, 2014, and, as a result of the injuries he received, was absent from work for the remainder of the 2013-2014 school year. Sometime in late July or August 2014, Zenoni was mailed a copy of a performance evaluation prepared by his

principal and dated July 25, 2014. The evaluation rated his teaching as ineffective. In the evaluation, Zenoni's principal relied upon an observation of Zenoni's classroom performance which the principal allegedly conducted on May 29, 2014. Zenoni was not at work on May 29 due to his injuries. After receiving the evaluation, Zenoni contacted Respondent's human resources department and asked that the performance evaluation be removed from his file and replaced with an evaluation based on an actual classroom observation. Zenoni did not receive a response to his request.

Zenoni alleges that his principal deliberately lied about conducting the classroom observation and that his poor performance evaluation was an attempt by the principal to set him up for wrongful discharge from his teaching position. He alleges that Respondent wrongfully failed to remove the tainted evaluation from his file. He also alleges that Respondent unlawfully denied him his right to union representation during a review of his performance evaluation. It appears that Zenoni alleges that his principal was required to, but did not, hold a meeting with him and a union representative before giving him the poor evaluation.

Discussion and Conclusions of Law:

The failure of a charging party to respond to an order to show cause may warrant dismissal of the charge. *Detroit Federation of Teachers*, 21 MPER 3 (2008).

Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. Sections 10(1)(a) and (c) of PERA prohibit a public employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities protected by PERA. However, not all types of unfair treatment violate PERA. PERA does not provide a cause of action for "wrongful discharge" per se. Absent an allegation that the employer interfered with, restrained, coerced, or retaliated against the employee for engaging in, or refusing to engage in, union or other activities of the type protected by PERA, the Commission has no jurisdiction to make a judgment on the fairness of an employer's actions. See, e.g., *City of Detroit (Fire Dep't)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524.

Zenoni alleges that his principal deliberately lied about having conducted a classroom observation of his teaching. He asserts that the principal did so in order to give him an ineffective rating and bring about his discharge. He alleges that the principal's conduct, and Respondent's refusal to remove the tainted evaluation from his file, violated PERA. However, Zenoni has not asserted that he engaged in any conduct or asserted any rights protected by §9 of PERA or that Respondent's misconduct was in any way connected to an assertion of his §9 rights. Therefore, even if Zenoni's allegation that his principal fabricated a classroom observation report is true, it does not state a claim upon which relief can be granted under PERA. I conclude that Zenoni's claim that Respondent violated PERA by failing to remove the tainted evaluation from his file also fails to state a claim under PERA.

In *NLRB v Weingarten*, 429 US 251 (1976), the U.S. Supreme Court held that under §8(a)(1) of the National Labor Relations Act (NLRA), which applies to employees in the private sector, an employee has the right to have a union representative present when interviewed by his employer when the employee reasonably believes that the interview may lead to discipline. The employee must invoke the right by requesting union representation. The employer then may grant the request, present the employee with the option of continuing the interview without representation or foregoing the interview altogether, or deny the request and terminate the interview. See *Montgomery Ward & Co*, 273 NLRB 1226, 1227 (1984). In *Univ of Michigan*, 1977 MERC Lab Op 496, the Commission adopted the so-called “Weingarten” rule. A public employer, therefore, violates §10(1)(a) of PERA if it refuses an employee’s request for a union representative at an investigatory interview or disciplines the employee for requesting union representation. *City of Detroit*, 29 MPER 32 (2009). As noted above, however, the “Weingarten” rule does not require an employer to conduct a meeting before imposing discipline; it only gives the employee the right to union representation, upon request, if the employer decides to question the employee and the employee reasonably believes this questioning may lead to discipline.

In this case, Zenoni alleges that Respondent violated PERA when his principal failed to meet with him and his union representative before issuing him a negative evaluation. I conclude that this allegation also fails to state a claim on which relief can be granted under PERA. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 1, 2015