STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the matter of:

ROCHESTER SCHOOL DISTRICT,
Respondent-Public Employer,

Case No. C98 K-224

-and-

ROCHESTER EDUCATION ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Pollard & Albertson, P.C., by William G. Albertson, Esq., for Respondent

Amberg, McNenly, Firestone & Lee, P.C., by Joseph H. Firestone, Esq., for Charging Party

DECISION AND ORDER

On February 8, 1999, Administrative Law Judge (hereinafter "ALJ") Julia C. Stern issued her Decision and Recommended Order in the above case, finding that Respondent Rochester School District did not threaten to discipline Timothy Brooks, a member of a bargaining unit represented by Charging Party Rochester Education Association (hereinafter "REA"), in violation of Section 10(1)(a) of the Public Employment Relations Act (hereinafter "PERA"), 1965 PA 379, as amended, MCL 423.210(a); MSA 17.455(10)(a). The ALJ also found that Respondent did not violate Sections 10(1)(a) and (c) of PERA by ordering Brooks to undergo a psychiatric examination. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA, MCL 423.216; MSA 17.455(16).

On August 25, 1999, the REA filed timely exceptions to the Decision and Recommended Order of the ALJ. Pursuant to Rule 67, R423.467, of the General Rules of the Employment Relations Commission, the Employer had the right to file a brief in support of the ALJ's decision. The response was due on August 18, 1999. Pursuant to a request by counsel for the Employer, the time for filing the response was extended to September 13, 1999. Although the Employer faxed a copy of its response to our Detroit office on that date, we do not accept the filing of exceptions or responses thereto by facsimile. Accordingly, the response will not be considered in this matter.

Background:

Timothy Brooks is a teacher at Adams High School in the Rochester School District and a member of a bargaining unit represented by the REA. Brooks was an active union member, holding various positions during his twenty years of employment with the school district. In 1998, Brooks ran for president of the bargaining unit. Just before the election, Brooks drafted a campaign flyer critical of various unnamed building administrators and disseminated it to his fellow teachers. Shortly thereafter, REA executive director Tom Fette dropped by Respondent's administrative offices to check his mailbox. Larry Westley, the district's executive director for human resources, showed Fette the campaign flyer and told him that some administrators had complained about it. As set forth more fully in the Decision and Recommended Order, Westley and Fette disagree about what was said next. It is undisputed, however, that Westley expressed a desire to suspend Brooks for three days and that Fette responded by telling Westley that he could not lawfully discipline Brooks because of the flyer. By the time Fette and Wesley ended their conversation, Fette did not believe that Westley intended to take any action against Brooks. Not long after that meeting, Wesley had a brief discussion with REA president Cathy Perini concerning the campaign flyer. Westley stated that "he had half a mind" to bring Brooks in and reprimand him. Perini reminded Westley that he could not lawfully take action against Brooks and the matter was dropped.

In the spring of 1998, Adams High School was vandalized. A portable classroom used by Brooks suffered considerable smoke damage and was rendered unusable. After complaining about the administration's failure to find him an acceptable classroom, Brooks filed a grievance regarding the matter on June 5, 1998. Approximately one month later, Brooks filed a grievance alleging that Respondent had failed to provide him with his schedule of classes for the upcoming school year. On August 4, 1998, Brooks had a conversation with the superintendent about the most recent grievance, the condition of the portable, and various other issues relating to the school building. Shortly thereafter, Westley met with four administrators assigned to the building who expressed concerns regarding Brooks' mental stability, including the possibility that Brooks might be violent. As a result of this meeting, it was decided that Brooks should be required to undergo a psychiatric examination. Westley informed Fette of the decision within a few days of the meeting. Although the Union initially suggested mediation, Fette and Brooks ultimately agreed to participate in the examination.

The unfair labor practice charge which is the subject matter of this dispute was filed by the REA on November 9, 1998, and amended on November 25, 1998. The charge, as amended, alleges that Respondent violated Section 10(1)(a) of PERA by threatening to discipline Brooks for the campaign flyer. The Union also contends that Respondent ordered Brooks to undergo the psychiatric examination in retaliation for the flyer and other protected activities. The ALJ concluded that Westley's statements to Fette and Perini did not violate PERA or, alternatively, that any violation which may have occurred did not warrant the issuance of a remedial order. With respect to the psychiatric examination, the ALJ found that the REA failed to establish that the Employer's decision was motivated by Brooks' protected activities.

Discussion and Conclusions of Law:

Several of Charging Party's arguments on exception pertain directly or indirectly to various

credibility findings of the ALJ. For example, the Union argues that the ALJ erred in relying on Westley's testimony concerning who made the decision to order Brooks to undergo a psychiatric examination. In *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124 (1974), our Supreme Court held that the factual findings of an experienced trial examiner who has observed witnesses and lived with the case should be given due weight and should not be overturned if they are supported by competent, material and substantial evidence. Substantial evidence means such evidence as a reasonable mind will accept as adequate to justify a conclusion. *Id.* at 122. See also *County of Ionia*, 1999 MERC Lab Op ____ (issued 12/28/99); *Michigan State University*, 1993 MERC Lab Op 52. Although Westley could not recall exactly what he may have told Fette, he consistently testified that he decided to require Brooks to take the psychiatric examination and that he made the decision at the urging of four high school administrators who had expressed concern regarding the teacher's well-being. We see no reason to set aside the ALJ's credibility findings as to this or any other issue in this case.

We also agree with the ALJ's conclusion that Westley's comments to Fette and Perini did not constitute a violation of PERA for which a remedial order is necessary. The record indicates that by the end of his meeting with Fette, Westley had changed his mind about taking disciplinary action against Brooks. Although Westley later told Perini that he had "half a mind" to bring Brooks in and reprimand him for the flyer, we agree with the ALJ that this statement was nothing more than a way of expressing his disapproval with the flyer and, perhaps, his frustration over not being able to take action against Brooks. Brooks was never disciplined for the flyer, and there is nothing in the record to indicate that Westley or any other member of the administration ever communicated with Brooks concerning the possibility of discipline. There is no evidence of anti-union animus by the Employer or other disharmony in their relationship with the REA. Under such circumstances, we find that the statements were of an isolated or de minimis nature and cannot reasonably be said to have the effect of restraining or coercing Brooks or any other employee of the district in the exercise of their protected rights. See e.g. See e.g. *Birmingham Bd of Ed*, 1983 MERC Lab Op 615; *Detroit Racing Assn*, 1976 MERC Lab Op 289; *City of Detroit*, 1976 MERC Lab Op 506; *Timet, Div of Titanium Metals Corp*, 274 NLRB 706; 119 LRRM 1021 (1985); *Gray Drugs, Inc*, 272 NLRB 1389; 117 LRRM 1481 (1984).

Next, the Union contends that the ALJ erred in failing to find that Respondent ordered Brooks to undergo the psychiatric examination in retaliation for the flyer and other protected activities. Where it is alleged that discipline or discharge is motivated by anti-union animus, the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor. *MESPA v Evart Public Schools*, 125 Mich App 71, 74 (1982). The elements of a prima facie case of discrimination under Sections 10(1)(a) or (c) of PERA include: (1) employee, union or other protected activity; (2) employer knowledge of that activity; (3) 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 actions. In determining whether an employer has engaged in unlawful activity, the totality of the circumstances surrounding the action will be examined. *Residential Systems*, 1991 MERC Lab Op 394, 406. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the party making

the claim must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich at 126; *County of Saginaw*, 1990 MERC Lab Op 775, 780 (no exceptions).

In the instant case, there is no dispute that Brooks engaged in protected activity of which the Employer was aware. In addition, the evidence establishes that Respondent's decision to order Brooks to undergo a psychiatric examination was made approximately three months after the election and around the same time that Brooks was voicing complaints about working conditions at the school. However, these factors alone are insufficient to establish a prima facie case of discrimination. See e.g. *North Central Community Mental Health Services*, 1998 MERC Lab Op 427, 436-437. There must be a showing of illegal motivation or causal nexus between the protected activity and the disciplinary action. *Id*.; *County of Monroe*, 1995 MERC Lab Op 63*; Plainwell Schools*, 1989 MERC Lab Op 464, 466; *City of Detroit Community Economic Development Dep't*, 1981 MERC Lab Op 585, 588. As noted, the ALJ credited Westley's testimony that he ordered Brooks to undergo the psychiatric examination at the urging of the four high school administrators. Although Fette testified that he doubted the sincerity of these administrators, there is no evidence in the record to suggest that they harbored any anti-union animus, or even that they were the same individuals who had earlier complained to Westley about the campaign flyer. Moreover, when the ALJ asked Fette if he believed that Westley himself was genuinely concerned about Brooks, he replied, "Oh absolutely." Under such circumstances, we conclude that Charging Party failed to establish, either directly or indirectly, that the decision to require Brooks to undergo a psychiatric examination was motivated by anti-union animus or hostility toward protected activity.

All other arguments raised by the Union have been carefully considered and do not warrant a change in the result.

ORDER

Pursuant to Section 16 of PERA, we hereby adopt the recommended order of the ALJ as our order in this case.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Maris Stella Swift, Commission Chair

_____

Harry W. Bishop, Commission Member

_____

C. Barry Ott, Commission Member

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ROCHESTER SCHOOL DISTRICT,
Respondent-Public Employer

Case No.C98 K-224

-and-

ROCHESTER EDUCATION ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Pollard & Albertson, P.C., by William G. Albertson, Esq., for the Respondent

Amberg, McNenly, Firestone & Lee, P.C, by Joseph H. Firestone, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This case was heard at Detroit, Michigan on February 8, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. The hearing was conducted pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 23.216, MSA 17.455(10) and 17.455(16). Based upon the entire record, including post-hearing briefs filed by the parties on April 20, 1999, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed on November 9, 1998 by the Rochester Education Association, and amended on November 25, 1998. The charge, as amended, alleges that the Rochester School District violated Section 10(1)(a) of PERA by threatening to discipline Timothy Brooks, a member of Charging Party's bargaining unit, for distributing a flyer critical of the school administration in connection with Brooks' campaign to be elected Charging Party's president. The charge also alleges that Respondent violated Sections 10(1)(a) & (c) when, in August 1998, it ordered Brooks to undergo a psychiatric examination. Charging Party alleges that this action constituted retaliation against Brooks because of the flyer and other activities protected by the Act.

Facts - The Alleged Threat:

Charging Party represents a bargaining unit of teachers employed by the Rochester School District. Brooks is a high school teacher in the Rochester District, and a member of Charging Party's bargaining unit. During his approximately 20 year employment with Respondent, Brooks held many different positions with Charging Party. In the spring of 1998, Brooks was Charging Party's vice-president and was a candidate for its presidency.

During the spring of 1998 Brooks ran against the incumbent for the office of Charging Party's president. Shortly before the election in early May, Brooks prepared a campaign flyer and distributed it by placing a copy in each teacher's school mailbox. In the flyer Brooks accused unnamed building administrators of incompetence in the discharge of a teacher, suggested that the superintendent had committed slander to cover up another administrator's blunder, and stated that another unnamed administrator had lied throughout the processing of a grievance. [1] The flyer asserted that the incumbent president should have taken more assertive action in response to these events.

Brooks did not succeed in defeating the incumbent president. After the election, on the afternoon of May 12 or 13, Tom Fette, executive director of the Avondale/Rochester Education Association, stopped by Respondent's administrative offices to check his mailbox there. Larry Westley, Respondent's executive director for human resources, saw him and asked to talk. Westley showed Fette a copy of Brooks' flyer, pointed out some of the accusations, and said that he had received complaints from some administrators.[2] Westley and Fette gave different versions of the rest of their conversation. According to Westley, he asked Fette if the flyer represented the position of the Rochester Education Association. According to Westley, Fette replied that he didn't write it, and that Westley should go see Brooks. Westley testified that he then said, flippantly, "Well, I'll go see him and I'll suspend him for three days." Fette immediately told Westley that he couldn't lawfully suspend Brooks because of the flyer. According to Westley, he was already aware of this, and therefore simply replied, "I know." Westley did not recall any further conversation. According to Fette's testimony, after Westley showed him the flyer Westley said that he was considering suspending Brooks for three days. According to Fette, he told Westley that he couldn't suspend Brooks, and the two men talked about the matter for some time. Fette testified that he persuaded Westley to "back away" from suspending Brooks. However, according to Fette, Westley said that he still wanted to call Brooks in and lecture him. Fette testified that he told Westley to go ahead, but that if he did Fette would "have him." According to Fette, he then said to Westley that Westley had better talk to his attorney before he did anything of that nature. By the end of the meeting Fette was convinced that he had persuaded Westley not to take any action against Brooks.

---

[1] These administrators are not identified anywhere in the record.

[2] Westley testified that three principals, the director of curriculum, and the superintendent had complained to him about the flyer. This group did not include any administrator assigned to Brooks' school.

About a week later, Fette told Brooks that Westley "had one of his tantrums," and had stated his intention to suspend Brooks for three days because of the flyer. Fette alsotold Brooks that Fette had pointed out that this was protected activity, that Westley responded that he was at least going to call Brooks in and reprimand him, and that Fette had pointed out that he could not do that either. Fette also told Brooks that Fette had convinced Westley that he could not legally do anything. At about this same time, Westley remarked to Cathy Perini, Charging Party's president, that "he had half a mind" to bring Brooks in and reprimand him for the flyer. Perini replied, "Yes, and Tom (Fette) has already told you that you had better not go there." Westley replied, "I know," and that was the end of their conversation. Perini reported Westley's statement to Brooks, remarking that Westley sounded like he "had softened" on the issue. Brooks was never disciplined or rebuked for the flyer, and the record does not indicate that either Westley or any other administrator ever spoke directly to Brooks about the flyer.

Facts - Alleged Retaliation:

A series of events commencing in early 1998 preceded Respondent's decision to order Brooks to undergo a psychiatric exam. Sometime prior to May 1998, Fette approached Westley and stated that Brooks believed that the administrators in his building were being impolite to him and refusing to talk to him. Near the end of the school year, Westley approached two assistant principals at Brooks' school about this, and learned that they believed that Brooks was behaving in an uncivil manner toward them. Westley intended to set up a meeting with all four administrators at the school, but was not able to do so immediately.

During the 1998 Memorial Day weekend a number of acts of vandalism were committed in the high school. Brooks' classroom, a portable unit, suffered considerable smoke damage and was unusable. Brooks was directed to hold his classes in the north mall of the high school's main building, an open area. Brooks was promised a new classroom within two days. Nine days later Brooks was still in the mall area, and he complained to an assistant principal. In response, the assistant principal offered Brooks the choice of two classrooms. One turned out to be in use and the other, the band room, lacked desks or tables and therefore was unsuitable for Brooks' art classes. By this time Brooks' portable classroom had been cleaned, although not repaired, and Brooks decided to return there for the remaining ten days of the school year.

After Brooks returned to his damaged classroom, he filed a grievance over the administration's failure to find him a suitable classroom, and over the condition of his portable after he returned to it. In response to the grievance, the assistant principal assured Charging Party that Brooks' classroom would be repaired by the fall. In addition, Westley assured Brooks and Fette that he would personally oversee the repair of the portable over the summer. Because Brooks' daughter was enrolled in summer school for part of the summer, and Brooks was going to be at the high school on a regular basis, Westley suggested Brooks personally check on the progress of the repairs. Brooks did so regularly. Six weeks after the school year had ended Brooks left a message for Westley that work on the portable had not yet began.

On July 9, Brooks filed a grievance alleging that Respondent had failed to provide him with his schedule of classes for the upcoming school year by June 1, as was the normal practice. The grievance procedure in the parties' collective bargaining agreement provides that a written step one grievance must be answered within five days. While Brooks was at the school checking on his portable, he also regularly checked his mailbox for the answer. When Brooks checked his mailbox on July 27 or 28, he still had not received an answer to his grievance

On August 4, Brooks came to the high school to check on the portable and to check his mailbox. While there, Brooks saw the assistant principal and confronted him with the fact that his portable had not yet been repaired. The assistant principal offered to give Brooks a brand new portable classroom that had just been delivered. Brooks told the assistant principal that he did not want to have to move his materials, and that somebody else would be stuck with the damaged portable if he moved. When Brooks checked his mailbox, he found an answer to his July 8 grievance. The answer was signed by his principal and dated July 23. Brooks believed the date on the answer to be false because the answer had not been in his mailbox on July 28. In addition, Brooks felt the answer contained inaccurate statements. Brooks immediately looked for the principal, but she was not in the building.

When Brooks was unable to find his principal, he decided to go to Respondent's central administration building and talk to Westley. Westley was not there, but Brooks saw the superintendent in his office and asked to speak to him. The superintendent gave Brooks coffee, and the two men had what Brooks testified was a cordial conversation. Brooks went over the grievance answer he had received, explaining what he believed were the inaccuracies. Brooks also talked about the fact that repairs had not begun on his portable. According to Brooks, they also discussed "other issues at the (high school) building . . . such as (the superintendent's) acknowledged concerns about administrative leadership in that building, concerns about staff morale in that building." The superintendent asked Brooks' impression of the performance of a particular new administrator. Brooks told the superintendent that "there were a number of serious issues" at the high school, and that Brooks would like to see the superintendent take more decisive action. Their conversation discussion lasted for about 30 minutes.

Within a few days after this discussion, the superintendent went to Westley, told him that Brooks had been in to see him, and inquired about the status of the portable repair. The superintendent commented that he did not understand why Brooks had come to him. The superintendent did not give Westley a full account of the subjects he and Brooks had discussed. On August 12, Westley called a meeting at the high school of the four administrators assigned to Brooks' building. The purpose of the meeting was to discuss both the status of the repairs to Brooks' portable and the apparent problems between Brooks and these administrators. During the meeting the administrators told Westley that they did not ignore Brooks, and that they were tired of Brooks' accusations to the contrary. They also relayed to Westley some complaints made by teachers regarding Westley's interactions with them. Brooks' campaign flyer was not brought up in the discussion. From the meeting, Westley learned that the four administrators and at least some of the teaching staff at Brooks' school had doubts about Brooks' mental stability. The possibility that

Brooks might be violent was discussed. Westley and the building administrators reached a consensus that Brooks should be required to undergo a psychiatric examination, as permitted by the contract.[3] Westley told the administrators that Brooks would be suspended pending receipt of the results of the exam. The meeting moved on to a discussion of Brooks' portable. While this subject was being discussed, the superintendent came in. He was advised of the decision to send Brooks for a psychiatric exam. The superintendent mentioned that Brooks had been to see him about the portable, and that he seemed a bit tense during their discussion. The superintendent, however, did not say anything else indicating either approval or disapproval of the decision. The participants returned to discussing Brooks' portable. During the course of the meeting the superintendent telephoned Respondent's maintenance department and was told that the problem was with the subcontractors used by the District's insurance company. The superintendent directed the maintenance department to make sure that the repairs were completed as soon as possible, whether or not the subcontractors could complete the job. The superintendent also made it clear to the administrators that he wanted Brooks' portable repaired in time for school.

Within a few days after this meeting, Westley informed Fette that he was directing Brooks to undergo a psychiatric examination. Fette suggested mediation because, according to him, he "believed there was a problem at the high school but did not believe it was psychiatric in nature." Westley, however, rejected this suggestion. Fette and Westley reached agreement on a psychiatrist to conduct the exam. Shortly thereafter, Brooks met with Westley and Fette and agreed to participate in the exam. Westley, Fette and Brooks agreed that if Brooks cooperated in the exam he would not be suspended pending receipt of the psychiatrist's report. They also agreed that one copy of the report would be sent to the District and one would be sent to Brooks. Brooks called the psychiatrist and made an appointment. After Westley received a copy of the psychiatrist's invoice, he attempted to obtain a copy of the report from the psychiatrist, but his phone calls were not returned. Westley then called Fette, who told him that the report was "clean." According to Westley, he trusted Fette and therefore did not make any further attempt to obtain a copy of the report.

Discussion and Conclusions of Law:

The Alleged Threat(s)

The charge alleges that Respondent violated Section 10(1)(a) by threatening to discipline

---

[3] Article 17.04 stated:

> The Board may require any employee to submit to a physical, psychological or psychiatric examination. If the choice of the examiner is not agreeable to both the Board and the teacher involved, the board and the teacher will mutually agree to a qualified examiner from a list of three(3) provided by the Board. The cost of (these) examinations will be paid by the Board.

Brooks for statements made in a flyer distributed by him in connection with his campaign for the office of Charging Party's president. Although the Commission does not appear to have addressed the issue of internal union election campaign materials, statements made by employees at union meetings are protected by PERA. *Teamsters Local 214 v 60th District Court*, 102 Mich App 216 (1980), *aff'd*, 417 Mich 291 (1983). Moreover, the National Labor Relations Board, (NLRB) has held that Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C.§ 150, et al, the counterpart to Section 9 of PERA, protects the right of employees to engage in a partisan union election campaign, and that an employer cannot lawfully prohibit the distribution of internal union election campaign materials simply because it finds their content distasteful. *Arkansas-Best Freight System, Inc.*, 257 NLRB 420 (1981), 107 LRRM 1496. In addition, the Commission has held that employees cannot be punished for making false or incorrect statements while engaged in protected activity, unless the statements are made deliberately or with malice. *Reese Public School District*, 1967 MERC Lab Op 489, 495. There has been no showing that Brooks knew the accusations contained in his flyer to be false. I conclude that Brooks' distribution of the union campaign flyer in May 1998 was activity protected by Section 9 of PERA, even if the accusations contained therein were untrue.

Respondent argues that Westley's statement that he would go see Brooks and suspend him for three days was made in jest, and without any intention to take such action. Respondent describes this statement as "facetious" and characterizes what passed between Fette and Westley as "banter."

I do not agree with Respondent that Westley was joking when he said he would suspend Brooks. Westley testified that he showed Fette the flyer, told him some administrators had complained about it, and then asked him if the flyer represented Charging Party's position. This was not "banter." To the contrary, I find that when Westley approached Fette about the flyer, Westley was genuinely angry. I find that when Westley suggested that he would suspend Brooks he was sincere. However, I credit Westley's testimony that his remark about suspending Brooks was made in response to Fette's suggestion that he ask Brooks if the flyer was authorized. This provides an explanation for why Westley approached Fette, rather than Brooks himself, in the first place. Accordingly, I find that Westley's remark was a spontaneous reaction to Fette's refusal to discuss the content of the flyer. That is, the context of the conversation suggests that Westley had not already decided to discipline Brooks when he initiated the conversation with Fette. I credit Fette's testimony that he and Westley discussed whether Westley could legally suspend Brooks because of the flyer, and his testimony that Westley said at one point that he still wanted to call Brooks in and lecture, because I find it unlikely that Westley would threaten to suspend Brooks and then simply say "I know," when Fette told him this would be illegal. However, I find that by the time Fette and Westley concluded their conversation, Fette had convinced Westley not to take any action against Brooks because of the flyer. I note that Fette himself testified that he believed this was the case.

After Westley's meeting with Fette, he had a brief exchange on the subject with Charging Party President Perini. Westley told Perini that he had "half a mind" to call Brooks in and reprimand him for the flyer. However, when Perini reminded him that he could not legally reprimand Brooks for the flyer, Westley immediately agreed. In the context of what followed, I find that Westley's reference

to reprimanding Brooks was nothing more than a way of indicating to Perini his disapproval of the accusations in the flyer. Rather than a second communication of the alleged threat, I find that Westley's remarks to Perini support my conclusion that by the end of his conversation with Fette, Westley had abandoned the idea of taking action against Brooks. That Westley never in fact suspended, reprimanded, or even spoke directly to Brooks about the flyer also supports this conclusion.

A violation of Section 10(1)(a) does not depend upon the employer's motive, or on whether the employee was actually coerced. The question is whether the employer engaged in conduct which, it may reasonably be said, tended to interfere with the free exercise of employee rights under Section 9. That is, the standard is an objective one. A threat to discipline an employee for engaging in protected concerted activity generally constitutes a violation of Section 10(1)(a). However, the Commission has held that even an explicit threat, when viewed in the overall context in which it occurred, may not violate Section 10(1)(a). In *Birmingham Bd of Ed*, 1983 MERC Lab Op 615, a supervisor explicitly threatened to sue an employee over some personal allegations contained in a grievance. Because the supervisor apologized to another employee who was present, and later granted the grievance, the Commission found no violation. In *City of Detroit*, 1976 MERC Lab Op 506, a union president told his superior in a collective bargaining session that even though she was a department head and the auditor general, she still had to obey the law and the collective bargaining agreement. Looking directly at the union president, the department head replied that she "had the power and the authority to transfer anybody out of the department she wished to." Characterizing this as a "hollow" threat, an administrative law judge refused to find a violation of Section 10(1)(a). The NLRB has held that while an isolated threat to retaliate against an employee because of his activities as a committeeman may constitute a violation of the NLRA, a remedy is not warranted when there has been no other evidence of unfair labor practices, the employee filed many other grievances without reprisal, and the parties have had a generally harmonious collective bargaining relationship. *Timet, Div of Titanium Metals Corp*, 274 NLRB 706, 119 LRRM 1021 (1985).

As noted above, Westley's statement that he would suspend Brooks was a spontaneous response to a remark by Fette. Moreover, the record indicates that by the end of his meeting with Fette, Westley had changed his mind about taking action against Brooks, and Fette knew this. In addition, Brooks heard about the threat only from Fette; Westley did not personally speak to him.[4] Since there is no indication that Westley knew that Fette had told Brooks about their conversation, there was no reason for Westley to assure Brooks that he did not intend to take any action. The evidence does not indicate that Respondent was guilty of other unfair labor practices. I conclude that Westley's statement was an isolated incident which did not violate Section 10(1)(a) of the Act, or, alternatively, that if Respondent committed a technical violation of the Act, it would not effectuate the purposes of the statute to order a remedy in this case.

The Alleged Retaliation

[4] As noted above, I find that Westley's remark to Perini was not a threat.

Charging Party alleges that Respondent unlawfully retaliated against Brooks for his concerted protected activities by directing him to undergo a psychiatric exam in August 1998. One of these activities was Brooks' May 1998 union campaign flyer. In addition, Charging Party alleges that Brooks' complaints about the lack of progress on the repair of his classroom, his complaint that his grievance was not being processed in a timely manner, his "expressed concern over administrative leadership and employee morale, and his taking his complaints to the superintendent were activities protected by the Act which contributed to Respondent's decision to order the psychiatric exam.

Four elements make up a *prima facie* case of unlawful discrimination under Section 10(1)(a) or (c) of PERA. These are (1) union activity or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility to the employee's exercise of his protected rights; (4) suspicious timing or other evidence supporting a finding that the protected concerted activity was a motivating factor in the alleged discriminatory action. *University of Michigan,* 1990 MERC Lab Op 272, 288. Once a *prima facie* case is established, the burden shifts to the Respondent to produce credible evidence that it would have taken the same action even in the absence of the protected conduct. *MESPA v Evart Public Schools,* 125 Mich App 65 (1983).

The record established that Brooks engaged in protected concerted activities, including distributing the union campaign flyer and filing grievances. There is no dispute that the Respondent was aware of these activities. However, there is no evidence of hostility by any Respondent agent toward Brooks' grievances. Nor was there any evidence that Westley, or any other supervisor, was disturbed by Brooks' complaining to the assistant principal, to Westley, or to the superintendent about matters relating to the subjects of his grievances. I find that Charging Party did not make a *prima facie* showing that the order that Brooks undergo a psychiatric exam was motivated by Brooks' filing of grievances or by his complaints made during the summer of 1998.

Charging Party's argument that the directive was motivated by hostility toward Brooks because of his comments in the campaign flyer is undermined by the testimony of its own agent. The record establishes that the decision to send Brooks for a psychiatric exam was made by Westley at the urging of the four high school administrators. [5] Westley's remarks to Fette in May 1998 might be taken as evidence of hostility toward Brooks' protected activity. However, Fette stated that he "did not believe that the (high school) administration in any way, shape, or form was telling the truth," but admitted that he believed Westley to be sincerely concerned about Brooks' well-being at the time he ordered Brooks to undergo the psychiatric examination. That is, Fette believed Westley to be acting in good faith, and not out of hostility toward Brooks because of his protected activity, when he directed Brooks to undergo the exam. As for the four building administrators who were also involved in the decision, there is nothing in the record to indicate that they were angry at Brooks because of the flyer.

[5] Fette testified that Westley told him that the decision was also based in part on superintendent's reaction to Brooks' demeanor during their discussion on August 4. The facts, however, indicate that the superintendent did not make the decision, but merely failed to veto it.

It is clear from this record that the administrators at Brooks' high school did not like him. In fact, these feelings were mutual. [6] However, in order to establish a violation of the Act a nexus must be shown between the employer's dislike and the employee's protected concerted activity. I find that Charging Party has not demonstrated that Brooks' campaign flyer was a motivating factor in Respondent's decision to order him to undergo a psychiatric examination in August 1998.

In sum, I conclude that Charging Party did not establish a *prima facie* case of unlawful discrimination against Brooks in the order that he undergo a psychiatric examination. I also find that Westley's May 1998 statements with regard to disciplining Brooks because of activity protected by the Act did not, for reasons discussed above, violate Section 10(1)(a) of PERA or, alternatively, that the violation does not warrant a remedial order. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

[6] Charging Party said on the record, "I believe on my worst day, I'm a better teacher than a couple of the (high school) administrators are administrators on their best day."