STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondent-Public Employer,

Case No. C99 C-43

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25,
Respondent-Labor Organization.
_____/

APPEARANCES:

Butzel Long, by Carey A. DeWitt and James J. Boutrous II, Esqs., for the Public Employer

Miller Cohen, P.L.C., by Bruce A. Miller and Eric Franke, Esqs., for the Labor Organization

DECISION AND ORDER

On May 31, 2000, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

_____
Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated: _____

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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, MSA 17.455(10) *et seq*., this case was heard in Detroit, Michigan on August 24, 1999, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. The proceedings were based upon an unfair labor practice charge filed by the American Federation of State, County and Municipal Employees, Council 25 (AFSCME or Union), against the Regents of the University of Michigan (Employer) on March 4, 1999. Based upon the record, and briefs filed by November 12, 1999, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of PERA:

The Charge:

In its March 4, 1999 charge, AFSCME Council 25 claims that the Employer violated Section 10(1)(a) and (c) by engaging in the following conduct:

> On or about October 1, 1998, during a meeting between the Union and the Employer, Mark Schefer (sic), an Athletic Facility Worker II, referred to an employer position as "a scam job" and Dennis Kind, an Athletic Facility Worker II, referred to is (sic) as "a con job." The employer terminated the meeting and disciplined the employees on October 8, 1998. By this and other conduct, the employer is interfering with rights protected by Section 9.

The Employer filed an answer and affirmative defenses on June 10, 1999. It denied the allegations set forth in the charge and asserted, among other things that the charge failed to allege a violation of PERA and only alleged violations of the collective bargaining agreement.

Findings of Fact:

The Union is the collective bargaining representative for all service maintenance employees. In 1987, a number of positions were reclassified. The groundskeeper II and maintenance mechanic I classifications were combined to create a new classification, athletic facility worker II (AFW), pay grade 07. The reclassification did not impact the wages of former groundskeeper II, Dennis Kind and Mark Schafer, nor of former maintenance mechanic I, Peter Brown.

In 1997 and 1998, the Union filed a series of grievances and the parties held two special conferences to address claims that the AFWs were working out-of-class and should be reclassified to pay grade 09. In July 1997, two grievances (97-356 and 97-407) were resolved by awarding Schafer and Kind $2,612 and $1,472, respectively for working out-of-class. Four grievances (97-382, 97-680, 98-486, and 98-533) were denied. In grievance 97-382, Schafer contended that the Employer violated the collective bargaining agreement by failing to timely respond to his request for a steward and for giving him an oral warning for requesting a steward. In denying the grievance, the Employer concluded that Schafer received the oral warning because he was "aggressive and got up in his [supervisor's] face" and demanded a steward immediately.

In October 1997, a special conference was convened in an attempt to determine exactly what work the AFWs were doing which constituted out-of-class work. Wendy Powell, the personnel representative who conducted the conference, testified that when she asked for a description of their responsibilities in summary format, Kind became irate, told her he had already given them to her, and tossed a group of papers across the table at her while shaking his finger and saying that she had ruined his life by creating the classification problem. Powell testified that Schafer became agitated and began saying, "this is bullshit." According to Powell, she discontinued the meeting, went to her office, shut the door, and burst into tears. Schafer testified that he did not see Kind throw anything at Powell, he did not throw any papers at Powell, but rather he placed the papers on the table in front of her. Kind denied that he verbally abused Powell. For several months after this incident, Powell's supervisor removed her from hearing grievances filed by the AFWs.

During the winter or early spring of 1998, the AFWs rejected the Employer's offer to resolve the reclassification issue by upgrading them from pay grade 07 to 08. A second special conference was held on October 1, 1998. The meeting was conducted by compensation administrator Gary Maki. He testified that during the course of the meeting, Schafer and Kind were shaking their heads, looking back and forth, and whispering to each other. According to Maki, Schafer looked at him and said, "this is bullshit," and Kind later said, "this is a con." When Maki asked Kind what he had said, Kind told him "this is a con, and you're a con," and Schafer again exclaimed, "bullshit." Maki then terminated the meeting and walked out. According to Maki, although he was not threatened, his credibility and sincerity in trying to resolve the issue was questioned.

The employees' version of the October 1 meeting differs slightly. According to Brown, after Maki produced a list of what purported to be the AFW's job duties, Kind whispered to Schafer and Brown that this was "a con job," at which time Maki stood up and demanded to know what Kind had said. After Kind repeated the statement, Maki asked if Kind were calling him a con man to which Kind responded, "whatever you want to take it as." Schafer testified that he told Kind he thought the meeting was "a scam job."

A few days later, on October 8, 1998, Kind and Schafer received letters of discipline from Mike Stevenson, the senior associate athletic director. Each letter reads in pertinent part as follows:

> When Gary Maki discussed the purpose of the special conference and requested information about your work responsibilities, you immediately displayed disruptive and uncooperative behavior to the point that the conference could not be held. You used profanity and indicated the special meeting was a sham. You have displayed this behavior on previous occasions when meetings have been terminated.
>
> This behavior is considered misconduct and will not be tolerated. Your failure to correct this problem will result in further disciplinary action, up to and including discharge.

Conclusions of Law:

Section 9 of PERA grants public employees the right to organize and engage in "lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection."

Section 10(1)(a) makes it illegal for employers to interfere with, restrain, or coerce employees in the exercise of their Section 9 rights. Section 10(1)(c) prohibits employers from discriminating in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization.

The Commission has repeated found conduct which is merely rude or insulting is protected when made in the course of otherwise protected activity. *Sanilac County Board of Commission,* 1967 MERC Lab Op 107; *Reese Public Schools*, 1967 MERC Lab Op 489. In *Baldwin Community Schools*, 1986 MERC Lab Op 513, the Commission found that the Employer violated PERA for suspending an employee who, during a meeting to discuss a grievance, shouted, waived a pencil and angrily accused his principal of being a homosexual and making homosexual advances. The employee's conduct, although offensive, was found not so egregious as to remove it from the protection of the Act. Whether particular conduct is protected depends upon whether it takes place "on the shop floor" in the presence of other employees or the public, or in a grievance meeting or collective bargaining session. Spontaneous remarks may be protected, whereas a history of similar intimidation or insubordination by the employee militates against finding the conduct protected. *Baldwin,* supra.

See also, *Unionville-Sebewaing Schools*, 1981 MERC Lab Op 932, 934, *aff'd* in an unpublished Court opinion, No. 61688 (4/3/84), where a custodian was discharged for his "outburst of insubordination" at a meeting called to discuss working conditions. During the meeting the employee referred to the superintendent as a "liar" and made some reference to hitting or punching the superintendent. The Commission found that the employee's conduct was not sufficient to remove the employee from PERA's protection since he had not demonstrated a propensity for violent or uncontrolled behavior.

Respondent claims that this case is analogous to *City of Detroit, Fire Department*, 1986 MERC Lab Op 14 (no exceptions), where the ALJ found that the Employer did not violate PERA when an employee was issued a written reprimand because of "abusive and profane language" while addressing his union president and other superiors regarding overtime assignments. I disagree. There was no finding by the ALJ that the employee was engaged in protected activity. Rather, in concluding that the employee was disciplined because his actions were beyond what his superiors considered acceptable behavior, he noted that the employee was "not at Headquarters to confer with his Union president."

In this case, Kind and Schafer were engaged in protected activity during the October 1, 1998. The meeting was called by the Employer to discuss continuing issues surrounding their reclassification. I find that Kind's and Schafer's remarks - bullshit, sham, and con artist - were rather mild and their actions were not so flagrant so as to remove them from PERA's protection. Initially, the remarks were whispered as an aside between Kind, Schafer, and Brown. They were only repeated when Maki asked what had been said. Significantly, Maki admitted that he was not threatened by the remarks but viewed them as an attack on his credibility and sincerity. Despite Maki's sensitivity and concern about his reputation and standing in the University community, the written warning issued to Kind and Schafer on October 8, 1998, violated Section 10(1)(a) and (c) of PERA. All other arguments raised by the Employer have been carefully considered and do not warrant a change in the result. Included is the Employer's unsupported claim that Kind and Schafer had a 15-year history of threatening behavior. I recommend that the Commission issue the following order:

Recommended Order

Respondent Regents of the University of Michigan, its officers and agents shall:

1. Cease and desist from disciplining or otherwise discriminating against employees in regards to terms and conditions of employment because of their exercise of rights protected by Section 9 of PERA.

2. Expunge Dennis Kind's and Mark Schafer's record of all references to written warnings issued to them on October 8,1998.

3. Post, for a period of thirty (30) consecutive days, the attached notice in conspicuous places on

Respondent's premises, including places where notices to employees are customarily posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated:_____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, **THE REGENTS OF THE UNIVERSITY OF MICHIGAN** HAS BEEN FOUND TO HAVE VIOLATED THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT. PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discharge or otherwise discriminate against employees because of their activities protected by Section 10 of the Michigan Public Employment Relations Act.

WE WILL expunge Dennis Kind's and Mark Schafer's record of all references to written warnings issued to them on October 8, 1998.

WE WILL insure that all of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

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The Regents of the University of Michigan

_____

By

Dated:_____

(This notice must remained posted for a period of thirty (30) days. Questions concerning this notice shall be directed to the Michigan Employment Relations Commission, 1200 Sixth Street, 14th Floor, Detroit, Michigan 48226, (313) 256-3540.)