STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF RIVERVIEW,
Respondent – Public Employer,

Case No. C00 G-118

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 25,
LOCAL 3667,
Charging Party – Labor Organization.
_____/

APPEARANCES:

Kevin J. Foley, Esq., Allen, James & Foley, P.C. for the Public Employer

Dennis Nauss, AFSCME Staff Specialist, for the Charging Party

DECISION AND ORDER

On October 31, 2001, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. MSA 17.455(10), this matter came on for hearing at Detroit, Michigan, on November 29, 2000, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on July 7, 2000, by AFSCME Council 25, and Local 3667, alleging that the City of Riverview had violated Section 10 of PERA. Based upon the record, including briefs filed by the parties on or before February 14, 2001, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges that the Employer violated PERA by the following action:

On or about 4/10/00 the Employer violated the provisions of the Act 423.210 Section 10 by threatening the Chief Negotiator for the Union. The threat included racially derogatory remarks.

Facts:

AFSCME Local 3667 represents a bargaining unit of part-time regularly scheduled fire fighters employed by the City of Riverview. Jimmy Hearns, an African-American, is the AFSCME staff representative assigned to this unit.

The parties met to begin bargaining in January of 2000 and had negotiated approximately five times prior to April 10 when the incident precipitating the unfair labor practice charge occurred. The Union team consisted of Hearns, lead negotiator Craig Williams, Robert Charette, Tim Lorrain, Michael Coleman, and Michael Aldridge. The City's team consisted of Fire Chief Robert Hale, Personnel Director Randy Altimus, and Finance Director David Sabuda.

The meeting on April 10 was scheduled for 5:00 p.m. Hearns arrived between 5:30 and 6:00 p.m. The initial discussion concerned ground rules. The focus then turned to lockers, authority to search them, and who had access to the lockers. During the discussion the chief was asked who had keys to the lockers and he responded that he and the fire marshall had keys. When pressed by the Union he acknowledged that his son, a fire lieutenant, also had keys. When Union representatives continued to ask why the chief's son had keys, he became upset. There are different accounts of the confrontation which followed.

According to Hearns, the chief accused the Union of personally attacking his family and stated that "the Union will not dictate any policy to us here at this fire station." Hearns testified that when the Union responded that they were not there to dictate policy but to bargain collectively, Hale angrily stated: "You m…..f…..s can kiss my ass." Hearns testified that he then said to Hale that he was not his employee and Hale could not talk to him that way, and Hearns then stated: "What makes you think you ass is any sweeter than mine? You can kiss my ass." According to Hearns the discussion continued with Hale stating: "I'll kick your black ass, boy" and later "I'll fill your black ass up with lead." Hearns testified that he told Hale that this was not appropriate conduct and that if he "wanted a piece of him" they could exit the building and go outside. According to Hearns he was alarmed because he had heard that the chief carried a gun. Hearns denied moving toward the chief during the incident. After the exchange, Sabuda asked for a caucus and the meeting subsequently broke up for the evening.

Hale also testified as to the incident. According to Hale, Hearns was an hour late for the meeting and when Hearns arrived he lectured them at length on how to negotiate. When the discussion turned to lockers, Hale testified that the Union persisted in asking him why his son had a key, and they were "getting under his skin." According to Hale, he told the bargaining team to "kiss my ass; I didn't have to report to them." Hale testified that he and Hearns then engaged in a verbal confrontation. He acknowledged that he called Hearns "boy" but did not intend it as having racial overtones. Hale testified that in the exchange, Hearns swore at him, called him "white old man," MF'r," and that he'd take him out back, beat his ass, and put him back in the hospital. Hale had recently been in the hospital for heart catheterization. Hale testified that after Hearns' remarks, Hale told Hearns that he would "pick lead out of his ass." According to Hale, when Hearns stood up and

approached him, a caucus was called by one of the Employer representatives.

Members of both the Union team and the Employer team testified regarding the incident and written reports made at the time were also submitted as exhibits. The testimony and written accounts vary slightly but all reflect that an angry verbal confrontation between Hearns and Hale took place at the bargaining table.

On April 17, 2000, Hearns wrote to Sabuda advising him that the Union wished to cancel negotiations until Hale was removed from the bargaining team because of the threats against him at the meeting of April 10, 2000, stating as follows:

> Mr. Sabuda, I cannot put my life in harms way, nor will I expose my committee to an individual who is out of control. Therefore, please be advised that we will not be meeting with you until you remove Fire Chief Robert Hale as a City Negotiation Committee member.

Sabuda responded by letter of April 18, 2000. Sabuda stated that the City was disappointed in the actions of both sides in the recent incident and that it was unfortunate that he and the chief could not control their tempers and criticisms towards each other. Sabuda also indicated that the City intended to continue to use Chief Hale in contract negotiations and that the Union could not dictate who would negotiate on behalf of the City. Finally, Sabuda indicated that the City would attend the meeting previously scheduled for May 10, 2000 at 5:30 p.m. at the AFSCME offices on West Lafayette in Detroit.

On the morning of May 10, 2000, Altimus called Hearns to inquire if the meeting was still on and Hearns confirmed that it was. The fire fighters and the management team waited until approximately 7:00 p.m. but Hearns did not arrive. No negotiations took place that evening. The parties have met in mediation sessions several times subsequently, but have not met across the table.

Discussion and Conclusions:

The Commission has long recognized that in the course of collective bargaining and grievance administration, tempers may become heated and harsh words may be exchanged. Such spontaneous outbursts made in this context are protected by PERA. *Baldwin Comm Sch*, 1986 MERC Lab Op 513, 524. The Commission has reviewed many situations where employees have made rude and insulting comments, such as: swearing and calling a supervisor a "con artist" (*Univ of Mich,* 2000 MERC Lab Op 192); accusing a principal of making homosexual advances (B*aldwin, supra)*; calling the superintendent a liar and threatening to punch him (*Unionville-Sebewaing Schools*, 1981 MERC Lab Op 932); and swearing at a supervisor and calling her a "minority' not qualified to do the job (*Detroit Water & Sewerage,* 1988 MERC Lab Op 1039). In each of these instances the Commission found the employee's conduct to have been protected under PERA since made in the course of protected activity.

As stated in *City of Portage,* 1989 MERC Lab Op 318, 328, the principle of protected speech in the context of collective bargaining applies equally to employers. In *Portage,* the ALJ, citing *Baldwin, supra,* found that the fact that a supervisor spoke in a loud voice and lost his temper during the discussion of a grievance did not amount to an unfair labor practice within the meaning of Section 10(1)(a) of PERA. Similarly, in *City of Saginaw (Police Dept)*, 1976 MERC Lab Op 996, the ALJ found that derogatory comments and racial slurs made by an employer's representative to a union representative during a grievance meeting did not involve protected rights under section 9 of PERA. The ALJ concluded that such comments, while not in any way condoned, did not interfere with union representation.

In the instant case, both Hearns and the chief exchanged rude, derogatory, and threatening remarks, in the context of bargaining over a controversial issue. I find this situation to be governed by the above precedent. The comments to Hearns, while offensive, do not merit a finding of a violation of Section 10(1)(a) of PERA by the Employer. As observed by the ALJ in *City of Saginaw, supra,* the Commission cannot be put in a position of policing statements made during the course of collective bargaining negotiations or grievance meetings which may be offensive to the other side; this would inhibit the free exchange of ideas and impede rather than promote collective bargaining.

The Union also claims that the Employer's action had a chilling effect on the bargaining process. However, the record reflects that any delay in bargaining was caused by the Union's refusal to meet at the bargaining table as long as Hale remained part of the Employer's team. It is well established that each side has a right to select whomever they wish to represent them in collective bargaining; a party objecting to the selection of the other side must demonstrate bad faith or ulterior motive to sustain an objection to the composition of its bargaining team. *St Clair County Comm Coll*, 1984 MERC Lab Op 879; *compare City of Detroit,* 1999 MERC Lab Op 252. I find no such exceptional circumstances demonstrated by this record.

Based on the above discussion, it is recommended that the charge be dismissed and that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch
Administrative Law Judge

DATED: _____