STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OAKLAND COUNTY,
Respondent-Public Employer,

Case No. C98 K-230

-and-

OAKLAND COUNTY COMMUNITY
MENTAL HEALTH AUTHORITY,
Respondent-Public Employer,

-and-

DOUGLAS G. NICHOLS
An Individual Charging Party.
_____/

APPEARANCES:

Butzel Long, P.C., by Craig S. Schwartz, Esq., for Respondent Oakland County

Cummings, McClory, Davis & Acho, P.C., by Thomas J. Laginess, Esq. for Respondent Oakland County Community Mental Health Authority

Alan F. Giles, Esq., for the Charging Party

DECISION AND ORDER

On December 27, 2000, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents did not violate Charging Party's rights under Sections 9 and 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.209 and 423.210(1)(a), by suspending him with pay, by barring him from entering the employer's premises, by prohibiting him from using the e-mail system or by prohibiting him from phoning employees during work hours. The ALJ recommended that the charges be dismissed.

On January 16, 2001, Charging Party Douglas G. Nichols filed exceptions and a brief in support. On January 19, 2001, Charging Party's counsel of record filed a brief in support of an exception to one of the ALJ's findings. On February 20, 2001, Respondent filed an answer to Charging Party's exceptions, including an objection to dual filing of exceptions, a motion to

strike Charging Party's January 16 exceptions, and a brief in support of the Decision and Recommended Order of the ALJ.

Charging Party's exceptions address several procedural issues as well as a single substantive issue. Charging Party's sole substantive exception to the ALJ's findings and conclusions focuses on Allegation 9 of the charges: Respondent's refusal to permit Charging Party, the grievance officer for his bargaining unit, to use Respondent's e-mail system to poll his bargaining unit members.

The record in this case indicates that some 14 allegations were initially involved in the charge. The hearing spanned nine days, beginning on March 4, 1999, and ending on February 8, 2000. Much of the hearing was devoted to testimony relating to the reason for the October 8, 1998 suspension and discharge of Charging Party. It was Charging Party's contention that his suspension and discharge were for engaging in protected union activities and were unrelated to allegations that he physically assaulted and threatened the life of an Oakland County Assistant Corporate Counsel. On January 26, 2000, which was the eighth day of hearing, Charging Party withdrew, with prejudice, the charges alleging unlawful suspension and discharge, and those relating to alleged unlawful threats and harassment by his immediate supervisor.

The facts in this case were set forth fully in the ALJ's Decision and Recommended Order and need not be repeated in detail here. Charging Party Douglas Nichols worked for the Oakland County Community Mental Health Authority (CMH) as a contract coordinator and served as the grievance chairperson for his bargaining unit. In September 1998, the president of the supervisor's association asked Nichols to write a letter in support of an individual in the supervisory unit who had been disciplined for sending a series of e-mails to all CMH employees. Nichols wanted to poll the members of his own unit before sending the letter in support of a member of a different unit. He drafted an e-mail message, and provided a copy to CMH's deputy director, Michael O'Hair, on October 4, 1998. Mr. O'Hair refused to allow Nichols to send the e-mail. Nichols did not send the e-mail, but used other means to poll his bargaining unit members.

I. PROCEDURAL ISSUES RAISED BY CHARGING PARTY

Charging Party's first procedural argument on exception is that the ALJ improperly limited his counsel's time in examining Michael O'Hair. We conclude from the record that the actions of the ALJ were reasonable under the circumstances and did not prejudice Charging Party's case. Charging Party's counsel had adequate time to examine the witness. He concluded his examination with the statement that he had no further questions of the witness. There is no merit to the contention that any limitation placed on the presentation of Charging Party's case by the ALJ caused his counsel to withdraw the charges relating to his suspension and discharge.

Next, Charging Party alleges that an improper ex parte communication took place on June 22, 1998, wherein the ALJ purportedly made statements contrary to Charging Party's interests. The record simply does not support this allegation of impropriety. Moreover, the matter was explicitly addressed on the record. Charging Party's counsel raised the issue at the next hearing date. The ALJ explained that she spoke with one of Respondent's witnesses, Jeffrey Kaelin, in the presence of Respondent's counsel, to urge Mr. Kaelin to leave the floor on which

the hearing was being held. After the ALJ's explanation, neither Charging Party nor his counsel objected. The failure to raise a timely objection constitutes a waiver of that objection. Therefore, even if impropriety had existed, Charging Party's failure to object at the hearing bars him from filing an exception on this basis. See *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 540. See also *Plymouth-Canton Community Schs*, 1998 MERC Lab Op 545, 554.

The assertion of Charging Party that the length of the hearings somehow deprived him of due process is similarly without foundation. On the contrary, the sheer length of time devoted to this case is indicative of the efforts undertaken by the ALJ to safeguard Charging Party's due process rights. An adequate transcript of the hearings has been made, preserving the testimony of the witnesses. The transcript was available for the ALJ's review before she issued her decision. Thus, there is no merit to Charging Party's assertion in this regard.

Finally, Charging Party's requests for a new hearing to rehear the remaining charges, to reinstate the charges which he dropped, and to present an amendment regarding "*Weingarten*[1] Rights" are hereby denied. Nothing in the record would support the granting of either of these requests at this time.

II. SUBSTANTIVE ISSUE RAISED BY CHARGING PARTY

Charging Party and his attorney take exception to the ALJ's interpretation of Commission precedent in *Detroit Water & Sewerage Dep't,* 1997 MERC Lab Op 117, and 1997 MERC Lab Op 453 (on motion for reconsideration). Specifically, Charging Party takes exception to the statement of the ALJ that:

> I would find in this case that the County violated Nichols' rights under Section 9 of PERA by refusing to let him distribute that message using the County's e-mail system. However, I am bound by the Commission's Decision in *Detroit Water & Sewerage Dep't.* As noted above, I interpret that case as holding that an employee does not have the right under PERA to use his employer's e-mail system to engage in activity which would otherwise be protected by the Act. For this reason, I find that the County did not violate Section 10(1)(a) of PERA by denying Nichols' request to send e-mail to his membership on October 5, 1998.

The ALJ correctly interpreted our prior decision in *Detroit Water & Sewerage Dep't*, which stands for the proposition that an employee has no absolute right under PERA to use his employer's e-mail system for union or other activity protected by PERA. In *Detroit Water & Sewerage Dep't*, we held that the protected content of the message does not necessarily give the sender of the message the right to use whatever means he chooses to communicate that message.

In *Detroit Water & Sewerage Dep't*, as in the case before us, the employer prohibited the charging party from using e-mail to communicate his message. In *Detroit Water & Sewerage Dep't*, the charging party was disciplined for specifically disregarding that prohibition. In the present case, the Charging Party obeyed the employer's rule and conveyed his message by other means. However, in both cases the question before us was whether the employer may prohibit

[1] *NLRB* v *J. Weingarten, Inc*, 420 US 251; 95 S Ct 959; 43 L Ed 2d 171 (1975).

the use of the e-mail system to send union-related communications without infringing on an employee's Section 9 rights.

A. The NLRB cases

Charging Party urges us to rely on *Timekeeping Systems, Inc,* 323 NLRB 244, 154 LRRM 1233 (1997), and *Pratt & Whitney,* NLRB Gen Couns Adv Mem, Case Nos 12-CA-18446, 12-CA-18722, 12-CA-18745 (February 23, 1998) for the proposition that a broad ban against all non-business use of electronic mail, including messages otherwise protected by Section 7 of the National Labor Relations Act (NLRA), is over broad and unlawful. Respondent, on the other hand, urges us to consider *Lockheed Martin Skunk Works,* 331 NLRB No 104, 164 LRRM 1329 (2000), and *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc,* 331 NLRB No 40, 167 LRRM 1196 (2000), *vacated in part* 253 F3d 19, 167 LRRM 2566 (2001) in support of the proposition that an employer is not required to provide a union with access to the employer's e-mail system.

Given the similarity between the language of Sections 9 and 10(1)(a) of PERA and Sections 7 and 8(a)(1) of the NLRA, the Commission is often guided by Federal cases interpreting the NLRA. *MERC* v *Reeths-Puffer Sch Dist*, 391 Mich 253, 260; 215 NW2d 672 (1974), *Detroit Police Officers Ass'n* v *Detroit*, 391 Mich 44; 214 NW2d 803 (1974) and *U of M Regents* v *MERC*, 95 Mich App 482, 489 (1980). Thus, we have considered the NLRB cases noted by Charging Party, those cited by Respondent, and several others.

The NLRB cases dealing with employee use of the employer's e-mail system fall into two categories: 1) Cases in which it was alleged that the employer has discriminatorily limited the use of its e-mail system and 2) Cases in which the employer has issued a broad ban prohibiting the use of its e-mail system for non-work purposes.

B. Discriminatory limitation of e-mail use

In the first category of cases are *Timekeeping Systems, Inc,* 323 NLRB 244, 154 LRRM 1233 (1997) *Lockheed Martin Skunk Works,* 331 NLRB No 104, 164 LRRM 1329 (2000), and *E. I. du Pont de Nemours & Co*, 311 NLRB 893; 143 LRRM 1121 (1993). In *Timekeeping Systems, Inc*, and *E. I. du Pont de Nemours & Co* there was evidence that the employer generally permitted employees to use the e-mail system for communications on topics that were not work related, but prohibited employee use of the e-mail system for union related communications or other communications of a protected concerted nature. In *Lockheed Martin Skunk Works,* the employer permitted employees to use the e-mail system for messages that were not work related, though the record did not support a finding of a discriminatory prohibition of union use of the e-mail system.

In *Timekeeping Systems, Inc,* the charging party was discharged for sending e-mails to coworkers criticizing his employer's proposed vacation policy. The main issue in that case was whether the content of the e-mail made sending the e-mail protected concerted activity. There the NLRB found the employer discriminated against the employee for engaging in protected concerted activity.

In the case before us, the content of Nichols's communication was never at issue, only the appropriate use of the e-mail system. The record is clear that Nichols was able to personally poll other union members without interference from the employer. In neither the instant case nor in *Detroit Water & Sewerage Dep't*, was the content of the communication at issue - only the employee's use of the e-mail system. Therefore, in our opinion, *Timekeeping Systems, Inc,* is not relevant to our conclusion in this case.

Similarly, in *E. I. du Pont de Nemours & Co* the issue was whether the employer had discriminatorily limited the employees' use of the e-mail system. There the employer's limitation on employee use of the e-mail system was directly related to the content of the e-mail. The employer permitted employees to send e-mail on a wide variety of subjects, but specifically prohibited the use of the e-mail system for messages related to union activity. The NLRB ordered the employer to cease and desist from discriminatorily prohibiting use of the e-mail system for distributing union literature and notices.

In *Lockheed Martin Skunk Works,* a petition to decertify the union had been filed. The petitioner used the employer's e-mail system to conduct mass mailings to the bargaining unit members in support of the decertification effort. The employer's policy prohibited solicitation during working time and prohibited distribution of printed materials in working areas or during working time. The employer's policy also permitted occasional personal use of the e-mail system. The union objected that the petitioner's use of the employer's e-mail system violated the employer's policies and asked the employer to put a stop to it. The employer did not restrict the petitioner's use of the e-mail system, but did grant the union's subsequent request to send its own e-mail messages. The union did not establish that the employer had discriminated against it with respect to access to the e-mail system. The fact that the petitioner used the e-mail system extensively and the union did not do so was as much due to the union's choice to use other methods as to the union's understanding of the extent to which the employer's e-mail system could be used for nonwork related purposes. Thus, the Board found no discrimination and denied the union's petition to set aside the decertification election.

Both *Detroit Water & Sewerage Dep't* and the case before us are distinguishable from the three NLRB cases previously discussed. In *Detroit Water & Sewerage Dep't,* we noted there was no evidence the City of Detroit had knowingly allowed employees to use the computer and e-mail system for personal or union business. Similarly, in the case before us, the record does not support a finding that the Respondent's employees were generally allowed to use the employer's e-mail system for personal or union business.

Although in the instant case there is no evidence that the Respondent had a written policy prohibiting the personal use of the employer's computers, there is testimony that at least one employee understood, and believed it was commonly understood by other County employees, that the use of e-mail was for work purposes only. Moreover, the fact that the union negotiated language in the collective bargaining agreement permitting it to have limited access to the e-mail system indicates that the union did not believe that employees were permitted to use the e-mail system for nonwork purposes.

We do not agree with Charging Party that Mr. O'Hair had set a precedent by routinely allowing e-mails by Nichols to be sent to union members on many subjects. The record in this case indicates that O'Hair only permitted Nichols to send one e-mail message to union members. That message announced the contract settlement. O'Hair permitted that message to be sent because he considered it was within the parameters of the negotiated e-mail provision, even though the contract had not yet been signed. That single incident does not prove a pattern of non-business use of the e-mail system. Thus, unlike *Timekeeping Systems, Inc*, *E. I. du Pont de Nemours & Co*, and *Lockheed Martin Skunk Works,* there is no basis for finding that the employer had generally permitted employees to use the e-mail system for non-work purposes. In the absence of such evidence, we cannot find that the employer discriminatorily denied Charging Party access to the employer's e-mail system as in the previously discussed NLRB cases.

C. Employer prohibition of all non-work related e-mail use

The second category of cases includes *Pratt & Whitney,* NLRB Gen Couns Adv Mem, Case Nos. 12-CA-18446, 12-CA-18722, 12-CA-18745 (February 23, 1998), *IRIS-USA,* NLRB Gen Couns Adv Mem, Case No. 32-CA-17763 (February 2, 2000), and *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc,* 331 NLRB No 40, 167 LRRM 1196 (2000), *vacated in part* 253 F3d 19, 167 LRRM 2566 (2001). In each of these cases, the issue was whether the employer could prohibit employees from using the e-mail system for all messages that were not work related.

In *Pratt & Whitney,* the employees spent the majority of their time on the computer. E-mail was the employees' main method of communicating. A significant portion of the employees used laptop computers provided by the employer to access the employer's e-mail system from outside the employer's facility. Other employees who were offsite were able to contact the employer's computer network using their own computers. The extensive use of computers, on and offsite, coupled with the use of e-mail as the primary method of communication between employees provided a factual basis for the NLRB general counsel's conclusion that the computers had become the employees' work areas within the meaning of *Republic Aviation*[2] and *Stoddard-Quirk*[3]. Noting the interactive nature of electronic mail, the general counsel found e-mail could be considered solicitation, rather than distribution. Under those circumstances, the general counsel opined that the employer's broad rule prohibiting all non-business use of e-mail could indeed infringe on employees' Section 7 rights[4].

Unlike *Pratt & Whitney,* the record in this case does not provide factual support for the proposition that the employer's computers had become the employees' work areas on which solicitation was permitted during nonworking time. Both *Detroit Water & Sewerage Dep't* and the instant case are distinguishable from *Pratt & Whitney,* as neither record contained factual support for the proposition that the employer's computers had become "work areas".

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[2] 51 NLRB 1186; 12 LRRM 320 (1943), *enfd* 142 F2d 193 (2d Cir. 1944), *affd* 324 US 793 (1945).
[3] 138 NLRB 615 ; 51 LRRM 1110 (1962).
[4] However, it is to be noted that in a more recent advice memo, the NLRB General Counsel found a similarly broad prohibition of e-mail use was not a violation because the use of e-mail and computers was not part of the employees' regular work. See *IRIS-USA,* NLRB Gen Couns Adv Mem, Case No 32-CA-17763 (February 2, 2000).

The most recent NLRB case to review the issue of whether an employer may prohibit employees from using its e-mail system for communications that are not work-related is *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc* (hereinafter *Adtranz*), 331 NLRB No 40, 167 LRRM 1196 (2000), *vacated in part 253 F3d 19, 167 LRRM 2566* (2001). In *Adtranz,* the employer's rule restricted use of the e-mail system to work-related matters. However, the employer did not strictly enforce the rule and permitted the employees to use the e-mail system to send personal messages. The Board held that there is no statutory right of an employee or a union to use an employer's bulletin board, telephone, computer or e-mail system for personal or non-business purposes. However, once an employer grants the privilege of occasional personal use of such equipment during work hours, it may not lawfully exclude union activities as a subject of discussion.

In the case before us, unlike *Adtranz*, there is no question of whether the limitation on the use of the e-mail system was applied discriminatorily. On the contrary, it appears that only work related use of the e-mail system was permitted until the union negotiated language in the contract permitting the union access to the e-mail system under limited circumstances.

III. Conclusion

Upon review of the aforementioned NLRB decisions and memoranda, we conclude that the proper standard is that enunciated in *Lockheed Martin Skunk Works,* and *Adtranz.* The principle we stated in *Detroit Water & Sewerage Dep't* is consistent with NLRB precedent and equally applicable here.

As with bulletin boards and telephone systems, there is no absolute right for employees or the union to use the employer's e-mail system for either personal or union business. Where the employer permits employee use of the e-mail system for nonwork purposes, however, the employer may not discriminatorily prohibit employees from using the e-mail system for union or other protected concerted activities. In such case, access to an employer's e-mail system may only be compelled if other types of non-business use of the e-mail system of a comparable scope are knowingly permitted.

Charging Party had the burden to prove that the Employer discriminatorily denied Nichols the use of the e-mail system while allowing others to utilize the e-mail system for purposes prohibited by the employer's policy. This record simply does not support such a finding. For the reasons set forth above, we find the exceptions of Charging Party to be without merit. Accordingly we find that Respondents did not violate Charging Party's rights under Sections 9 and 10(1)(a) of PERA by denying Nichols's request to send e-mail to the membership on October 5, 1998.

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

_____
Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Dated:_____

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APPEARANCES:

Brown, Schwartz, Patterson & Ankers, by Craig S. Schwartz, Esq., for Respondent Oakland County

Cummings, McClory, Davis & Acho, P.C., by Thomas J. Laginess, Esq. and Geno Salomone, Esq., for Respondent Oakland County Community Mental Health Authority

Alan F. Giles, Esq., for the Charging Party

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 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Detroit, Michigan on March 4, March 18, April 20, May 19, May 20, June 17, and December 20, 1999, and on January 26 and February 8, 2000, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before June 5, 2000, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed on November 12, 1998, by Douglas C. Nichols against his former employer, Oakland County.[5] The charge was amended on December 11, 1998. The charge, as amended, alleged that in 1997 Nichols was instrumental in organizing a bargaining unit of employees in CMH, that he later served on the bargaining committee for the unit's first contract, and that he was the unit's grievance chairperson during negotiations. Nichols alleged that he was treated in a hostile manner by his supervisors because of his union activities. He further alleged that he was suspended on October 12, 1998, and later discharged, because of his union and other protected activities. Nichols also alleged that the County, by a series of acts set forth in the charge, unlawfully interfered with Nichols' rights under Section 9 of PERA. The charge, as amended, included 14 separate allegations. However, some of these allegations were withdrawn during the course of the hearing. These included the allegations that Nichols' suspension and discharge violated PERA. The allegations remaining, numbered as in the original charge, are as follows:

> (Allegations 1-3 withdrawn)
>
> 4. On or about 8/27/98, Administrator Ginny Reed advised U.A.W. Unit Chairperson Douglas Nichols that he would be better off if he gave up his involvement with the leadership of the UAW at CMH.
>
> 5. On or about 10/28/98 Reed refused to discuss informally or accept grievances presented by Unit Chairperson Nichols in violation of the contractually agreed upon grievance procedure.
>
> 6. On or about 10/13/98, Karen Jones of the Oakland County Personnel Department told Nichols that he could not file grievances due to the fact that the contract was not signed, although it had been ratified by both sides previous to this date.
>
> 7. On or about 10/13/98, Jackie Hooper of the Oakland County Personnel Department told Nichols that since he was "assigned to home," the UAW should choose a different chairperson, in violation of the collective bargaining agreement and UAW rules.
> 8. On or about 10/12/98, Reed asked Nichols for a written account of an alleged incident which occurred on 10/8/98. When Nichols asked for time for a Union representative to call him back, this request was denied.

[5] Nichols was employed in the County 's department of community mental health (CMH). On January 1, 1999, CMH became a separate entity, the Oakland County Community Mental Health Authority (CMHA). All parties agree that this entity is the successor to Oakland County as the employer of community mental health employees, and CMHA was joined as a party for this reason. However, all events covered by this charge occurred while CMH was a department of the County.

9. On or about 10/5/98, CMH Deputy Director Mike O'Hair refused Nichols access to the County's e-mail system for the purpose of polling the UAW membership regarding a request to author a letter in support of the terminated vice-president of another CMH bargaining unit. This was the contractually agreed-upon method of communication for UAW members at CMH for bona fide union business.

(Allegation 10 withdrawn)

11. On 10/14/98 and 10/15/98, respectively, Supervisor Paul Wieckowski instructed Nichols that he was no longer allowed to call or come to CMH, limiting his ability to investigate and adjust grievances in accordance with the collective bargaining agreement.

12. On or about 10/13/98, O'Hair again refused Nichols access to the e-mail system, the contractually agreed-upon method of communication for UAW members at CMH for bona fide union business, so Nichols could instruct members how to get in touch with him while he was "assigned to home," being their duly elected representative.

13. On or about 10/27/98 UAW-represented employee Jeffrey White asked his chief, John Donaldson, to see his union representative in order to file a grievance. This grievance [sic] was never granted.

Motion to Amend Charges After Hearing:

In Nichols' post-hearing brief, he requests permission to amend his charges as follows:

1. Amend Allegation 7 to reflect that according to testimony presented at the hearing, the alleged conduct occurred on both October 13 and October 14.

2. Amend Allegation 8 to allege that Nichols was improperly denied union representation on October 8, 1998 as well as on October 12, in accord with testimony presented at the hearing.

3. Amend Allegation 9 to change the date of the alleged misconduct from October 5 to October 4, 1998, in accord with the testimony presented at the hearing.

Commission Rule 54(1), R 423.454, states that the administrative law judge designated by the commission may permit a charging party to amend its charge before, during, or after the conclusion of the hearing upon such terms as may be deemed just and consistent with due process. In accord with this rule, I will permit Nichols to amend Allegations 7 and 9 of his charge to conform to the testimony presented at the hearing. I conclude, however, that it would not be consistent with due process to permit Nichols to amend Allegation 8 to allege that he was unlawfully denied union representation at an investigatory interview on October 8, 1998. Respondents were not properly on notice that they were accused of violating Nichols' right to

union representation during the interview which took place on October 8. Moreover, Nichols' testimony regarding the interview of October 8 occurred early in this lengthy proceeding. I conclude that Nichols could easily have cured the problem of insufficient notice by moving to amend his charge before the close of the hearing, and that it would not be just to allow the amendment at this late date.

Facts - Background:

Nichols was hired as a contract coordinator in the Oakland County CMH in January 1996. On April 4, 1997, the United Auto Workers (UAW) filed a petition to represent a unit of "non-clinical, non-supervisory" employees of the CMH department, including contract coordinators. Supervisors in this department had been represented by another labor organization since about 1995. Nichols was active in the campaign to organize the nonsupervisory unit. After the UAW was certified on July 2, 1997, Nichols became the principal employee representative on a bargaining team headed by Reuben Turner, UAW International Representative. The County and the UAW reached a tentative agreement on a first contract during the summer of 1998. This agreement was ratified by the bargaining unit in late August or early September 1998, and by the Oakland County Board of Commissioners on September 24, 1998. The effective date of the contract was September 24. The contract document was signed by the parties sometime between October 14 and October 23, 1998.

After the UAW was certified, Nichols was appointed by the UAW to serve as grievance chairperson until an election could be held for this office. Glenn Jackson, also a contract coordinator, was appointed alternate chairperson. On October 12, 1998, Nichols was suspended with pay. Nichols held the position of grievance chairman until Jackson took over on October 31, 1998. Nichols was discharged by the County on November 5, 1998.

The facts specific to each allegation are set forth in chronological order below.

Allegation 4

In 1998 Paul Wieckowski, a contract supervisor, was Nichols' immediate supervisor. Virginia Reed, administrator for contract services, was immediately above Wieckowski. During the summer of 1998, Nichols was involved in helping to negotiate the first contract for his unit of CMH employees. Sometime in July or August 1998, Nichols confided to a co-worker that he felt severely depressed, even suicidal. The co-worker reported this statement to Wieckowski. Wieckowski called Nichols to his office and suggested that Nichols make contact with the County's Employee Assistance Program (EAP). Nichols told Wieckowski that he didn't need help, and accused Wieckowski of a breach of the County's confidentiality rules. On or about August 27, 1998, Nichols went to Reed's office and asked her if she knew that Wieckowski had spoken to him about the EAP. Reed said that she did. During the course of the subsequent discussion, Reed said that Nichols had lost his focus over the past year, that his performance had slipped. Nichols replied, "it is a tough job to do, and I have union negotiations." Reed then said that Nichols should give up his union leadership position.[6]

[6] Reed testified to a conversation with Nichols in the summer of 1998 during which, according to Reed, Nichols tearfully expressed his unhappiness with his position at CMH. According to

Allegation 9

In 1998 the County had no general policy regarding the use of the County's e-mail system to send personal or union-related mail. During the summer of 1998 the County and the UAW agreed to the following language to be incorporated as Article X, Section 6 of their contract:

> The Employer shall allow the Union use of the County e-mail system to send notices from the unit chairperson to Union members. Such notices must be approved by the CMH Deputy Director prior to sending. Said notices shall be restricted to:
>
> (a) Notices of Union meetings
>
> (b) Notices of Union elections
>
> (c) Notices of results of Union elections and Union appointments
>
> (d) Notices of Union recreational or social affairs
>
> (e) Other notices of bona fide Union affairs, which are not political or libelous in nature.

In late August 1998, Nichols asked for and was granted permission to use the e-mail system to notify his membership of the results of the membership's contract ratification vote and his own appointment as temporary grievance chairperson.

During the summer of 1998, an individual in the CMH supervisory unit was disciplined because of the content of a series of e-mails he sent to all CMH employees regarding the transition to an independent authority. The County asserted that these e-mails encouraged "poor morale and disrespect." In September 1998, the president of the supervisors' association asked Nichols to write a letter to the County stating that these e-mails had no a negative effect on his members. Nichols decided that he should poll the members before sending the letter. Nichols drafted an e-mail, and gave it to Michael O'Hair, CMH's Deputy Director, on October 4, 1998. O'Hair told Nichols that he was "interfering with the process," and that he only knew a quarter of the story. O'Hair also said that Nichols' e-mail was not a proper use of the e-mail system. Nichols did not send the e-mail.

Allegation 8

Reed, during this conversation she told him that she thought his "attitude toward his work" had changed. Reed did not recall discussing Nichols' conversation with his co-worker or Wieckowski's suggestion that Nichols see an EAP counselor, and she did not recall suggesting to Nichols that he give up his union involvement. Since it is not clear that the discussion Reed recalled was the one referred to in the charge, I credit Nichols' testimony.

On Thursday afternoon, October 8, 1998, Nichols had a confrontation after a meeting in the CMH offices with an attorney from the County corporation counsel's office. The attorney had previously worked at CMH, and bad blood existed between the two men. Immediately after this conversation, the attorney reported to Wieckowski and then to Reed that Nichols had refused to let go of his hand and had threatened to kill him. The attorney then went to his own supervisor and repeated his statement. On his way to talk to Reed about the incident, Wieckowski saw Nichols and asked him if something had happened. Nichols said that there had been an incident with the attorney, and asked if he could file a complaint. At Wieckowski's suggestion, Nichols returned to his office and wrote a brief statement of his version of the confrontation. Nichols did not then, or at any later time, admit to threatening the attorney with any type of physical violence. Wieckowski had difficulty locating Reed. When he found her, Reed told him to get Nichols and bring him to her office for a meeting. On the way to Reed's office, Nichols asked Wieckowski if he should get union representation. Wieckowski replied, "that's up to you," and Nichols said, no, he didn't need it. However, upon entering Reed's office Nichols asked Reed "half-jokingly" if he needed union representation. Neither Reed nor Wieckowski responded. Reed asked Nichols what had happened. Nichols replied that he had decided that it was a personal conversation, and that he didn't choose to make it public. Reed and Wieckowski then told Nichols that the attorney was making "serious allegations." Nichols asked them what the attorney had said. Reed replied that they couldn't tell him, but that he should tell them what happened. Nichols then gave Reed and Wieckowski a version of events which was, as Nichols later admitted, not the complete story. Reed then told Nichols to write down what had happened. Nichols said that he had already done so, but Reed did not ask him to produce it at that time. After Nichols left Reed's office, he called Turner. When Turner and Nichols spoke later that evening, Turner told him he should not have talked to his supervisors without a union representative present.

The next day, Friday, Nichols was on approved annual leave. A series of discussions about the previous day's incident took place between and among Reed, O'Hair, the attorney, the attorney's supervisor, and representatives of the County's personnel department. Wieckowski and Reed were directed to meet with Nichols on Monday morning, get a written statement from him, and then tell him that he was being "reassigned to home," i.e. suspended with pay, pending investigation of the incident. At 8:15 a.m. on October 12, Reed asked Nichols to give her a written statement by noon of that day. Nichols said that he had been instructed by the union not to provide a statement until he had union representation. At that point, Reed told him that he was reassigned to home, and that he would have to leave the premises. Nichols tried to argue, but Reed said, "they will not allow me to discuss this." Nichols then telephoned Turner. He was told that Turner wasn't there, but would be back in about 15 minutes. Nichols told Reed that Turner would be right back, but she repeated that he had to leave. Before Nichols left, Wieckowski took Nichols' keys to the building, laptop, badge, and beeper.

On November 5, 1998, Nichols was discharged for his conduct on October 8. The statement made by Nichols to Reed and Wieckowski on October 8 clearly played some part in the County's decision to credit the attorney's allegations. The County's charges against Nichols stated, in part:

> Your account primarily lacks credibility due to its inconsistency. When asked by your supervisors to supply your side of the story you refused to be specific, but

admitted to calling the attorney a weasel and using profanity. You didn't want to tell your side of the story until you knew what the attorney's account of the incident was. And you also claimed that the attorney initially used profanity toward you and that you had already contacted your union representative prior to the discussion of this incident with your supervisors. Furthermore, your story changed during the internal investigation when you then denied using profanity in that incident at all.

Allegation 11

On Tuesday, October 13, Nichols came to CMH to discuss grievances he wanted to file with Wieckowski. Wieckowski had previously been told by Jackie Hooper, the County personnel representative responsible for Nichols' bargaining unit, that Nichols was not to be allowed on CMH property. On Tuesday morning, Wieckowski told Nichols what Hooper had said. Wieckowski told Nichols that if Nichols needed something he should call himself, Reed, or O'Hair.

On October 14, Nichols called several CMH employees at work. Nichols asked these employees about several different incidents that had occurred during his employment, in the attempt to gather information that would support his version of the October 8 incident. Wieckowski and Reed were concerned that these calls might constitute interference with the County's investigation. Reed and Wieckowski were also worried that some employees might be intimidated by Nichols, given the nature of the allegation against him. Finally, discussion among employees about the calls was disrupting work. Wieckowski called O'Hair, who told him to tell Nichols that he was prohibited from making phone calls to employees at CMH or coming on the property without prior permission. On either October 14 or 15, Wieckowski called Nichols and told him he was not to call anyone at CMH except himself, O'Hair or Reed.

On October 15, Nichols came to CMH accompanied by an attorney. When Wieckowski objected to his presence, Nichols told Wieckowski that he thought Wieckowski had told him that if he had to come on union business it was ok, as long as Nichols presented himself to Wieckowski. Wieckowski allowed Nichols to go with his attorney to his desk to look for some union documents. After some time had passed, Wieckowski came back and told Nichols that he was not allowed to be at CMH, and that he couldn't come there again.

Allegation 6

On October 13, Nichols had a conversation about filing grievances with Karen Jones, another personnel representative. Jones told him that the contract for his unit was not yet signed, and that therefore neither the contract nor the grievance procedure was yet in effect. Jones' statement was in accord with the County's position that the contract would not take effect until it was signed by the parties.

Allegation 7

On October 13 and/or 14, Hooper and Nichols had at least one conversation, probably a series of conversations, about Nichols' role in handling grievances while he was suspended with

pay. The record indicates that in at least one of these conversations, Hooper said something to the effect that since Nichols was barred from CMH property, the UAW should choose someone else to handle grievances.

Allegation 12

When he was at CMH on October 13, Nichols saw O'Hair. Nichols asked O'Hair if he could send an e-mail telling the membership how to reach him at home. O'Hair responded that he did not want Nichols sending e-mails. However, O'Hair told Nichols that he himself would send an e-mail notifying the unit members that Nichols had been assigned to home and giving them Nichols' home telephone number.[7] Later, after Nichols had left, O'Hair decided that the employees should not get this message from him. He decided to give Nichol's phone number to Jackson instead. O'Hair, however, neglected to do this. Between October 12 and October 30, when Jackson took over as grievance chairman, bargaining unit members did not have the phone number of a union representative.

Allegation 13

Sometime after October 12, Jeffrey White, a member of the CMH nonsupervisory unit, wanted to discuss a problem with back wages with a union representative. On about October 27, White asked his supervisor, John Donaldson, how he could do this. Donaldson referred him to Hooper at the County's personnel office. Hooper gave White the phone number of Reuben Turner. When White reached Turner, Turner gave him a phone number which turned out to be Nichols' work phone number. As Nichols was suspended, White was of course unable to reach him. White took his problem to Donaldson, who didn't have any further suggestions. White never filed a grievance over his wage problem

Allegation 5

By October 23, the collective bargaining agreement for Nichols' unit had been signed by both parties. That contract provides that prior to a grievance being reduced to writing, "the employee should first bring their problem or grievance to the attention of their immediate supervisor." Nichols arranged with Hooper to come to the personnel department and present his grievances to Wieckowski on October 28. Wieckowski was not available, so Reed came in his stead. Prior to the meeting, Hooper told Reed that if Nichols wanted to discuss his suspension, she should tell him that this was not something that he and she could resolve informally. Nichols came in, laid several grievance papers in front of Reed, and said he had some issues or concerns he wanted to discuss. Reed said that she couldn't discuss "it," and that nothing could be resolved informally. Nichols told Reed that she didn't even know what the grievances were about, but Reed replied that nothing was going to be resolved informally between them.

Nichols took his grievances to Hooper, who accepted them later that same day. Nichols filed five separate grievances. In these grievances Nichols protested his suspension without just

[7] The e-mail system the County used at the time was not connected to the Internet. In other words, Nichols could not e-mail employees at CMH from his computer at home.

cause, Jones' refusal to accept his grievances, the County's disclosing to other CMH employees that Nichols had been charged with threatening another employee's life, management's performing his duties while he was suspended, the restrictions imposed upon his access to the building and the ban on his calling employees at work, and O'Hair's failure to e-mail his phone number to bargaining unit members. The grievances were answered in writing by Wieckowski on November 5, 1998, but were not appealed by the UAW to the next step of the grievance procedure.

Discussion and Conclusions of Law:

Reed's Alleged Threat - Allegation 4

Nichols alleges that on or about August 27, 1998, his supervisor, Reed, unlawfully told him to give up his activities on behalf of the UAW. An employer violates Section 10(1)(a) of the Act when it threatens an employee with adverse employment consequences because of his union or other activity protected by the Act. See, e.g., *Clinton Co ISD*, 1984 MERC Lab Op 529; *Crestwood Schools*, 1976 MERC Lab Op 959. However, the employer's statement must be viewed in light of the surrounding circumstances to determine whether it should reasonably be construed as a threat. *Black Angus*, 1974 MERC Lab Op 29, 33. In the instant case, Nichols initiated the conversation with Reed by coming to her office and asking her if she knew about the EAP referral. Only after Nichols had raised the issue of his admitted emotional distress did Reed state that she felt Nichols had lost focus and his performance had slipped. Instead of denying any problem, Nichols himself suggested the stress of the union negotiations as a possible cause of his problems. Then, and only then, did Reed suggest that Nichols should give up his union duties. Whether Nichols in fact had any significant performance problems is irrelevant. I find that Reed's remarks cannot be construed as a threat to Nichols' employment.

Alleged Interference with Nichols' Duties as Grievance Chairperson - Allegations 7, 11, 12 & 14

Allegations 7, 11, 12 & 14 allege that the County unlawfully interfered with Nichols' attempt to fulfil his duties as grievance chairperson. In Allegation 7, Nichols alleges that the County interfered with his rights when Hooper told Nichols that the UAW should choose someone else to handle grievances. In Allegation 11, Nichols alleges that the County interfered with his Section 9 rights by barring him from coming to CMH or calling employees at work while he was suspended. In Allegation 12, Nichols alleges that O'Hair interfered with Nichols' performance of his duties as grievance chairperson when he refused to allow Nichols to use the County's e-mail system to notify bargaining unit members of his suspension, and then failed to keep his promise to give employees Nichols' home phone number. In Allegation 13, Nichols alleges that as a result of the acts in Allegation 11 and 12, bargaining unit member Jeffrey White was unable to file a grievance over a pay dispute.

There is no indication that Hooper suggested that Nichols should be permanently removed as grievance chairman because of his misconduct. I find nothing in Hooper's remark except a simple statement of the obvious - as long as Nichols was barred from CMH's premises, he could not serve effectively as the steward for the employees at CMH.

In addition to arguing that the County interfered with his ability to function as grievance chairman, Nichols argues that by barring him from visiting or calling CMH the County interfered with his right to communicate with other employees in order to get information relevant to his own grievances. Nichols cites *MERC v Reeths-Puffer SD*, 391 Mich 257-258 (1974) in support of this claim. The County argues that the ban on visits and calls was a necessary measure to protect the workplace and prevent disruption because of the nature of the charges against Nichols. The County also asserts that it allowed Nichols access to the County's personnel office to handle union business, and that it would have arranged for Nichols to meet privately with individual CMH employees at the personnel office if he had so requested.

Nichols seems to suggest that because he was the designated grievance chairperson, the County could not lawfully bar him from CMH's premises or from calling employees. He also argues that the decision to bar him was made because he was the grievance chairperson. At the time Nichols was barred from CMH, however, he was under investigation for threatening to kill another employee. Nichols withdrew all allegations in the original charge based on the County's purported animus toward him because of his union activities. I must, therefore, assume that the County legitimately believed that Nichols might have made the threat. Under these circumstances, the County's actions were normal safety precautions. There is nothing in the record to suggest that the County would have acted differently if the employee alleged to have made the threat was someone other than the grievance chairperson. The fact that Nichols was the grievance chairperson did not, of course, prohibit the County from taking the same steps it might take with any other employee accused of similar conduct. *Reeths-Puffer*, *supra*, is distinguishable on several grounds. In *Reeths-Puffer*, a substitute bus driver who had filed a grievance over the employer's failure to offer her a permanent position was discharged for making phone calls to the homes of other drivers. The substitute was seeking information to enable her to prosecute her grievance effectively. The employer argued that the driver's calls constituted "harassment" of the other drivers. The Commission, the Court of Appeals and the Supreme Court agreed that the discharged driver was engaged in activity protected by the Act, and ordered her reinstated. In this case, however, Nichols was barred only from calling employees at work. As Wieckowski testified, Nichols' calls were interfering with work getting done. Moreover, in *Reeths-Puffer*, the other drivers complained to the employer about the substitute's calls simply because they did not want to help her; they feared that if her grievance was successful their own jobs might be jeopardized. In this case, however, Nichols had been accused of making a violent threat toward another employee. The record indicated that at least one employee, reasonably or unreasonably, feared that Nichols might physically harm her because she had told the County about a previous encounter with Nichols. I find that the County did not violate Nichols' rights by barring him from visiting CMH premises or using the County's e-mail system while the charges against him were under investigation. I also find that the County acted lawfully in banning Nichols from making phone calls to CMH employees during working hours.

The record indicates that White had trouble making contact with a union representative when he wanted to discuss filing a grievance. However, White's problems were as much the fault of the union as of the County. Hooper gave White Turner's phone number. Turner, who knew that Nichols was suspended with pay and was not at CMH, could have either assisted White himself or given White the number of the alternate grievance chairperson, Glenn Jackson. Either Turner or Jackson could have asked O'Hair to give employees Nichols' home address, or Jackson could have asked O'Hair for Nichols' number and for permission to send an e-mail to the unit

himself. In any case, I find that the County had no affirmative obligation to ensure that the employees had a grievance chairperson on the job or a means of contacting one.

For the reasons set forth above, I conclude that the County did not unlawfully interfere with Nichols' duties as grievance chairperson or his right to investigate his own grievances.

Alleged Interference with Nichols' Right to File Grievances - Allegations 5 & 6

In Allegation 6, Nichols alleges that the County, through its personnel representative Karen Jones, violated his rights under PERA by telling him he could not file grievances on October 13, 1998. In Allegation 5, Nichols alleges that his supervisor, Reed, violated his rights by refusing to accept grievances from him or informally discuss these grievances as provided by the contractual grievance procedure.

The contract between the County and the UAW had not been signed by either party on October 13, 1998, although both parties had ratified it by that time. Nichols argues that because it had been ratified, the contract was in effect on October 13. Therefore, according to Nichols, Jones violated his rights under PERA by refusing to accept his grievances. The County maintains that the contract was not in effect on October 13 since it had not yet been signed. I find it unnecessary to reach the question of when the contract became effective. On October 28, Nichols was permitted to file the grievances he sought to file on October 13. These grievances were processed, and the record does not indicate that Nichols suffered any prejudice from the County's refusal to accept them two weeks earlier. Nichols likewise suffered no prejudice from Reed's refusal to discuss his grievances on October 28. The purpose of an informal meeting at the beginning of a grievance procedure is to allow minor disputes to be resolved without the initiation of formal procedures. Nichols clearly had no right to argue with Reed about decisions that the County's personnel department had made. For reasons set forth above, I conclude that the County did not violate Nichols' rights under Section 9 of PERA by its conduct in these two incidents.

Alleged Weingarten Violation - Allegation 8

The charge alleges that on October 12, 1998, Nichols was unlawfully punished for insisting on union representation before making a written statement about events occurring on October 8, 1998. As set forth above, in his post-hearing brief Nichols moved to amend the charge to allege that he was also unlawfully denied union representation at an investigatory interview on October 8. For reasons discussed above, I have denied Nichols' motion to add this allegation to his charge.

In *University of Michigan*, 1977 MERC Lab Op 496, the Commission adopted the rule of *NLRB v Weingarten, Inc*, 420 US 251, 88 LRRM 2689 (1971), a case arising under the National Labor Relations Act, 29 USC §151. Under the so-called *Weingarten* rule, an employee is entitled to union representation at an investigatory interview 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. *Montgomery Ward & Co*, 273 NLRB 1226, 1227 (1984); *New Jersey Bell Tel Co*, 300 NLRB 42 (1990).

I find it unnecessary to decide here whether Nichols' had a right, under the *Weingarten* rule, to consult with a union representative before making a written statement about events that could lead to his discipline because I find that Nichols was not punished for his refusal to submit a statement on the morning of October 12. The facts do not support Nichols' claim that he was suspended with pay because he refused to provide a statement before consulting with his union representative. To the contrary, on Friday, October 9, when Nichols was on annual leave, Reed was told by her superiors to ask Nichols for a written statement of the events of October 8, and then to inform him that he was "assigned to home" pending investigation of the incident. On Monday morning Reed asked Nichols for the written statement. Nichols refused, saying that he had been instructed by the union not to provide it until he had union representation. The record is clear that when Reed then told Nichols to go home, she was not punishing him for refusing to provide the statement. The decision to suspend Nichols with pay pending investigation of the October 8 incident had been made the previous Friday, and Reed was merely carrying out her orders to inform him of this fact. [8] I conclude that the County did not violate Nichols' *Weingarten* rights on October 12, 1998.

The County's Denial of Nichols' October 5 Request to Send an E-mail - Allegation 9

Respondents argue that by alleging that the contract was violated when O'Hair refused to let Nichols' send an e-mail to his members on October 5, 1998, Nichols is really alleging that the County violated its duty to bargain under Section 10(1)(e) of PERA. They assert that, as an individual, Nichols lacks standing to bring a charge under that section. They also argue that even if Nichols had standing, the allegation involves only a dispute over the meaning of Article X, Section 6 of the contract.

I do not agree with Respondents that Nichols has alleged that the County violated its duty to bargain, despite Nichols' insistence that the e-mail he sought to send was of the type allowed by the contract. Rather, Nichols alleges that he had a protected right, under Section 9 of the Act, to send that e-mail. I also note that elsewhere in its dealings with Nichols and in this proceeding, the County asserted that the contract did not take effect until it was signed by both parties. According to this position, when Nichols requested to send the e-mail on October 5, there was no contract and thus no contract language covering the use of e-mail.

The Commission has addressed the question of the use of e-mail as protected activity in a single case, *Detroit Water & Sewerage Dept*, 1997 MERC Lab Op 117, and 1997 MERC Lab Op 443 (on motion for reconsideration). In that case the Commission upheld the decision of its

[8] According to the transcript of Nichols' pre-dismissal hearing on November 2, 1998, Thomas Eaton, the County's deputy director of personnel in charge of labor relations and the hearing officer, repeatedly questioned Nichols' about his failure to give a statement about the October 8 incident. At one point in the hearing Eaton said, referring to Nichols' failure to turn in a written statement, "And that's my question, what causes you to believe that when your supervisor asks for something or directs you to give him something, that you don't have to do it?" Nichols' failure to give a written statement, however, was not included in the County's statement of charges against him.

Administrative Law Judge (ALJ) that the employer could lawfully discipline a union building representative for using the e-mail system to conduct union business. The building representative: (1) sent a written summary of a grievance meeting to a grievant and his supervisor; (2) complained to the human resources department about the conduct of this supervisor after the supervisor received the first e-mail; (3) notified human resources that a grievance should be moved to the next step of the grievance procedure; (4) requested that the union president move a grievance to the next step. The employee was disciplined for gross misuse and abuse of department equipment by personal use of the computer, and for disobeying an order, given after the second e-mail, to stop using the e-mail system for union business. My interpretation of the Commission's holding in this case is that an employee has no protected right under PERA to use his employer's e-mail system for union or other activity which would otherwise be protected by PERA.

The National Labor Relations Board (NLRB) has arguably held to the contrary. In *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997), the NLRB held that an employee was engaged in activity protected by Section 8(a)(1) of the National Labor Relations Act, 29 USC § 150, when he sent an e-mail to all his fellow employees criticizing a proposed vacation policy change, and requesting that the employees contact the employer's president. The NLRB affirmed the finding of its ALJ that the e-mails constituted concerted activity, since they invited group action. It also found that the e-mails were protected despite their flippant and somewhat sarcastic tone. The ALJ and the Board rejected the employer's argument that the conduct was not protected because the employee "took over" the e-mail system, noting that the employer had conceded at the hearing that employees were permitted to "post 'simple' e-mails to each other, to make personal telephone calls, and otherwise to spend some working time in nonwork pursuits." The ALJ, in particular, noted that the e-mails could not have taken employees more than a few minutes to digest. Compare *Electronic Data Systems,* 331 NLRB No. 52 (2000), where the NLRB held that an employee's e-mail messages to all employees asking them to support a strike by the employees of a customer were concerted, but not protected, activities. The NLRB found the e-mails to be unprotected because the employee urged her fellow employees to ignore dispatches from the customers and thereby to engage in an unlawful partial work stoppage. Since its decision in *Timekeeping Systems, Inc*, the NLRB's Division of Advice has also issued memos concluding that a broad ban against all non-business use of electronic mail, including messages otherwise protected by Section 7 of the NLRA, is over broad and unlawful. See, e.g., *Iris-USA*, Case No.32-CA-17763, Advice Memorandum dated February 2, 2000.

The language of Section 9 and 10(1)(a) of PERA is similar to that of Sections 7 & and 8(a)(1) of the NLRA. In interpreting PERA, including the definition of "protected concerted activity" under that Act, the Commission and the court often look to Federal cases interpreting the NLRA. *Reeths-Puffer SD, supra,* at 260; *U of M Regents v MERC*, 95 Mich App 482,489 (1980). I believe that the Commission may wish to reconsider the question of employees' right to use their employer's e-mail system in light of the NLRB's positions on these issues. I find that the message Nichols sought to distribute to unit employees on October 5 dealt with a matter of mutual concern, the discipline of a fellow employee. The message, moreover, was directed toward the taking of concerted action, i.e. the sending of a letter by the union protesting the discipline. The content of that message irritated the County. However, there was nothing in the message's content to remove it from the protection of the Act. I would find in this case that the County violated Nichols' rights under Section 9 of PERA by refusing to let him distribute that

message using the County's e-mail system. However, I am bound by the Commission's decision in *Detroit Water & Sewerage Dept*. As noted above, I interpret that case as holding that an employee does not have the right under PERA to use his employer's e-mail system to engage in activity which would otherwise be protected by the Act. For this reason, I find that the County did not violate Section 10(1)(a) of PERA by denying Nichols' request to send an e-mail to his membership on October 5, 1998.

In summary, for the reasons discussed above, I conclude that Nichols has not demonstrated that the County interfered with his rights under Section 9 of PERA by the actions alleged in his charge. In accord with the findings of fact, discussion, and conclusions of law above, I recommend that the Commission issue the following order pursuant to Section 16 of PERA.

RECOMMENDED ORDER

The charge in this case is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: