

**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-44

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
& MUNICIPAL EMPLOYEES, COUNCIL 25,
Charging Party-Labor Organization.

APPEARANCES:

Butzel Long, P.C., by Carey A. DeWitt, Esq., for the Respondent

Miller Cohen, by Bruce A. Miller, Esq., For the Charging Party

DECISION AND ORDER

On October 9, 2001, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, 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

Date:

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Labor Organization-Charging Party

APPEARANCES:

Butzel Long, P.C., by Carey A. DeWitt, Esq., for the Respondent

Miller Cohen, by Bruce A. Miller, 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, this case was heard at Detroit, Michigan on July 14, October 7, and November 10, 1999, and on January 27, January 28 and April 6, 2000, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including my observations of the demeanor of the witnesses and post-hearing briefs filed by the parties on July 17, 2000, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Positions of the Parties:

Michigan AFSCME Council 25 filed this charge against the University of Michigan on March 9, 1999. Charging Party, through its affiliated Local 1583, represents a bargaining unit of Respondent's employees which includes maintenance mechanics. The charge alleges that in November 1998 Respondent unlawfully reassigned two maintenance mechanics, Barry Maus and Norman Oleski, from their assignments in Respondent's Zone 10 to assignments on Respondent's campus in Ann Arbor. Charging Party asserts that Maus and Oleski were transferred because they claimed their contractual right to out-of-class pay and filed numerous grievances when Respondent denied their requests for such pay. According to Charging Party, Jack Thams, Maus and Oleski's supervisor, knew

that the transfers would constitute a punishment because both Maus and Oleski lived near Zone 10 and far from the main campus. Charging Party asserts that the reasons given by Respondent for the transfers are a mere pretext for Thams' decision to retaliate against Maus and Oleski for engaging in activities protected by the Act.

Respondent maintains that it transferred Oleski and Maus because it changed the way it used and maintained some of the properties in Zone 10. As a result, Respondent did not need full-time maintenance men in Zone 10, and Oleski and Maus were reassigned to vacant maintenance positions on the main campus. Respondent asserts that Oleski and Maus's reassignment had no connection to their protected activities. It argues, however, that even if the Commission finds that Oleski and Maus's grievances were a motivating factor in the decision to transfer them, the evidence demonstrates that they would have been transferred even if they had not filed the grievances.

Facts:

Maus and Oleski's Duties in Zone 10

Prior to their transfer in November 1998, Maus, Oleski, and a third maintenance mechanic, Jim Weber, were assigned to work full time in Zone 10. Zone 10 is a group of five rural properties owned by Respondent. These properties are located between 30 and 40 miles from Respondent's Ann Arbor campus. The most developed property, the Fresh Air Camp, was once a full time summer camp. The Camp includes a swimming beach, boating area, and about 40 buildings, including a dining hall and dormitories. Throughout the early and mid-1990s, Respondent rented the Camp to private groups or groups from the University community, primarily for weekend events. Zone 10 also includes the E.S. George Reserve, a biological research station. The Reserve and the other three properties in Zone 10 contain a total of 15 buildings. Jeff Bolgos supervises maintenance in Zone 10. His supervisor is Jack Thams, general foreman of Respondent's zone maintenance department. Thams is in charge of maintenance in Zone 10 and in approximately 150 buildings on the main campus.

Maus, Oleski and Weber did the outside maintenance work on all five properties in Zone 10. This included plowing snow from paths and roads, grading gravel roads, caring for wildlife (including culling deer and trapping geese), removing leaves, checking and repairing fences, making fire lanes, cleaning the beach at the camp, clearing underbrush, and trimming trees and bushes. The three maintenance mechanics repaired and serviced mowing equipment used by student employees. The maintenance mechanics operated heavy equipment, including bulldozers and backhoes. The maintenance mechanics also maintained and repaired the buildings, and erected barns and sheds. Although Respondent hired contractors to do projects such as digging wells, installing fences, and constructing new buildings, the maintenance mechanics often worked alongside the contractors. Skilled tradesmen employed by Respondent on the main campus came out to Zone 10 to do refrigeration repairs and major electrical work, but most other repair work was done by the maintenance mechanics.

During the winter, when there was less work to do on the grounds, the maintenance mechanics worked on inside projects. For example, one winter they remodeled a bathroom. They also repaired walls and painted inside buildings during the winter. While this work improved the properties, most of the buildings on which they worked were not receiving much use. The record indicates that the

majority of these winter projects would not have been done if the three men had not had spare time during the winter.

Controversy Over The Fresh Air Camp

In late 1995 or early 1996, Zone 10 came under the scrutiny of administrators who were searching for ways to reduce Respondent's plant operations budget. These administrators included Thams' immediate supervisor, Assistant Director of Plant Operations Richard Robbins. They also included Robbins' predecessor Jerry Lonergan, Director of Plant Operations Jim Christenson, and Paul Spradlin, the associate vice-president for facilities. Maintenance at the Fresh Air Camp was a significant part of the duties of the Zone 10 maintenance mechanics; during the warm weather months they spent about 25% of their time on this property. However, throughout the 1990s the Camp had not been able to generate enough rental income to cover its expenses. The administrators discovered in 1996 that during the previous two years rental revenue from the Camp had covered less than one-quarter of the Camp's maintenance expenses. The administrators were also bothered by the fact that the Camp was rarely rented for educational purposes. The Camp's records showed that it was most commonly rented for picnics and weddings. In the fall of 1996, the administrators decided to sell the Camp. They discovered, however, that under the terms of the original gift of the property, Respondent would have to give the proceeds of the sale to a specific charity. Given the losses the Camp was incurring, the administrators did not rule out selling the property. At Thams' urging, however, the administrators agreed to keep the Camp open for two years, or until about October 1998. During this period Thams was to keep maintenance expenses to the minimum and try to increase the Camp's rental revenue.

Beginning in the winter of 1996-97, Respondent distributed brochures and placed advertisements to market the Camp to the University community. However, rentals did not increase significantly in either 1997 or 1998.

On April 30, 1998, Ron Nussbaum presented a proposal to convert the Camp to a teaching facility and an extension of the E.S. George Reserve's research facilities. Nussbaum is the associate director of the Reserve, and a staff member of the Museum of Zoology within Respondent's School of Literature, Science and the Arts (LS&A). Nussbaum's proposal was initially rejected because it required academic departments within LS&A to assume the cost of maintaining the property. However, both Nussbaum and the director of the Museum of Zoology, Gerald Smith, were concerned that the Camp might end up being used for a purpose that would interfere with the research taking place on the adjacent Reserve property. Also, classes then being held on the Reserve were beginning to interfere with research there, and Smith thought that it would be a good idea to move these classes to the Camp. Beginning in the spring of 1998, faculty members within LS&A began discussing uses for the Camp. In July 1998, Smith sent a letter to Respondent's vice-president for business operations indicating that the Museum had a plan for obtaining funding to use the Camp as a facility for classes in the residential college and the biology and natural resources departments.

The faculty members interested in the Camp wanted to use some of the Camp's buildings, but they wanted the grounds returned to a natural state. Although Respondent was still taking rental reservations for the Camp, in the spring of 1998 Smith told Bolgos to stop mowing, clearing brush, picking up tree limbs, and clearing leaves at the Camp. Thams was directed to open only three of the

Camp's buildings.

In the fall of 1998, the Ann Arbor YMCA presented Respondent with a proposal to lease the Camp for use as a children's camp. The YMCA's initial proposal would not have permitted LS&A to hold classes there. Moreover, some faculty members were opposed to permitting the Camp to be used as a recreational facility. However, Respondent's plant maintenance department, the Museum of Zoology, and the YMCA began discussions aimed at finding a compromise that would allow both LS&A and the YMCA to use the Camp.

At the end of October 1998, the Camp was closed as a rental facility.¹ In December 1998, LS&A made plans to use the Camp on a limited basis beginning in the spring of 1999. In late December 1998 or early January 1999, the YMCA decided that it was no longer interested in the Camp. The record indicates that classes began to be conducted at the Camp in the spring of 1999, and that the use of the Camp for that purpose gradually increased throughout the summer of 1999. However, as late as April 2000 plans for future use of the Camp were still in limbo because the interested academic departments had not yet attracted enough students to these classes to justify the departments assuming full financial responsibility for maintaining the Camp.

Maus and Oleski's Attempts to Get Their Position Upgraded, and Their Out-of-Class Pay Grievances

Both Maus and Oleski were hired by Respondent in the 1980s specifically to work in Zone 10. Weber transferred to Zone 10 to fill a vacancy in about 1995. Around the time of Weber's transfer, Maus and Oleski read their job description and concluded that they regularly performed work outside of and above their classification. At that time all three men were classified as Maintenance Mechanic II, pay grade 9. In March 1996 Maus and Oleski requested a job audit and position upgrade. An audit was performed, and Maus and Oleski's request was denied. In about October 1996 Charging Party filed a grievance in which it argued that the three Zone 10 maintenance mechanics should be upgraded to pay grade 13. This is the highest pay grade in the AFSCME unit, and was above the pay grade of any existing maintenance mechanic classification.

Maus testified that sometime after he and Oleski requested the audit in March 1996, Thams told him that if he and Oleski persisted with their request for a classification change and a pay increase, Respondent would just shut the Fresh Air Camp down. Thams denied saying this, although he testified that in October or November 1996, he met with all the Zone 10 employees and told them "we have two years to try and keep (the Fresh Air Camp) open, and we have to concentrate on getting University people to use the Camp." Thams also testified that during this conversation he told the maintenance mechanics to be careful when reporting their time and not to overstate how much time they spent working at the Camp. I credit Maus. Thams, as his own testimony indicates, wanted to keep the Camp's expenses down so as to reduce its operating deficit. Thams did not deny making comments to Maus in December 1997 that were similar to those Maus recalled him making in 1996. Moreover, Maus had a clear recollection of the 1996 conversation, and his testimony was believable.

On December 13, 1996, Human Resources Representative Keith Clark answered Maus and

¹ After making a special appeal, one group that had rented the Camp for several years was allowed to rent it for a weekend.

Oleski's reclassification grievance at the third step. According to the answer, the grievance was procedurally improper because the maintenance mechanics had been performing the same duties for a long time. Clark admitted, however, that the audit showed that the maintenance mechanics in Zone 10 routinely performed duties of the type performed by employees in the skilled trades unit. Clark said that Respondent would review the situation to determine whether these duties should be reduced. He also noted that the maintenance mechanics in Zone 10 could take training to qualify as Maintenance Mechanic IIIs, pay grade 11, training which is available to all employees classified as Maintenance Mechanic II. Clark also stated that Respondent was willing to provide "temporary rate adjustments to these staff on occasions when they are assigned the higher level Trades type duties on an extended basis." Clark suggested in the grievance answer that Charging Party take its reclassification request to the bargaining table.

Charging Party followed Respondent's advice. During contract negotiations in the early part of 1997, Charging Party tried unsuccessfully to persuade Respondent to create a new classification for the Zone 10 maintenance mechanics.

In the summer of 1997, after contract negotiations had concluded, Maus and Oleski began submitting claims to be paid out-of-classification pay for various tasks they performed. Some of these claims were approved, and some were denied. After a few months, in late 1997, Thams told Bolgos that he wanted to review all Maus and Oleski's requests. Thereafter, fewer of their claims were approved as Thams denied some types of claims that Bolgos had approved.

In December 1997, Maus and Oleski filed a grievance seeking compensation for an "ongoing" improper denial of out-of-class pay. Maus testified, without contradiction, that sometime shortly after he and Oleski filed their December grievance Thams told him that if these grievances continued "they would just lock the gates on (the Fresh Air camp property) and close up all the buildings." Maus replied that they were still University buildings and still needed to be maintained. Thams stated, "They will just come in with bulldozers and bulldoze them to the ground."

On January 23, 1998, Clark issued Respondent's third step response to Maus and Oleski's December 1997 grievance. Respondent agreed to pay Maus, Weber and Oleski between \$150 and \$250 each for out-of-class skilled trades work they had performed. It also paid each man about \$1,000 in "temporary promotion compensation," pending their promotion to Maintenance Mechanic III, and agreed to compensate the men at the higher rate for their entire shift whenever they worked on a higher job four or more hours per day on "proper extended projects." In the response Clark referred to Maus and Oleski's 1996 grievance and noted that Respondent "has reduced the amount of Trades type work being performed by the AFSCME employees, and intends to continue this reduction where possible, thereby keeping more of the overall work within the Maintenance Mechanic classifications."

On January 27, 1998, Thams came out to Zone 10 to speak to the three maintenance mechanics and Bolgos about the out-of-class pay issue. Oleski testified that before the meeting began he asked to have a union steward present. When Thams denied his request, Oleski took out a notebook and began taking notes. Oleski testified that Thams said angrily, "Well, write down about you having secret meetings with Nussbaum." Oleski testified that he had no idea what Thams meant by that remark. Oleski further testified that Thams then said that he (Oleski) "had a good thing here and (Oleski) was screwing it up." According to Oleski's testimony, after making that comment Thams asked Oleski,

sharply, if he had any work to do. When Oleski told him that he was waiting for orders, Thams told Oleski to go out and hunt some deer. The planned meeting did not take place. On January 29, 1998, Maus and Oleski filed another grievance. In addition to protesting Thams' denial of their out-of-class pay claims, the grievance alleged that Thams had harassed and intimidated them.

I credit Oleski's testimony. Oleski had a clear and detailed recollection of this incident. Thams could not remember what he said when he came out to speak to the men about the out-of-class pay issue in January. Thams recalled saying something at some time to Maus and Oleski about union stewards bothering Nussbaum about out-of-class pay. Thams testified that at some point he discovered that Maus and Oleski were claiming out-of-class pay for their entire shift whenever they performed any out-of-class work for more than four hours per day, not just when they were working on a single project. Thams testified that he told Oleski and Maus, "You know, you are really screwing this up, this out-of-classification work, and probably your upgrade, by not being honest with the University." Thams did not recall, however, when he made this remark.

On February 10, 1998, Robbins came out to Zone 10 to talk to Thams, Bolgos, and the maintenance mechanics about the out-of-class pay problem. Robbins said that he thought it would be cheaper to pay the maintenance mechanics out-of-class pay than to pay skilled tradesmen to travel to Zone 10 and back. Robbins said that he wanted the maintenance mechanics to do the majority of the out-of-class work. Robbins also suggested that he would consider upgrading the maintenance mechanics to pay grade 13 if, after a year, he discovered that it would be cheaper to upgrade them than to pay them the out-of-class pay. Robbins gave the maintenance mechanics a form to use for submitting out-of-class pay claims. Robbins also said that he would leave it up to Bolgos and Thams to determine what type of work was out-of-class.

In about April 1998, Maus and Oleski completed their training and were promoted to Maintenance Mechanic III. However, they continued to file claims to be paid out-of-class pay for performing work normally performed by painters, roofers, electricians, heavy equipment operators, welders, masons, carpenters and plumbers. When their claims were denied, Maus and Oleski grieved. On June 30, 1998, for example, Maus and Oleski filed a grievance requesting to be paid skilled trades rates for five different types of assignments they had performed. Respondent agreed to pay them carpenter pay for building a deck, but denied their other claims on the basis that all that work was within the Maintenance III classification. The record indicates that between December 1997 and October 1998, Maus and Oleski filed at least ten grievances claiming that they had been improperly denied out-of-class pay.

On March 23, 1998, Thams, without explanation, transferred Maus and Oleski to the Ann Arbor campus for two weeks, while Weber remained in Zone 10. During these two weeks Maus and Oleski principally followed other maintenance mechanics around observing their work.

On May 13, 1998, Thams e-mailed Robbins that his plan was not to take reservations for the Camp after October 1, 1998, and not to reopen in the summer of 1999 unless he heard differently from Robbins. Thams also said in this e-mail that he planned on filling three open maintenance mechanic positions on campus with "the camp people." He said, "with the camp and reserve in full swing that will not happen until we close the camp for the winter." In their subsequent conversation Robbins told Thams to try and rent out the Camp as much as possible for the 1998 season, however cheaply.

Robbins also told Thams that it was o.k. to transfer the maintenance mechanics from the Camp, but that he should check with Clark first.

During the summer of 1998, Maus, Oleski and Weber did less out-of class work. Maus and Oleski testified that although skilled tradesmen were sent out to Zone 10 more often, a lot of work which Maus and Oleski had performed previously was left undone.

In about the first week of October 1998, Thams decided to transfer Maus, Oleski and Weber to assignments on the main campus for the winter. Thams testified that he decided that, with the Fresh Air Camp closing, there was not enough essential work in Zone 10 to justify three full-time maintenance men, and that he could make better use of Maus, Oleski and Weber on campus. Thams testified that he and Bolgos agreed that they were “going to give it a try and see what happened.”

On October 9, 1998, Thams came out to Zone 10 to meet with Maus, Oleski and Weber. Thams told them that prospects looked good for the YMCA taking over the camp. He then announced that they were going to be transferred to jobs in Ann Arbor for the winter. (Bolgog, who was not present that day, was to remain on the properties). Maus and Oleski testified that Maus asked Thams when this had been decided, and Thams replied that he and Bolgos had made the decision the previous week. Maus and Oleski testified that Maus asked what brought this on, and Thams replied, “all the bitching and grievances.” Maus then phoned his union steward. When he handed the phone to Thams, Thams replied, “I don’t have to talk to that son-of-a-bitch.”

I credit Maus and Oleski’s testimony that Thams said that they were being transferred because of the “bitching and grievances.”² Thams testified that it was “unlikely” that he brought up the out-of-class grievances, but his overall recollection of what he said on October 9 was poor. Thams initially testified that he did not give Maus, Oleski and Weber a reason for the transfers on October 9. Later, Thams testified that he believed that he told the men that they were being transferred because of the closing of the Camp, and that he was going to move them into town for the winter and see what happened with the Camp. In response to a question asked on cross-examination, Thams admitted that Maus and/or Oleski might have accused him of transferring them because of the grievances. Thams did recall making the remark about the steward; he testified that as the conversation progressed he became angry and “just lost it.”

Maus, Oleski and Weber were transferred to the main campus effective November 9, 1998. Weber was given a permanent assignment at a location where he had worked previously. Maus and Oleski were given a temporary assignment getting serial numbers from equipment. During this period

² Although Weber testified that he “probably would have remembered” if Thams had said that the transfers were the result of the grievances, Weber maintained that he could not recall what Thams actually said about the reasons for the transfers. Weber testified that he did not agree with Maus and Oleski’s efforts to claim out-of-class pay, and that he was tired of listening to them complain about the issue. In early 1998 Weber testified, he had put in a request to be transferred out of Zone 10 because he was tired of Maus and Oleski’s complaints. Weber’s testimony, and his demeanor, clearly expressed his desire to stay out of the dispute between Maus and Oleski and Thams. I conclude that Weber’s testimony does not justify discrediting Maus and Oleski’s version of the conversation.

Thams told Maus that he and Oleski would be returning to Zone 10 in the spring or earlier. In the winter of 1998-99, Maus and Oleski were given temporary assignments on campus. They also, with Weber, worked one week in Zone 10 harvesting deer and spent several days there plowing snow. In addition, Oleski was sent out to repair a broken water main. Both Maus and Oleski testified that the amount of work being done in Zone 10 during this period had been “cut way back” from previous years.

Since about January 1999, Maus and Oleski have had permanent assignments on the Ann Arbor campus where their duties are those of a Maintenance Mechanic III. In the spring of 1999, Maus, Oleski and Weber were sent out to the Camp to open up the buildings. All of the buildings at the Fresh Air Camp were opened, although only six were actually used that summer. From the spring through the fall of 1999, Maus and Oleski alternated working in Zone 10 on most Tuesdays and Thursdays. Beginning in the spring of 1999, private contractors, using their own equipment, were hired to mow grass and cut trees on all the Zone 10 properties. Skilled tradesmen were sent out from Ann Arbor to perform repair work that fell within their trades’ jurisdiction. Contractors were hired to do roofing and siding work that Maus and Oleski might have done in the past.

The record indicates that since the fall of 1998 routine maintenance in all of the buildings in Zone 10 has been reduced, and no improvements are being done on any of the buildings until LS&A decides what use it will finally make of the Camp. Aside from plowing snow in the winter, Bolgos spends most of his time checking unoccupied buildings and fences and responding to emergency calls, as well as arranging for contractors, tradesmen, or the maintenance mechanics to come out and do necessary work. People occupying buildings in Zone 10 are now required to perform more of their own routine maintenance, such as putting salt in their water softeners. On the grounds in Zone 10, roads are not being graded as often as they were before 1998, lawns and trails are not being mowed as often, fire lanes are being opened as frequently, no leaf removal is being done, and fences are not being checked as often. Thams testified that overall maintenance work on the Zone 10 properties, including the work now done by contractors, is about 30-40% of what was done in 1997. The maintenance expenses for Zone 10 for the period November 1, 1998 through October 1999 were about half those for the period November 1997 through October 1998.

Discussion and Conclusions of Law:

The elements of prima facie case of unlawful discrimination under Section 10(1)(c) of PERA are: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee’s protected rights; (4) suspicious timing or other evidence that protected activity was a motivating cause of the allegedly discriminatory action. *Parchment SD*, 2000 MERC Lab Op 110; *Rochester SD*, 2000 MERC Lab Op 38. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive. *MESPA v Ewart PS*, 125 Mich App 65 (1983). Charging Party then has the burden of establishing either (1) the employer’s stated reasons are a pretext, or (2) while there may have been legitimate reasons for the employer’s actions, it would not have taken these actions but for the employee’s union activities. *Residential Systems*, 1991 MERC Lab Op 394,405.

Maus and Oleski’s protected concerted activity began in March 1996, when they first requested that their positions be upgraded, and continued up to and after their transfer in November 1998. After

their grievance over Respondent's refusal to give them an upgrade was denied and Charging Party was unsuccessful in negotiating them an increase at the bargaining table, Maus and Oleski began in the summer of 1997 to file claims for out-of-class pay allegedly due them under the contract. In December 1997, they filed a grievance over an improper "ongoing" denial of their claims. As a result, Maus, Oleski and Weber received some compensation from Respondent for out-of-class work they had performed, and recognition from Respondent that they were, in fact, performing work above their classification. Between the time they filed that grievance and their transfer in November 1998, Maus and Oleski filed many claims for out-of-class pay, and at least ten grievances over claims denied. At the same time that Maus and Oleski were persistently attempting to get the pay they felt they deserved, Respondent was trying to meet its self-imposed deadline for reducing the operating deficit at the Fresh Air Camp. The dispute over pay for the maintenance mechanics in Zone 10 came to involve not only Maus and Oleski's supervisor's supervisor, Thams, but also Thams' boss, Robbins.

There is substantial evidence that Thams, at least, was angered by Maus and Oleski's claims for additional pay and their grievances. After Maus and Oleski filed their request for a job audit in March 1996, Thams told Maus that if he and Oleski persisted with their request for a classification change and a pay increase, Respondent would "just shut the Fresh Air Camp down." Shortly after Maus and Oleski filed their first grievance over Respondent's denial of their out-of-class pay claims in December 1997, Thams told Maus that if these grievances continued, "they would just lock the gates on (the Fresh Air Camp) and close up all the buildings." On January 27, 1998, Thams came out to Zone 10 to speak to the maintenance mechanics about the out-of-class pay issue. Last but not least, when Thams came to Zone 10 to announce that the maintenance mechanics were to be transferred to the campus for the winter, he told Maus and Oleski that their transfer was the result of "all the bitching and grievances," then reacted angrily when he was asked to talk to their union steward on the phone.

However, despite Thams' evident hostility toward Maus and Oleski's protected activities, I conclude that the evidence as a whole establishes that Maus and Oleski would have been transferred even if they had never sought a job audit, made claims for out-of-class pay, or grieved.

In 1996 Respondent concluded that the Fresh Air Camp: (1) cost substantially more to operate than it generated in revenue, and (2) was serving no educational purpose. In the fall of 1996, Thams' superiors wanted to sell the Camp property. Since, as they discovered, Respondent could not keep the proceeds of the sale, Thams' successfully persuaded them to allow the Camp to remain open for at least two years, or until October 1998. In the interim, Thams would try to increase the Camp's revenue while reducing expenses. However, Thams' efforts to persuade more members of the University community to rent the Camp as it was were not successful. By May 1998, Thams understood that Respondent would not continue to rent out the Camp after the 1998 season. Although the majority of the work the maintenance mechanics performed in Zone 10 was not at the Camp, they spent a substantial amount of time on Camp-related duties. With the Camp's rental business closed, there would be less essential maintenance work. Maintenance on the other Zone 10 properties could be reduced. The maintenance work remaining might be done by a combination of Bolgos, contractors, tradesmen, and the maintenance mechanics working part-time. This meant that Maus, Oleski, and Weber could be reassigned to vacant maintenance positions on campus. In contemplation of the closing of the Camp's rental business, Thams told Robbins in May 1998 that he planned to transfer the maintenance mechanics after the Camp was shut down for the winter.

Between Thams' e-mail to Robbins on May 13, 1998 and the transfer of Maus, Oleski and Weber on November 9, there were two developments that could have resulted in the need for full-time maintenance mechanics in Zone 10. The first of these was Smith and Nussbaum's proposal to use the Camp as a research and/or teaching facility. However, although LS&A faculty had many ideas for using the Camp, by October 1998 plans for funding were still in an infant stage; there was no clear indication how many of the Camp buildings LS&A would ever use. Moreover, Smith had made it clear that he wanted maintenance work on the grounds of the Camp to be greatly reduced, if not eliminated. The second development between May and October 1998 was the YMCA's proposal to rent the Camp for use as a children's camp. If this had occurred, the Camp would have had to be maintained at least as well as it had been before the spring of 1998. Thams hoped that the YMCA would rent the camp; on October 9, 1998 he told the maintenance mechanics that prospects for this looked good, and that they were being transferred to campus "for the winter." In October 1998, however, Respondent and the YMCA had not reached any agreement.

In short, by October 1998 the two-year reprieve for the Fresh Air Camp had come to an end. Because Respondent had not succeeded in eliminating the operating deficit that had caused it to consider selling the Camp in 1996, the Fresh Air Camp would no longer be rented out to the public. Although several parties were interested in using the Camp property, there was no firm plan for the Camp's future in October 1998. On the other hand, there were maintenance mechanic openings on campus that needed to be filled. In October 1998 there was no apparent reason not to reduce the level of maintenance performed in Zone 10. Nor was there any apparent reason to keep three full-time maintenance mechanics working in Zone 10.

Charging Party compares this case to *Parchment SD, supra*. In *Parchment*, the Employer subcontracted its food service operations and discharged its employees after the employees filed grievances over a reduction in staffing. The record indicated that the food service operation had an operating deficit. However, when a Board member asked the Employer's assistant superintendent if the assistant superintendent's recommendation to subcontract was "purely financial," the assistant superintendent replied that "although there is a financial incentive, he would probably recommend it anyway," and began discussing the grievances. As the administrative law judge in that case, I found that while the Employer had a legitimate reason to subcontract its food service operation, the assistant superintendent's statement indicated that his desire to get rid of the union was the predominant reason the Employer decided to enter into the subcontract. The Commission adopted my decision in *Parchment* when no exceptions were filed.

On October 9, 1998, Thams told Maus and Oleski that his decision to transfer them was brought on by "the bitching and grievances." On its face, this looks like an admission that he transferred the men because of their protected activities. Thams' remark, however, must be viewed in context. Unlike the assistant superintendent in *Parchment*, Thams had to take into account previous decisions made by his superiors. As noted above, in October 1998 the Fresh Air Camp, as a rental operation, was closing. Since reducing the operating deficit was part of the reason for ending the Camp's rental operation, if Thams had not reduced the deficit by reducing maintenance in Zone 10 he would have eventually had to explain this decision to his superiors. Transferring the maintenance mechanics out of Zone 10 was the obvious way to reduce the deficit. When Thams announced the transfers in October 1998 there was a possibility that either the YMCA would rent the Camp, or

LS&A's use of the Camp property would be such that the services of three full-time maintenance mechanics would be required. Until there were firm plans for the Camp's use the following spring, however, there was no justification for keeping maintenance at the same level as in previous winters. In fact, Maus and Oleski testified that Thams told them on October 9 that they would be transferred for the winter; i.e., that they might be back in Zone 10 in the spring. I conclude that the record establishes that once the Camp's rental operation was closed, there was no justification for keeping the three maintenance men working full time in Zone 10. I also conclude that when Thams told Maus and Oleski that their grievances had brought about their transfer he was not revealing the real reason for their transfer. Rather, he was venting his anger by blaming them for the Camp's closing, a decision over which Thams had no control.

Charging Party makes numerous arguments, none of which address the essential logic of Thams' October 1998 decision. As Charging Party pointed out, other maintenance zones, including some administered by Thams, run chronic operating deficits. However, Respondent turned its attention to Zone 10 in 1996 because the Camp was producing a large operating deficit but not serving an educational function. There is no indication a similar situation existed in any of the other maintenance zones. Charging Party argues that Thams' did not make his transfer decision for financial reasons because he did not do an impact study to evaluate the effects of the transfer. Thams didn't need a study to conclude that Zone 10 expenses would be reduced if the three maintenance mechanics' salaries were removed from its budget, maintenance services were cut back, and Zone 10 was charged only for the actual cost of services provided by contractors, tradesmen and maintenance mechanics.

In accord with the findings of fact and discussion and conclusions of law set forth above, I conclude that Charging Party did not establish that Barry Maus and Norman Oleski were reassigned in November 1998 because they had engaged in concerted activities protected by the Act. Therefore I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge in this case is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____