**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF BAY CITY,
Public Employer - Respondent,

Case No. C04 B-031

- and -

TEAMSTERS LOCAL 214,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Allsopp, Kolka & Wackerly, P.C., by Mark A. Kolka, Esq., for Respondent

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for Charging Party

## DECISION AND ORDER

On October 17, 2005, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order finding that Respondent City of Bay City did not violate Section 10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) and (c), as charged by Charging Party Teamsters Local 214. The ALJ found that Respondent did not commit an unfair labor practice when it disciplined employee Keith Miles for violating a City resolution prohibiting employees from speaking to city commissioners about employment-related matters. The ALJ reasoned that Miles was not engaged in concerted activity when he spoke to the commissioner. The ALJ also found that the City's maintenance of the resolution that Miles was said to have violated did not inhibit employees from engaging in activities protected under PERA. Thus, the ALJ recommended that the charge be dismissed.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. Charging Party filed exceptions and a brief in support on December 9, 2005. Respondent's brief in support of the ALJ's Decision and Recommended Order was filed on January 18, 2006. In its exceptions, Charging Party contends that the ALJ erred by failing to conclude that the resolution inhibited employees in the exercise of rights protected by PERA and that maintenance of the resolution itself was an unfair labor practice. Further, Charging Party argues that Miles' discipline was an unfair

labor practice because the actions for which he was disciplined were protected under PERA. Upon review of Charging Party's exceptions, we find that they have merit.

Factual Summary:

The City is governed by a city commission consisting of nine commissioners and ~~a~~ mayor. The mayor is the chief executive officer of the City and presides at the meetings of the city commission, but has no administrative duties. The city manager, who serves at the pleasure of the commission, is the chief administrative officer of the City. Robert Belleman was the city manager at the time of the incidents in question.

On December 6, 1999, Bay City passed a resolution that provides in relevant part:

> [I]t shall hereafter be the policy of the City to grant to those individuals employed by the City of Bay City the right and privilege to freely communicate with their elected representatives and to address the City Commission in a public forum according to the rules of said forum to the same degree as those who are not employed by the City of Bay City so long as the communication deals with issues entirely outside of labor relations or employment related matters. There remain clearly established restraints on employee-commissioner communication and/or interaction related to employment and labor relations issues.

Residents of Bay City who attend commission meetings are allowed to address the commission. Residents who are not employed by the City may speak to the commission on matters related to employment or labor relations. On occasion, City employees have addressed the commission regarding the City's budget and reductions in force. When those employees began speaking about employment related matters, the mayor warned them that they could be subject to discipline. Although during Belleman's tenure as city manager, none of the employees who have proceeded to address the commission about layoffs have been disciplined, Belleman interprets the resolution to apply to all city employees who speak to commissioners about employment related matters on their own behalf or on behalf of a group of employees.

Since November of 2000, Keith Miles has been employed by the City as an information services administrator responsible for maintaining the City's computer equipment. At the time of the incidents that led to the charge in this matter, the position of information services administrator was not represented by a labor organization.

In March 2003, the Utility Workers of America, Local 541 (UWA) filed a petition for a representation election seeking to accrete to its existing supervisory bargaining unit all of the City's administrative and professional employees, including the information services administrator. That petition was withdrawn in May 2003. In August 2003, a petition for a representation election was filed by Teamsters Local 214 (Case No. R03 H-112) seeking to

represent essentially the same unit previously sought by the UWA. On November 19, 2003, the Teamsters filed an unfair labor practice charge (Case No. C03 K-252) alleging, among other things, that the city manager, Robert Belleman, had unlawfully interfered with the organizational rights of employees. On November 20, 2003, the City filed a charge (Case No. CU03 K-253) against the UWA asserting that the UWA president, Kim Coonan, had attempted to extort contract concessions from the City. The three cases were consolidated and representatives of the parties, including Belleman and Coonan, were present in MERC's Detroit office for a hearing on the matters on January 7, 2004.

In November 2003, Miles had spoken with City Commissioner Brunner about the City's organizational chart. During that conversation, Miles expressed his discontent about his new supervisor, Dana Muscott, the deputy city manager. In mid-December 2003, Belleman called Miles into his office and warned him about speaking with commissioners regarding employment matters. On January 7, 2004, the day on which representatives of the parties were in MERC's Detroit office for a hearing, Miles had a conversation with City Commissioner John Davidson during which he mentioned his plans to attend a union meeting and referred to Belleman's involvement in alleged unfair labor practices.

On January 23, 2004, Davidson told Belleman of his conversation with Miles. Davidson told Belleman that Miles had mentioned going to a union function and had mentioned Belleman's "poor labor practices." Later that day, Belleman called Miles into a meeting during which he accused Miles of having referred to him as the "king of unfair labor practices" in a conversation with a commissioner. Miles either denied making the comment or said he did not recall making the comment.[1] Belleman reminded Miles that he had been warned about speaking with commissioners. He dismissed Miles from the meeting and contacted Davidson to confirm Davidson's account of his discussion with Miles. A short while later, Miles was called back to Belleman's office and was given a disciplinary notice, suspending him for ten days based on Belleman's conclusion that Miles had violated the "Personal Conduct" section of the employee handbook by making "discrediting statements about the City Manager, lying to the City Manager, and discussing employment related matters with City commissioners." Belleman's statement on the notice explained his rationale for the discipline as follows:

> Commissioner Davidson informed me that Keith Miles made a statement referring to me as "Unfair Labor Practice." On 1/23/04, I met with Mr. Miles to discuss the situation. Ms. Muscott was present along with Mr. Berglund. Mr. Miles denied having a conversation with Commissioner Davidson. I explained to Keith that this was the second occurrence where he conversed with City Commissioners about employment related matters. After discussion and issuance of discipline, Keith stated that he would stop talking to City Commissioners if it is going to come back on him.

1 Belleman subsequently confirmed with Davidson that Miles had not used the word "king."

After Miles told Belleman and Muscott that he would not talk to commissioners in the future if it were going to get him into trouble, Muscott responded by telling Miles that if the commissioners needed information regarding something involving his department, he was required to talk with them. Miles sent a letter grieving his suspension to Muscott, in which he disputed Belleman's statement that he denied speaking with Davidson, argued that the ten-day suspension was not within the disciplinary guidelines set forth in the employee handbook, and contended that Belleman was interfering with the unionization attempt in which he had been involved. After reviewing the grievance, Belleman reduced the suspension to five days without pay, which was served from January 26 to January 30, 2004.

In a meeting between Miles and Muscott on June 30, 2004, Miles told them that he knew he had erred by talking to Davidson because of the trouble that it caused him. He also indicated that he avoided talking to commissioners whenever possible. Although Muscott told Miles that he was to talk with the commissioners when they requested information related to his department, he was never told that he could also talk to commissioners about terms or conditions of his employment if he was doing so on behalf of a group of employees.

Charging Party filed this charge on February 2, 2004, alleging that both the resolution and the City's discipline of Miles for violating the resolution were unlawful under PERA. On July 21, 2004, the ALJ conducted the hearing in this case and took testimony from Miles, Davidson, Belleman, and Muscott. In his Decision and Recommended Order, the ALJ noted a conflict between the testimony given by Miles and that given by Respondent's witnesses, but found it unnecessary to resolve that conflict. We too note that there are numerous differences between the testimony given by Miles and that given by Respondent's witnesses. However, the testimony given by Miles and Davidson was consistent in that in both versions of the conversation Miles, in response to a question by Davidson, reported that he was going, or had been invited to, a union meeting and discussed the pending labor disputes between Respondent, the Teamsters, and the UWA.

With regard to the January 7 conversation, Miles testified that he asked Davidson how his computer equipment was working and that the two of them continued to converse on that subject. Miles then testified that at the end of the conversation, he mentioned that he would be attending a Bay Area Labor Council meeting later that evening. Davidson questioned Miles as to whether the meeting was that Tuesday. Miles responded that he had been told by UWA President Coonan that it was that evening. At that point, Davidson asked Miles where Coonan was and Miles told him that Coonan was in Detroit at a "labor practice hearing." According to Miles, Davidson then asked him "What unfair labor practice?" At that point, Miles briefly explained what he understood to be the purpose of the proceedings and that the matter involved the City's attempt to interfere with recent organizing efforts.

With respect to this same conversation, Davidson testified that he saw Miles and Coonan together in the hallway of the City Hall. As they walked by, Davidson spoke to Miles. Coonan continued walking down the hall, but Miles stopped to talk. Davidson asked Miles, "What's up?" Miles responded that he had been invited to a trade union meeting by

Coonan. Davidson also testified that when he asked Miles about the purpose of the meeting, Miles told him that the meeting concerned "Robert Belleman practice poor labor practice." Davidson testified that the two of them started talking about it and he advised Miles to discuss the matter with Belleman. In a written statement prepared by Davidson, he wrote, "Keith kept on pursuing this topic in the discussion. I again stressed that he should talk to Robert Belleman about this." At the time of the conversation between Miles and Davidson, several unfair labor practice and representation matters involving the parties to this case were pending, however, Davidson testified that he was unaware of those matters at that time.

**Discussion and Conclusions:**

Charging Party contends that the December 6, 1999 resolution restrains employees from engaging in concerted activities protected by PERA. The ALJ disagreed and noted that we have no jurisdiction to consider the principles of constitutional law relied upon by Charging Party in arguing that the resolution was unlawful. We agree with the ALJ that any limitation on employees' constitutional rights to free speech that may be imposed by the resolution is not properly before us. However, it has long been recognized that employees' right to communicate regarding terms and conditions of employment is inherent in the right of self-organization. *Beth Israel Hosp v NLRB*, 437 US 483, 491(1978).[2] Employees' right to communicate regarding terms and conditions of employment extends to communications with other employees as well as to non-employees. *Redford Twp*, 1984 MERC Lab Op 1056. See also *Cintas Corp v NLRB*, 482 F3d 463, 466 (CA D.C., 2007); *Stanford Hosp & Clinics*, 325 F3d 334, 343 (CA D.C., 2003); *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). We have specifically found that employee communications with employer officials are included in the category of communications that are protected under PERA. In *City of Menominee*, 1982 MERC Lab Op 585, we found that the employer unlawfully reprimanded a union officer because the officer sent a letter directly to the mayor and the public safety committee of the city council contrary to the grievance procedures outlined in the contract and/or the employer's personnel manual. Similarly, in *City of Menominee*, 1982 MERC Lab Op 1420, we found unlawful the employer's suspension of a union officer because he contacted a city alderman to discuss a pending press release instead of going through the employer's chain of command.

Although the resolution at issue here does not expressly prohibit employees from engaging in protected concerted activity, it is unlawful if its effect is to restrain or chill such activity. For the purposes of determining legality, rules that prohibit employees from discussing working conditions are considered analogous to no-solicitation rules. *Double Eagle Hotel & Casino*, 341 NLRB 112, 113 (2004). The mere existence of an overbroad no-

2 Given the similarity between the language of Sections 9 and 10(1)(a) of PERA and Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA), 29 USC §§151-159, 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); *U of M Regents v MERC*, 95 Mich App 482, 489 (1980).

solicitation rule is unlawful because it may chill the exercise of the employees' right to engage in concerted activity for collective bargaining or mutual aid and protection. See *NLRB v Southern Maryland Hosp Center*, 916 F2d 932, 940 n.7 (CA 4, 1990).

To determine whether the resolution is unlawful, we must consider whether employees would reasonably construe the language of the resolution to prohibit activity protected under PERA. *Cintas Corp*, 344 NLRB No. 118 (2005); *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). As noted by the ALJ, the resolution could be used to discipline protected concerted activity. If a city employee, acting on behalf of other city employees, communicated with a city commissioner regarding terms and conditions of employment, that employee would be engaged in protected concerted activity. Nevertheless, it is evident from the wording of the resolution and Belleman's testimony that the employee could be disciplined under the resolution. The chilling effect of Respondent's resolution is also evidenced by Miles' expressed reservations about talking to commissioners in the future. Accordingly, we find that employees could reasonably construe the resolution as prohibiting them from engaging in protected concerted activity. The resolution is overly broad and, therefore, unlawful because it prohibits all communications about labor relations or employment related matters.

Charging Party points out that merely by maintaining a rule or policy that impermissibly restricts, prohibits, or threatens discipline for protected expressive conduct, the Employer has committed an unfair labor practice. We agree that a rule may be unlawful even if it is never enforced. In *Cintas Corp v NLRB*, 482 F3d 463 (CA D.C., 2007), the court enforced the order of the National Labor Relations Board (NLRB or Board) finding an employer's confidentiality rule unlawful and held "an employer's failure (intentional or not) to enforce a facially unlawful rule does not redeem the rule." 482 F3d at 466. Similarly, in *NLRB v Vanguard Tours, Inc*, 981 F2d 62 (CA 2, 1992) the NLRB found an employer rule, which prohibited employees from making statements regarding wages, hours, and other employment conditions, was an overly broad limitation on employee discussions of union matters and was, therefore, an unfair labor practice. The court granted enforcement to the Board's order holding "Because of the likely chilling effect of such a rule, the Board may conclude that the rule was an unfair labor practice even absent evidence of enforcement." *Vanguard Tours, Inc*, at 67. Thus, even if Respondent never enforced the resolution against an employee for engaging in protected concerted activity, the mere maintenance of the resolution violates Section 10(1)(a) of PERA.

Discipline for the violation of an unlawful no-solicitation rule is an unfair labor practice.[3] See *Double Eagle Hotel & Casino v NLRB*, 414 F3d 1249, 1259 (CA 10, 2005); *NLRB v McCullough Environmental Services, Inc*, 5 F3d 923, n.9 (CA 5, 1993). Such discipline is "analogous to the 'fruit-of-the-poisonous-tree' metaphor often used in criminal law." *In re Saia Motor Freight Line, Inc*, 333 NLRB 784, 785 (2001), citing *Opryland Hotel*,

[3] As noted previously, rules that prohibit employees from discussing working conditions are considered analogous to no-solicitation rules. *Double Eagle Hotel & Casino*, 341 NLRB 112, 113 (2004).

323 NLRB 723, 728 (1997). Indeed, such discipline has been found by the NLRB to be a violation of section 8(a)(3) of the National Labor Relations Act (NLRA), 29 USC 158(a)(3), which prohibits discrimination against employees to encourage or discourage membership in any labor organization. Under these circumstances, an 8(a)(3) violation can be found without consideration of *Wright Line*'s[4] dual-motivation analysis. See *In re Saia Motor Freight Line, Inc*, 333 NLRB 784, 785 (2001); *London Memorial Hospital*, 238 NLRB 704, 708 (1978). See *AT & SF Memorial Hospitals*, 234 NLRB 436 (1978)*; Daylin, Inc, Discount Division d/b/a Miller's Discount Dep't Stores*, 198 NLRB 281 (1972), enf'd 496 F2d 484 (CA 6, 1974). Accordingly, we find that Respondent's discipline of Miles is a separate and additional violation of the rights guaranteed by PERA.

We further find a violation of Section 10(1)(a) and (c) because Miles was disciplined for engaging in protected concerted activity. Concerted activity, which includes activity undertaken by one employee on behalf of others, is protected by PERA even in the absence of the participation or authorization of a labor organization. See *City of Detroit (Police Dep't)*, 19 MPER 15 (2006); *Hugh H Wilson Corp v NLRB*, 414 F2d 1345, (CA 3, 1969). Individual action is concerted if "the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group." *C & D Charter Power Systems, Inc*, 318 NLRB 798, 798 (1995), citing *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992), enf'd 53 F3d 261 (CA 9, 1995). See also *Carpenters Local 925*, 279 NLRB 1051, 1059 n.40 (1986). As the court explained in *Ewing v NLRB*, 861 F2d 353, (CA 2, 1988), "Only when individual action lacks the requisite nexus with the collective action fostered by the NLRA will the act be deemed unconcerted." *Ewing* at 361.

We find a sufficient nexus between Miles comments to Davidson and the pending representation and unfair labor practice proceedings to find that Miles activity was concerted. According to Miles' testimony, after Davidson asked him the purpose of the MERC hearing that Coonan was attending that day, he explained what he understood to be the purpose of the proceedings and that the matter involved the City's attempt to interfere with recent organizing efforts. According to Davidson's testimony, after he asked Miles the purpose of the union meeting to which Coonan had invited Miles, Miles told him that the meeting concerned the city manager's "poor labor practices." According to Davidson's statement after he advised Miles to bring up the matter with Belleman, Miles continued to pursue the topic and Davidson "again stressed that he should talk to Robert Belleman about this." While Miles did not consider himself to be a spokesperson for his fellow employees, it is evident that his concern about the matter and its effect on the working conditions of his unrepresented coworkers prompted him to explain the ongoing labor dispute to the commissioner. It is, therefore, apparent from the testimony given by both witnesses that Miles' statements were an outgrowth of the labor dispute pending before MERC at the time of their January 7, 2004 conversation and constituted concerted activity under the standard adopted in the cases

[4] *Wright Line, Division of Wright Line, Inc*, 251 NLRB 1083 (1980, *enf'd* 662 F2d 899 (CA 1, 1981) *cert den*, 455 US 989 (1982) and subsequently adopted by Commission and Michigan courts. See e.g. *MESPA v Evart Pub Schs*, 125 Mich App 71, 74 (1983); *Waterford School District*, 19 MPER 60 (2006)

construing the NLRA. Accordingly, we find that Respondent violated Section 10(1)(a) and (c) by disciplining Miles for engaging in the protected concerted activity of communicating his concerns about an ongoing labor dispute to a city commissioner.

We have reviewed each of the arguments raised by Respondent in its response to Charging Party's exceptions and find that they would not change the result. Accordingly, the ALJ's decision is reversed.

## ORDER

It is ordered that Respondent City of Bay City, its officers, agents, representatives, and successors shall:

1. Cease and desist from:

   a. Enforcing the December 6, 1999 resolution prohibiting employees from discussing labor relations and employment-related matters with the City's elected officials.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them in Section 9 of PERA.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Within fourteen days from the date of this order, set aside and expunge records of the disciplinary action taken against Keith Miles without prejudice to any rights or privileges he previously enjoyed.

   b. Make Keith Miles whole for any loss of pay he may have suffered as a result of his unlawful suspension by paying him the amount he would have earned during the dates of his suspension, January 26 to January 30, 2004, together with interest on the amount owed at the statutory rate of five percent (5%) per annum, computed quarterly.

   c. Notify employees that the December 6, 1999 resolution restricting their ability to discuss labor relations and employment-related matters with the City's elected officials has been rescinded and is no longer in effect.

   d. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are customarily posted. Copies of the notice shall be duly signed by a representative of the City of Bay City and shall remain posted for a period of thirty consecutive days. One signed copy of the notice shall be returned to the Commission and

reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced, or covered by any other material.

e. Notify the Michigan Employment Relations Commission within twenty days of receipt of this Order regarding the steps that the Employer has taken to comply herewith.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

## NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the CITY OF BAY CITY has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

**WE WILL NOT** enforce the December 6, 1999 resolution prohibiting employees from discussing labor relations and employment-related matters with the City's elected officials.

**WE WILL NOT** in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 9 of PERA.

**WE WILL,** within fourteen days from the date of this order, set aside and expunge records of the disciplinary action taken against Keith Miles without prejudice to any rights or privileges he previously enjoyed.

**WE WILL** make Keith Miles whole for any loss of pay he may have suffered as a result of his unlawful suspension by paying him the amount he would have earned during the dates of his suspension, January 26 to January 30, 2004, together with interest on the amount owed at the statutory rate of five percent (5%) per annum, computed quarterly.

.

**WE WILL** notify employees that the December 6, 1999 resolution restricting their ability to discuss labor relations and employment-related matters with the City's elected officials has been rescinded and is no longer in effect.

**ALL** of our employees are free to organize together or to form, join, or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

CITY OF BAY CITY

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF BAY CITY,
Respondent-Public Employer,

Case No. C04 B-031

-and-

TEAMSTERS LOCAL 214,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Allsopp, Kolka & Wackerly, P.C., by Mark A. Kolka, Esq., for Respondent

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for 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 and 423.216, this case was heard at Detroit, Michigan on July 21, 2004, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before October 21, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

This charge was filed on February 2, 2004, by Teamsters Local 214, against the City of Bay City. The charge alleges that Respondent violated PERA when it suspended an employee for engaging in protected concerted activities. The charge contends that the suspension was issued by Respondent pursuant to a facially discriminatory resolution which prohibits employees from conversing with elected officials about labor relations matters.

Findings of Fact:

### I. Background

This case involves a suspension issued by Respondent to Keith Miles in January of 2004. Miles has been employed by the City in the position of Information Services Administrator since November of 2000. In that capacity, Miles is responsible for maintaining the City's computer equipment. At the time of the events giving rise to this dispute, the Information Services Administrator position was not represented for purposes of collective bargaining.

On March 13, 2003, the Utility Workers of America, Local 541 (UWA) filed a petition with MERC seeking to accrete to its existing supervisory bargaining unit all of the City's administrative and professional employees, including the Information Services Administrator. The UWA subsequently withdrew the petition in a letter dated May 27, 2003. Thereafter, on or about August 11, 2003, Teamsters Local 214 filed a petition for representation election seeking to represent essentially the same unit (Case No. R03 H-112).

On November 19, 2003, the Teamsters filed an unfair labor practice charge alleging that the City Manager, Robert Belleman, unlawfully interfered with the organizational rights of employees by granting UWA representatives permission to use its premises, facilities, equipment and work time to solicit the individuals who were subject to the pending representation petition filed by the Teamsters. The charge, Case No. C03 K-252, also alleged that Belleman violated PERA by reorganizing the City's administrative staff in response to the Teamsters' petition for election.

On November 20, 2003, the City filed a charge against the UWA asserting that its president, Kim Coonan, attempted to extort contract concessions from the City. Specifically, the charge alleged that Coonan threatened to falsely accuse Belleman of trying to persuade the UWA to interfere with the Teamsters' representation petition if Belleman did not agree to certain fringe benefits for UWA members (Case No. CU03 K-253).

Case Nos. R03 H-112, C03 K-252 and CU03 K-253 were consolidated. On January 7, 2004, representatives of the parties, including Belleman and Coonan, appeared for hearing in MERC's Detroit offices. Following a prehearing conference, the parties agreed that both of the unfair labor practice charges would be withdrawn. With respect to Case No. R03 H-112, the City and the Teamsters agreed to a consent election for certain positions covered by the petition. On October 12, 2004, the Teamsters were certified as the bargaining representative of various positions, including the Information Services Administrator.

## II. City Charter and 1999 Resolution

Article 7.2 of the City Charter prohibits the mayor and commissioners from interfering with, dealing with or giving orders to "any city officer, administrative official or employee, either publicly or privately" except for the purpose of inquiry or for obtaining or furnishing information. On December 6, 1999, Respondent passed a resolution clarifying the purpose and intent of Section 7.2 of the charter with respect to the rights of City employees. The resolution provides that City employees have the same right to access elected representatives as any other citizen, and that employees may speak directly with those representatives "so long as the communication deals with issues outside of labor relations or employment-related matters. There remain clearly established restraints on employee-commissioner communication and/or interaction related to employment and labor relations issues."

## III. Communications Between Miles and City Commissioners

In November of 2003, Miles had a conversation with a commissioner regarding the City's organizational chart. During the conversation, Miles expressed his displeasure with the fact that Dana Muscott, the Deputy City Manager, was now his supervisor. Several weeks later, on or about

December 17, 2003, Belleman called Miles into his office and cautioned him about speaking with members of the commission regarding employment related matters.

In January of 2004, Miles had another conversation with a commissioner. This time, the discussion resulted in the suspension which is the subject of the instant charge. Miles testified that the conversation occurred at City Hall on January 7, 2004, the same day that representatives of the Teamsters, the UWA and the City were in Detroit for the MERC hearing. Miles encountered Commissioner John Davidson outside the City Assessor's office and asked Davidson how his computer equipment was working. The two men continued to talk and, towards the end of the conversation, Miles mentioned that he would be attending a meeting of the Bay Area Labor Council that evening at the IBEW hall, and that he had confirmed the meeting date with Coonan.[5] Davidson asked where Coonan was that afternoon and Miles answered that Coonan was at MERC for a "labor practice hearing." According to Miles, Davidson then inquired as to the nature of the hearing, and Miles briefly explained his understanding of the proceedings. Miles testified that he told Davidson that the matter involved the City's attempt to interfere with the recent organizing efforts by the Teamsters, as well as unilateral changes to employment status for the unrepresented positions. According to Miles, the discussion of the MERC proceedings lasted only about ten seconds.

Davidson's version of the incident differed from that of Miles. Davidson testified that Kim Coonan was at City Hall and standing near Miles just before the conversation began. Coonan walked away as Miles and Davidson exchanged greetings. According to Davidson, Miles mentioned that he was attending a "union function" that evening at the AFL-CIO trades union hall. Davidson asked Miles about the meeting and, according to Davidson, Miles responded, "Robert Belleman poor labor practice." Davidson testified that Miles made no attempt to explain in detail what he meant by "poor labor practice" nor did Miles refer at any time to the MERC proceedings. Davidson testified that when Miles continued to pursue the topic, he told him to take the matter up with Belleman. Davidson testified that at the time of the conversation, he was unaware that any unfair labor practice charges involving the City were pending before MERC.

Several weeks later, on January 23, 2004, Miles was called into a meeting in the City Manager's office. Belleman accused Miles of having referred to him as "the king of unfair labor practices" or "unfair labor practice Belleman" during a conversation with a commissioner. Although Miles did not specifically admit to having spoken with Davidson, he did deny making a disparaging comment about the City Manager. Belleman brought up the fact that Miles had previously been warned about speaking to commissioners regarding labor relations matters. Belleman then concluded the meeting, telling Miles that further discussions would be warranted if the allegation was substantiated.

Shortly thereafter, Miles was called back into the City Manager's office and suspended for ten days without pay. Belleman indicated that the discipline was being imposed because Miles had a conversation with a commissioner and then lied about it. Miles took issue with Belleman's accusation that he had lied, but indicated that he would stop talking to commissioners if it was going to get him in trouble. Miles testified that he also gave a detailed account of his conversation with Davidson and that he disclosed the fact that the discussion pertained to the MERC cases which were pending at the time. In contrast, Respondent's witnesses, including Belleman, Muscott,

[5] The Bay Area Labor Council is an organization comprised of unions in the Bay City area, including UWA, Local 541.

Davidson and Human Resources Director Dale Berglund, testified that Miles never offered any specific details about the conversation or made any reference to the MERC proceedings.

On January 23, 2004, Belleman issued a written disciplinary notice formally suspending Miles for ten days without pay. The notice alleged that Miles had violated the "Personal Conduct" section of the Employee Handbook by making "discrediting statements about the City Manager, lying to the City Manager, and discussing employment related matters with City Commissioners." On January 29, 2004, Miles sent a letter to Muscott grieving his suspension. In the letter, Miles asserted that a ten day suspension was not within the disciplinary guidelines set forth in the Employee Handbook, and that Belleman was interfering with the "unionization attempt" in which he had allegedly been involved. Miles also took issue with Belleman's contention that he lied about having spoken with Davidson during the January 23, 2004 meeting. Following receipt of the grievance, Belleman reduced the suspension to five days without pay. A revised disciplinary notice reflecting this change was issued on January 30, 2004. Miles served the suspension from January 26 to January 30, 2004.

Discussion and Conclusions of Law:

Charging Party alleges that Respondent disciplined Miles in violation of Sections 10(1)(a) and (c) of PERA. Section 10(1)(a) makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to public employees under Section 9 of the Act, including the right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." Section 10(1)(c) prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. The elements of a prima facie case of unlawful discrimination or retaliation under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Univ of Michigan,* 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696.

Respondent contends that Miles' conversation with Davidson did not constitute protected activity under Section 9 of PERA. The City argues that Miles was merely expressing personal complaints when he spoke to the commissioner. The National Labor Relations Board has held that an individual's complaints to his or her employer will not constitute concerted action unless they were undertaken on behalf of other employees and in furtherance of a group concern. *Meyers Industries, Inc (Meyers II)*, 281 NLRB 882 (1986), enf'd *Prill v NLRB*, 385 F2d 1481 (DC Cir 1987). See also *NLRB v Talsol Corp*, 155 F3d 785 (CA 6, 1998). Although employees need not formally choose the complaining employee to speak on their behalf, the employee must be actually, not impliedly, representing the views of other employees, or acting alone for the purpose of initiating group action. *Manimark Corp v NLRB*, 7 F3d 547, 550 (CA 6, 1993). The public venting of a personal grievance, even a grievance shared by others, is not concerted activity. *Pelton Casteel, Inc v NLRB*, 627 F2d 23, 28 (CA 7, 1980). These same principles have been applied to cases arising under PERA. See *City of Detroit (Water & Sewerage Dep't)* 17 MPER 79 (2004) (no exceptions); *Hazel Park Harness Raceway*, 1994 MERC Lab Op 342 (no exceptions); *Wayne County*, 1993 MERC Lab Op 560; *City of Detroit (Water & Sewerage Dep't)*, 1993 MERC Lab Op 157 (no exceptions); *City of Adrian*, 1985 MERC Lab Op 764 (no exceptions).

Applying these standards to the instant case, I find that Miles was not engaged in concerted activity. The parties presented conflicting testimony concerning the substance of the conversation between Miles and Davidson. Miles testified that he briefly described the cases which were pending before MERC in response to a question posed by Davidson. Davidson denied that Miles made any reference to the MERC proceedings. I find it unnecessary to resolve this conflict. Whether I credit Miles' version of the facts or the testimony of Respondent's witnesses, Miles' conduct cannot fairly be characterized as concerted within the meaning of Section 9. There is no evidence that Miles was making a complaint in furtherance of any group concern, or that his remarks were somehow intended to encourage other employees to engage in lawful group activity. Miles was not a Union representative, nor is there any indication that he was actively involved in Charging Party's organizing campaign. Although Miles testified that he was speaking for his co-workers, there is no proof that any employees authorized him to speak on their behalf, agreed with his comments or were even aware of his actions. Merely repeating jointly held concerns of other employees does not constitute concerted action. *Manimark Corp,* (complaints to supervisor about working conditions unprotected where there was no evidence that employee acted on behalf of co-workers or that other employees had decided to act upon those shared concerns). See also *City of Decatur*, 14 PERI ¶ 2004 (1997) (employee's letter to city council complaining about working conditions not protected activity under the Illinois Public Labor Relations Act even though letter expressed group concerns where complaints were not made with or on the authority of others).

I also find no merit to Charging Party's assertion that MERC should require the City to rescind the 1999 resolution. The principles of constitutional law relied upon by the Union in support of this contention have no application in this forum. While it is conceivable that the City's prohibition on communications between employees and elected officials could be enforced so as to restrict legitimate concerted activity protected by PERA, there is no evidence that the City has in fact applied the resolution in an unlawful manner, nor is there suggestion that employees have actually been inhibited from engaging in protected activities as a result of the resolution.

In summary, I conclude that Respondent did not violate Sections 10(1)(a) or (c) of PERA by suspending Miles as a result of his conversation with Davidson. For the foregoing reasons, I recommend that the Commission issue the order set forth below:

## RECOMMENDED ORDER

The unfair labor practice charge is herby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____