STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EATON COUNTY TRANSPORTATION AUTHORITY,
Public Employer-Respondent,

Case No. C05 D-079

- and -

AMALGAMATED TRANSIT UNION, LOCAL 1761,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Robert G. Huber, Esq., for the Respondent

Law Offices of Mark H. Cousens, by John E. Eaton, Esq., for the Charging Party

DECISION AND ORDER

On June 29, 2006, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Eaton County Transportation Authority (EATRAN or the Employer), violated Section 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a), when its board chairperson threatened to remove Gary Carpenter, the president of Charging Party, Amalgamated Transit Union, Local 1761 (the Union), from his union position. However, the ALJ found that Carpenter's subsequent discharge was wholly a result of a bus driving accident and was not motivated by union animus. Thus, the ALJ found that Carpenter's discharge was not a violation of Section 10(1)(a) and (c) of PERA, as alleged in the charge.

The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. After filing requests, Respondent and Charging Party were each granted an extension until August 21, 2006, to file exceptions to the ALJ's Decision and Recommended Order. Both parties filed exceptions on August 21, 2006. Respondent subsequently requested and was granted an extension of time to file a response to Charging Party's exceptions, and its response was filed on September 12, 2006.

In its exceptions, Respondent argues that the ALJ erroneously failed to credit testimony of its witnesses that would establish that its board chairperson did not in fact threaten to remove Carpenter as union president. In its exceptions, Charging Party argues that the ALJ erred when she failed to find a discriminatory motive for Carpenter's discharge. We have reviewed the parties' exceptions and find that they are without merit.

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. Respondent EATRAN is governed by a board of directors. At the time of the incidents leading to the charge in this matter, Kristy Reinecke was EATRAN's board chairperson and Linda Tokar was EATRAN's general manager.

Gary Carpenter began working for Respondent as a part-time bus driver in December 2001. He was hired as a full-time custodian in July 2002. As a custodian, Carpenter moved buses around and occasionally worked as a substitute driver. During October and November of 2003, he drove a regular route as a substitute. Carpenter and one of the bus drivers, Sarah McCallum, were quite active in soliciting support for the recognition of the Union as the bargaining unit's representative. Charging Party filed a petition for a representation election in May 2004 and was certified as the bargaining representative of Respondent's employees on July 7, 2004. In August 2004, Carpenter became president of the Union local and McCallum became its vice-president.

EATRAN's general manager, Tokar, was aware of Carpenter's pro-union activities and was initially opposed to employees organizing. During the Union's organizing drive and after Charging Party was certified, Carpenter's relations with Tokar and Reinecke changed. Tokar and Reinecke perceived a negative change in Carpenter's demeanor after he became involved with the Union. Carpenter and a fellow union supporter, Carol Pierson, perceived a negative change in Tokar's attitude towards them. Around July 9, 2004, Carpenter received his first written warning; he was accused of insubordination.

In November 2004, a bus driven by McCallum slid off an icy road into a ditch and had to be towed. McCallum was required to fill out an accident report and undergo testing for drugs and alcohol. McCallum stated in her report that there was no contact between her bus and any object. On November 26, Tokar gave McCallum a warning letter related to the accident. McCallum objected to the warning, asked for a meeting, and asked that Carpenter, president of the local, be present at the meeting. Reinecke, Tokar, McCallum, and Carpenter met to discuss the matter on the morning of December 8, 2004.

At that meeting, the parties argued about whether McCallum's bus sliding into a ditch was an "incident" or an "accident." Carpenter maintained that other drivers did not have to fill out accident reports when they became stuck in the snow and pointed to another driver who had been towed out of the snow on the same day that McCallum's bus had gone into the ditch. Reinecke and Tokar maintained that McCallum had hit a sign and, thus, it was an accident. Carpenter asserted that McCallum was being treated differently because she was a union officer.

The discussion became heated. At one point, Reinecke told Carpenter to stop talking and to let her hear from McCallum instead.

The parties dispute Reinecke's next comments. Carpenter testified that Reinecke stated in response to heated discussions, "I've dealt with unions before. You won't be president long. I know how to get rid of you, and I've done that before." Reinecke testified that she merely said that she knew how unions functioned and denied saying that she would remove Carpenter from his job or his position with the Union. In her testimony, Tokar denied hearing Reinecke threaten Carpenter's job or threaten to have him removed as union president. McCallum, however, testified that she heard Reinecke state that she knew how to deal with union presidents and would have Carpenter removed. The ALJ found McCallum to be a credible witness as McCallum, of the four people present at the meeting, had the least stake in the outcome of the unfair labor practice charge. The ALJ credited Carpenter's and McCallum's testimony that Reinecke said she could have Carpenter removed as union president.

On the afternoon of December 8, 2004, Carpenter addressed a meeting of Respondent's board regarding various employee complaints. Many of the complaints were directed at Tokar. Tokar testified that she did not pay much attention when Carpenter spoke to the board because he read his complaints "in a boring voice." However, Tokar subsequently held two staff meetings in which she responded to Carpenter's complaints.

Later that month, McCallum had an accident while driving her bus. She experienced a flare-up of a long term medical condition and took an extended sick leave. Effective January 3, 2005, Carpenter was assigned to work as a full time driver on the route vacated by McCallum. Tokar informed Carpenter that since he had not driven a bus regularly, he would need three weeks of retraining with the operations supervisor, Paul Martin. On January 3 and January 5, Carpenter drove a bus route with Martin on board as trainer. Martin also rode with Carpenter on January 10, the third time that Carpenter drove the route. On that occasion, Martin sat several rows behind the driver's seat. While driving, Carpenter leaned over to look at his manifest on the floor; he failed to notice an intersection, and ran a stop sign. A pickup truck on the intersecting highway hit the bus, knocking both vehicles off the road. Martin, Carpenter, the driver of the truck, and all but one of the bus passengers were taken to the hospital, and both vehicles were destroyed.

The accident was severe and Respondent determined that Carpenter was negligent and at fault. Respondent's personnel policy includes a progressive discipline system for major and minor preventable accidents. The manual further provides that Respondent may immediately discharge "any employee who knowingly damages or negligently and recklessly uses EATRAN property or vehicles." Carpenter's doctor determined that he had sufficiently recovered from his injuries to return to work as of February 21, 2005. When Carpenter reported to work that day, he was told that he was suspended without pay, and was instructed to return for a meeting on February 23. At the February 23 meeting, Tokar gave Carpenter a letter informing him of Respondent's finding that he was at fault in the accident and that he was being discharged for that reason. Carpenter appealed his discharge to the EATRAN board, who upheld the firing. Several of the board members stated that their concern was for the safety of the public and that Carpenter's union activities did not play any part in their decision to uphold the firing.

On April 11, 2005, the Union filed the charge against EATRAN alleging that Carpenter's discharge was caused by his union activity and violated Section 10(1)(a) and (c) of PERA. The charge also complained that the chairperson of Respondent's board threatened to "remove" or "get rid of" Carpenter as union president because of his conduct during a December 2004 grievance meeting and that within three months of that meeting, Carpenter was, in fact, discharged.

Discussion and Conclusions of Law:

The ALJ concluded that during the heated December 8, 2004 grievance meeting, Respondent's board president, Reinecke, threatened to have Carpenter removed from his position as union president and thereby violated Section 10(1)(a) of PERA. The ALJ's conclusion that Reinecke threatened to remove Carpenter from his union position rests in large part on her finding that Carpenter's and McCallum's testimony about the incident is more credible than that of the Employer's witnesses. In its exceptions, Respondent contends that the ALJ's credibility finding is an error. Inasmuch as the ALJ has an opportunity to observe and to evaluate witness demeanor, we give great weight to ALJ credibility determinations and will not overturn such determinations unless they are clearly contrary to the record. See *City of Lansing (Bd of Water & Light)* 20 MPER 33 (2007); *Saginaw Valley State Univ*, 19 MPER 36 (2006); *Bellaire Pub Sch*, 19 MPER 17 (2006). Here, Respondent contends that the ALJ's credibility determination is contrary to the record. We disagree.

Respondent argues that McCallum's memory is impaired as the result of a medical condition that worsened after her December 2004 accident and the medication for that condition, Lamictal. At the hearing, McCallum candidly admitted her medical condition and the effects of her medication on her memory. McCallum acknowledged that her short term memory has been affected by the Lamictal, which she has been taking since January 2005. She explained that before she began taking that medication she had a photographic memory, but after taking the Lamictal her memory is like that of an average person. She also explained that she continues to retain the memories she had from the period prior to beginning the medication. Respondent has pointed to nothing in the record that would cause us to doubt McCallum's assessment of the degree of her memory impairment or the point at which it commenced. The ALJ's credibility finding in this case relates to events, and McCallum's memory of events, that occurred prior to the flare up of her medical condition and her need to take the Lamictal.

Respondent also contends that McCallum's testimony about whether her bus struck a sign in the November 2004 accident/incident was inconsistent with her prior statements about that event and should cause us to overturn the ALJ's credibility finding. Clearly, the ALJ was required to weigh questions about the credibility of several witnesses. Indeed, several inconsistencies in the testimony of the Employer's witnesses were noted in Charging Party's post hearing brief, including inconsistencies between the accounts given by Tokar and Reinecke about the December 8, 2004 grievance meeting. Upon thoroughly reviewing the testimony and exhibits in this matter, we are persuaded that the ALJ's stated rationale for her credibility finding

is sound. As compared with the three other witnesses who attended the December 8, 2004 meeting, McCallum had the least stake in the outcome of this matter and her testimony, with respect to the statements made in that meeting, corroborated that of Carpenter. When these factors are considered with the ALJ's unique opportunity to observe the witnesses, we conclude that the ALJ's credibility finding is supported by the record. Accordingly, we find that Reinecke did in fact threaten to have Carpenter removed from his position as union president.

For the reasons stated by the ALJ, we also conclude that Reinecke's threat violated Section 10(1)(a) of PERA. As Respondent points out in its exceptions, Carpenter was chosen to be president by the Union membership. Reinecke's authority to remove him from that position was, therefore, limited. However, one way that Reinecke could remove Carpenter from his union position was to discharge him. Therefore, we agree with the ALJ's finding that Reinecke's statement could have reasonably been construed as a threat to discharge Carpenter for his conduct at the December 8, 2004 grievance meeting. Such a threat is unlawful interference with Carpenter's exercise of the rights guaranteed by Section 9 of PERA.

Turning to Charging Party's exceptions, we find no error in the ALJ's conclusion that Charging Party failed to establish a prima facie case with respect to its contention that Carpenter was discharged because of his union or other protected activities. In order to establish a prima facie case of discrimination under Section 10(1)(c) of PERA, the Charging Party must establish the following: (1) that the employee engaged in union or other protected concerted activity; (2) that the employer had knowledge of that activity; (3) the employer's anti-union animus or hostility towards the employee's protected activity; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory actions. See *Waterford Sch Dist*, 19 MPER 60 (2006); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. For the reasons stated in ALJ's decision, we agree that Carpenter engaged in protected activity, that Respondent was aware of his involvement in protected union activities, and had animus towards Carpenter because of those protected activities. However, Charging Party failed to show a causal connection between Respondent's anti-union animus and its decision to discharge Carpenter. As the ALJ explained, the accident and Carpenter's negligence were of such a serious nature that even if Carpenter had not been engaged in protected union activities, the result would have been the same. Therefore, we conclude that Carpenter's discharge did not violate Section 10(1)(a) or (c) of PERA.

We have carefully examined all other issues raised by the parties and find they would not change the result. We affirm the ALJ's findings that Respondent's board president threatened to have Carpenter removed from his position as union president and that Respondent thereby violated Section 10(1)(a) of PERA. We also affirm the ALJ's finding that Respondent's decision to discharge Carpenter for his involvement in a serious accident while driving one of Respondent's buses was not a violation of Section 10(1)(a) or (c) of PERA.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Thrun Law Firm, P.C., by Robert G. Huber, Esq., for the Respondent

John E. Eaton, 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, this case was heard at Lansing, Michigan on September 28, October 20, and October 21, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on December 8, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On April 11, 2005, the Amalgamated Transit Union, Local 1761, filed this charge against the Eaton County Transportation Authority (EATRAN or Respondent). Charging Party was certified as the bargaining representative for Respondent's employees on July 7, 2004. Thereafter, according to the charge, Gary Carpenter, the appointed president of Local 1761, became the focus of Respondent's union animus. Charging Party alleges that Respondent violated Section 10(1)(a) of PERA on December 8, 2004, when Kristy Reinecke, the chairperson of Respondent's board, threatened to "remove" or "get rid of" Carpenter as union president because of his conduct during a grievance meeting. Shortly thereafter, on February 23, 2005, Respondent discharged Carpenter after he had an accident driving a bus. Charging Party alleges

that Carpenter's discharge was caused by his union activity and violated Sections 10(1)(a) and (c) of PERA.

Paragraphs five and six of the charge state:

> 5. After the Union was certified, the employer began to change work rules. It began to cite employees for conversing among themselves and has proposed prohibiting employees from coming to work early and congregating in the drivers' room prior to the start of employee work shifts.
>
> 6. After the Union was certified, the employer began to treat every incident involving a bus as an accident. Prior to certification, employees used an incident report to report incidents which were not as serious as a vehicle accident and accident reports to record traffic accidents involving a bus.

In the relief section of the charge, Charging Party asks that Respondent be ordered to "cease and desist in the disparate treatment of employees for their union activities, " and to "cease and desist in making unilateral changes in working conditions, such as the accident policy, without bargaining in good faith."

Charging Party presented evidence at the hearing regarding the incidents referred to in paragraphs five and six of the charge. However, at the hearing and in its post-hearing brief, it cited these incidents only as evidence of Respondent's union animus and did not assert that that they constituted independent violations of PERA. I conclude, therefore, that Charging Party abandoned these claims.

Facts:

Background

Respondent EATRAN is a public transit system that provides "dial-a-ride" service in Eaton County. EATRAN is governed by a board of directors. At the time of the events covered by this charge, the board chairperson was Kristy Reinecke. Reinecke was employed full-time as the city clerk/treasurer for the City of Eaton Rapids. Linda Tokar was EATRAN's general manager and in charge of day-to-day operations.

Gary Carpenter was hired by Respondent as a part-time bus driver on December 17, 2001 after applying for a full-time driver position. At the time of his hire, Carpenter had worked as a deliveryman for United Parcel Services but had no prior experience as a bus driver. In July 2002, Carpenter accepted a position as Respondent's full-time custodian. As a custodian, Carpenter moved buses around and also occasionally worked as a substitute driver. From October 1 to November 23, 2003, he drove a regular route as a substitute. As discussed more fully below, at the end of December 2004, Respondent eliminated Carpenter's custodial position and assigned him to drive a bus.

Charging Party's Organizing Drive

In the spring of 2004, Carpenter and driver Sarah McCallum contacted Charging Party and obtained and distributed union authorization cards. Carpenter was more open about soliciting support for the union than McCallum. Tokar was aware of Carpenter's role in the union organization drive but did not know that McCallum was involved. Tokar admitted that she was initially opposed to employees organizing because she thought EATRAN was too small to have a union. On May 4, 2004, Charging Party filed a petition for a representation election in a unit consisting of Respondent's drivers, dispatchers, and custodians. An election was held on June 21, 2004, and Charging Party was certified as the bargaining agent on July 7, 2004.

Tokar and Reinecke testified that Carpenter's demeanor changed after he became involved with the union. According to Reinecke, Carpenter went out of his way to avoid her. Tokar testified that beginning in May 2004, Carpenter "tried to push his weight around." As an example, Tokar testified that Carpenter began spending the first half hour of his workday talking to other employees instead of performing his custodial duties. Tokar also testified:

> (Carpenter) hasn't always been my favorite person since this started happening. . .
> He caused a lot of unrest at work, a lot of . . . (hard feelings) between employees . .
> They were afraid of him and his intimidation.

Driver Pamela Kyriakides testified that the union organizing campaign marked the beginning of a lot of friction between union supporters and other employees.

Events Following Charging Party's Certification

Carpenter and Carol Pierson, a dispatcher and union supporter, testified that Tokar's attitude toward them changed after the election. According to Pierson, Tokar no longer engaged her in friendly conversation. Carpenter testified that Tokar went out of her way to be rude to him. According to Carpenter, Tokar and maintenance supervisor George Leist began making petty complaints about the quality of his work and trying to stop him from talking to other employees. According to Tokar, in July and August 2004, Carpenter spent too much time talking to other employees when he or they were supposed to be working.

On or about July 9, 2004, Leist wrote a memo accusing Carpenter of insubordination. Carpenter complained to Charging Party international vice-president Paul Bowen about this charge. He also sent Bowen a letter describing several occasions where he felt that Tokar and operations supervisor Paul Martin had followed him around, spied on him, or been deliberately rude to him. Bowen passed along these complaints to Ray Davis, Respondent's counsel and chief spokesman in its contract negotiations with Charging Party. Tokar produced her own written version of the incidents described in Carpenter's letter. In Tokar's version, Carpenter evaded work and made sarcastic comments when asked to perform simple tasks. Davis told Bowen that the memo was only a written warning for being rude. This was the first written warning Carpenter had received during his employment with Respondent.

On August 31, Bowen notified Respondent that Charging Party had formed a new local, Local 1761, to represent its employees and that Charging Party had appointed an executive board. Carpenter was appointed president of the local and business agent, and McCallum was appointed vice-president. Shortly thereafter, Carpenter mentioned to Leist that since he was president of the local, there would probably be times that he would have to be absent from his job to negotiate contracts and settle disputes and grievances. Leist told him, "That's not going to happen."

In September, a bus mechanic showed Tokar a hose on one of Respondent's buses that appeared to have been deliberately cut. Tokar felt this was a serious enough matter to bring up with Respondent's board. Shortly thereafter, Respondent changed Carpenter's shift from afternoon to days, and Carpenter had to turn in his set of keys.

Around this same time, Leist began telling drivers to leave the premises immediately after they finished work. Both Carpenter and Pierson testified without contradiction that it had been a normal practice for employees, including Leist, to stop and chat with each other and the dispatchers before leaving. When Pierson questioned Leist about this, he told her to "take it up with the powers that be," referring to Tokar.

Morning Meeting on December 8

On November 24, 2004, Charging Party vice-president McCallum's bus slid off an icy road into a snow-filled ditch near a railroad crossing. The bus was towed from the ditch. Pictures of the scene taken two days later by Martin showed a sign leaning at slight angle next to where the bus had been in the ditch. McCallum was required to fill out an accident report and to undergo testing for drugs and alcohol. McCallum's report stated that there was no contact between her bus and any object. On November 26, Tokar gave McCallum a warning letter. McCallum told Tokar that she should not have received a warning letter or been required to take a drug/alcohol test because what happened to her on November 24 was an "incident" rather than an "accident." In early December, she asked to meet with Tokar to discuss the matter and to have Carpenter present. Tokar agreed, and a meeting was scheduled for December 8.

On the morning of December 8, Reinecke, Tokar, McCallum and Carpenter met in a conference room to discuss McCallum's disciplinary warning. The parties argued about whether the event was an "incident" or an "accident." [1] Carpenter maintained that other drivers had not been required to fill out accident reports when they were stuck in the snow. He used the example of another driver whose bus had to be towed out of the snow on the same day. Reinecke and Tokar said that McCallum had hit a sign. Carpenter accused Respondent of treating McCallum differently because she was a union officer.[2] Interchanges between Carpenter and Reinecke

[1] Respondent used both "accident" and "incident/passenger injury" report forms. However, the record indicates that in 2004 Respondent did not have a consistent practice of requiring drivers to use one form or the other. For example, McCallum's personnel file contained two "accident" reports from the summer of 2000 and two "incident" reports from September 2000 and June 2004. All four incidents resulted in minor damage to her bus. In only one of these incidents was McCallum clearly not at fault, and for this incident she filled out an accident report.

[2] The charge did not allege that McCallum's November 2004 disciplinary warning violated PERA.

became heated. Reinecke told Carpenter to stop talking and let McCallum answer Reinecke's questions herself. After this, the witnesses' accounts differ. Carpenter testified:

> I said I was president of the local; I had the right to be there to represent Sarah . . . [Reinecke] said, "You didn't get all the votes." And I said, "Be that as it may, I am still the president." And she said, "I've dealt with unions before. You won't be president long. I know how to get rid of you, and I've done that before."

Reinecke testified:

> Mr. Carpenter was speaking for Sarah. At the point that I had heard everything that Mr. Carpenter had said, I asked to hear Sarah's side of the story, at which point Mr. Carpenter got very belligerent and stated that – slammed his fist on the table and stated that he was union president, he demanded respect, and I had to give him that respect, at which point I stated that I fully well knew how unions worked and how they operated, and I was aware of how they functioned.

According to Reinecke, Carpenter's face became purple with rage and he leaned over the table to put his face close to her. She denied saying anything about removing Carpenter from his job or union office and stated that she knew better than to make such a comment.

McCallum testified that the meeting became heated toward the end. She testified that Reinecke said that she had dealt with unions before, knew how to deal with presidents, and would have Carpenter removed. Tokar recalled that Reinecke said that she was "used to dealing with unions," but denied hearing Reinecke threaten Carpenter's job or threaten to have him removed as union president.

Bowen testified that Carpenter called him on or shortly after December 8. According to Bowen, Carpenter told him that Reinecke had said that "she didn't have to deal with (Carpenter), that she had dealt with this kind of situation before, and that she would see if he could be removed or replaced as union president." Bowen immediately called Davis to complain that Reinecke had threatened Carpenter. Davis later reported to him that Reinecke denied making any threat but had said that Carpenter had been rude and that she would rather deal with Bowen.

I credit Carpenter and McCallum's testimony that Reinecke said she could have Carpenter removed as union president. It was obvious from Reinecke's testimony at the hearing that she was infuriated by Carpenter's behavior at the meeting. Despite her experience with unions, Reinecke could easily have made this statement in anger. I found McCallum to be a credible witness. Of the four parties present during this conversation, McCallum had the least stake in the outcome of this unfair labor practice charge. At the hearing, Respondent attempted to show that McCallum was easily intimidated and suggested that she was afraid to testify against Carpenter. However, at the time of the hearing, McCallum's employment status was precarious because of her disciplinary record. I conclude that McCallum would be more likely to be intimidated by her employer than by Carpenter or her fellow employees. Moreover, despite attempts by Respondent to question her memory during cross-examination, McCallum was consistent in her testimony on important events. McCallum and Carpenter's testimony was also

supported by that of Bowen, who testified that Carpenter reported the threat to him shortly after it occurred.

Afternoon Board Meeting on December 8

On November 29, Carpenter wrote to Reinecke asking to appear before the board at its December 8 meeting. He listed the following as topics he wished to discuss with the board members: (1) unprofessional conduct/abuse of authority by the general manager; (2) low morale; (3) unwholesome work environment; (4) intimidation of employees; (5) questionable work directives. A copy of this letter was sent to Tokar, and Tokar and Reinecke discussed it before the board meeting.

Respondent's board held its meeting in the afternoon of December 8. Carpenter attended this meeting. Davis and Tokar were also present. At some point in this meeting, Reinecke said to Davis, "They never go in there (meetings with management) without their union representative." Davis said that he and Reinecke had already been over this, and that employees were entitled to representation under Weingarten rights.

During the public comment portion of the meeting, Carpenter read a prepared statement that had been drafted by Local 1761's executive board.[3] The statement accused Tokar of yelling at an employee, being rude and unpleasant, being indifferent to the dispatchers' workload and the fact that they often did not get breaks, intimidating McCallum by disciplining her for being stuck in the snow and telling her she would probably be suspended after her November 24 incident/accident, giving McCallum an arguably illegal directive to require wheelchair riders in her bus to wear seatbelts, criticizing employees for sticking up for each other, being upset when her orders were questioned, and "undermining the union authority." Davis asked Carpenter whether he had tried to resolve these matters with Tokar, and Carpenter replied that he had. Davis said that management and the employees needed to work harder to resolve problems before bringing them to the board. Davis and Carpenter agreed that Carpenter and a union representative would meet with Tokar and try to work out these issues.

Tokar testified that she did not pay much attention to Carpenter's statement at the board meeting because he read it in "a boring voice." According to Tokar, she did not get a copy of the statement until February 2005. In March 2005, Tokar held two staff meetings during which she provided detailed rebuttals of the charges in this statement. Tokar said at one of these meetings that she felt that a group of employees were "gathering like wolves to attack her." At the hearing, Tokar identified these employees as the members of Local 1761's executive board.

Carpenter's Reassignment

On December 18, McCallum hit some landscaping rocks and damaged her bus. Shortly thereafter, she experienced a flare-up of a chronic health condition and left on an extended sick leave until February 18, 2005. On December 27, Tokar called Carpenter to the office and told him that his custodian's position was being eliminated due to budget cuts. Tokar told him that he

[3] Copies of this document were also sent to Tokar and the board members.

would be a full-time driver effective January 3, 2005. Tokar assigned Carpenter to McCallum's route.

Tokar also posted a notice stating that two part-time driver positions, a mechanic aide, and a bookkeeper position would be eliminated in addition to the custodian's job. The custodian position was the only one actually abolished. According to Tokar, the elimination of the positions was her idea, but when she told Respondent's board about it they were opposed.

Between her hire in 2000 and June 2004, McCallum received several warnings for minor accidents as well as two negative evaluations. When McCallum returned from sick leave in February 2005, Respondent notified her that it intended to discharge her because of the December 18 accident. Bowen and Respondent negotiated a last chance agreement pursuant to which McCallum was not to drive a bus for eighteen months. Respondent reinstated Carpenter's custodial position and gave it to McCallum.

Carpenter's Accident

Operations supervisor Martin trained Carpenter when he was hired as a part-time driver in 2001. On December 27, Tokar told Carpenter that because he had not been driving regularly, he would probably need three weeks of retraining. Carpenter agreed with her. On January 3 and January 5, 2005, Carpenter drove a bus route with Martin on board as trainer.

The exact route Respondent's drivers follow and the number and location of stops they make each day varies because Respondent's customers call to book their rides in advance. Drivers leave each day with manifests showing where they are to stop, when they are to be there, and the names of the customers at each stop. At each stop, drivers have to log in their actual pickup times and mileage. There was less time between stops on most routes in 2005 than there had been in 2002. On Carpenter's first day driving in January 2005, he complained to Martin that his route was "nuts."

On January 10, Carpenter drove his route for the third time. Martin rode with him but sat several rows behind the driver's seat. At 4:00 pm, Carpenter was running about twenty minutes behind schedule. Carpenter had forgotten to look at his manifest at his last stop to find his next destination. While Martin was talking to a passenger, Carpenter turned a corner and leaned over to look at the manifest sitting on the floor. He did not notice the next intersection, and ran a stop sign at a road where the posted speed limit was 55 mph. A pickup truck hit the bus broadside ahead of the driver's seat. The impact sent both vehicles off the road, and the truck hit a telephone pole and flipped over. Martin, Carpenter, the driver of the truck and all but one of the bus passengers were taken to the hospital. Martin, who was thrown through the back window of the bus, broke a shoulder blade, an arm, and a leg. Carpenter and the driver of the truck were also hospitalized. Both the truck and the bus were completely destroyed. The police report from the accident indicated that Carpenter would be issued a citation for disregarding a stop sign, although the ticket he actually received said "defective equipment."

When Tokar heard about the accident, she was visiting Reinecke, who was home recuperating from surgery. Tokar rushed to the scene. The police did not administer an alcohol

test to Carpenter or Martin at the scene, and Tokar failed to arrange for either of them to be tested for either drugs or alcohol. Under federal transportation regulations, Tokar should have ordered both men tested unless she had determined that Carpenter was not responsible for the accident. When Tokar spoke to Carpenter at the hospital after the accident, Carpenter asked if he would be fired. Tokar told him not to worry and that things would work out. They had a similar conversation on January 13 while Carpenter was at home recuperating from his injuries.

Post-Accident Events and Carpenter's Discharge

EATRAN had never had an accident of comparable severity. In late January 2005, Respondent received a letter from an attorney representing the pickup truck's driver that threatened a lawsuit. Respondent and its insurance company conducted an investigation of the accident, including obtaining police reports and pictures of the accident, and taking witness statements. Carpenter was interviewed twice in February 2005. Carpenter admitted running the stop sign, but argued that the intersection was difficult to see. He also said that if Martin had been sitting directly behind him, Martin could have pointed out the stop sign and told him where to go so that he would not have had to look at the manifest.

Respondent's personnel policy manual included a progressive discipline system for major and minor preventable accidents, but the policy manual warned that the system was intended only as a general guideline. The manual stated, "Respondent will immediately discharge any employee who knowingly damages or negligently and recklessly uses EATRAN property or vehicles."

Carpenter reported to work again on February 21, 2005 after being released by his doctor. Tokar gave him a letter stating that he was suspended without pay pending investigation of the accident. She told him to come to a meeting on February 23. At the meeting on February 23, Tokar handed Carpenter a letter stating that he was being terminated. The letter stated that Respondent considered his accident to be serious. It also stated that Respondent did not believe that there was a sufficient excuse for the accident since the weather was clear, there was sufficient daylight to see the stop sign, the route was not overly difficult, and he had completed it on the previous day without difficulty and had said he liked it. As Tokar escorted Carpenter to the door, she told him not to worry about the union presidency because it would be in good hands with McCallum.

Carpenter appealed his discharge to the EATRAN board. On March 9, 2005, Carpenter and Bowen appeared before the board. Reinecke was not present at this meeting. Bowen told the board that discharge was too severe a penalty given the difficulty of the route and the fact that Carpenter was still in training. Bowen argued that some of the responsibility lay with Martin because as a trainer he should have been sitting directly behind Carpenter and watching the road with him. Bowen asked Tokar if she had ever trained drivers and, if so, where she sat during training. Tokar admitted that she sat immediately behind the driver. Tokar gave the board a packet of information about the accident. She included information about the discharge of another driver in the spring of 2004. This employee was the only other driver Respondent had discharged after having only one accident. In that case, the driver failed to yield the right of way and was hit by another vehicle. There were no injuries to passengers from that accident, but the

driver had been warned more than once about failing to stop or making incomplete stops. The board voted to uphold Carpenter's discharge. Several board members testified that their decision was based on concern for the safety of the public and that Carpenter's union activities did not play any part in their decision. On March 21, 2005,Tokar sent Carpenter a letter notifying him that his appeal had been denied.

Tokar and McCallum's April 2005 Conversation

McCallum testified that in April 2005, while she was the custodian, she and Tokar had a conversation about Carpenter that began with a discussion of his work habits and how good a job he had done as custodian. According to McCallum, Tokar said that she felt Respondent had treated Carpenter very well before the union started and mentioned a wage increase that the maintenance employees had been given the year before. McCallum testified that Tokar then said that she hated Carpenter for getting in the union. According to McCallum, she told Tokar that she had started the union, and that she, rather than Carpenter, had called Bowen and talked to most of the employees. McCallum testified that Tokar expressed surprise. Tokar denied telling McCallum that she hated Carpenter. According to Tokar, she and McCallum had a conversation in May 2005 in which McCallum said that she was responsible for bringing in the union. Tokar testified that McCallum said in this same conversation that Carpenter should be fired because he ran a stop sign. She said that she remembered this because both statements surprised her. As discussed above with reference to the December 8 grievance meeting, I find McCallum to be a credible witness and I credit her version of this discussion.

Discussion and Conclusions of Law:

Reinecke's December 8 Threat

In defining the scope of conduct protected by PERA, the Commission recognizes that tempers may become heated and harsh words may be exchanged during collective bargaining and the handling of grievances. Rude, insulting or otherwise offensive conduct that would not be tolerated in another context is protected when it occurs in a grievance meeting. *Genesee Co and Genesee Co Sheriff,* 18 MPER 4 (2005); *Baldwin Cmty Schs,* 1986 MERC Lab Op 513, 524. See also *City of Detroit,* 18 MPER 27 (2005) (no exceptions); *Reese Pub Schs,* 1967 MERC Lab Op 489. Even a reference to an act of physical violence does not necessarily remove an employee from the Act's protection when that statement is part of activity otherwise protected by the Act. *Unionville-Sebewaing Area Schs,* 1981 MERC Lab Op 932, 935.

On the morning of December 8, 2004 the parties met to discuss McCallum's complaint about her disciplinary warning. Carpenter's attendance at this meeting as McCallum's union representative was clearly protected activity, even though this meeting was not formally designated as a "grievance" meeting. See *City of Detroit (Water & Sewerage Dep't),* 1988 MERC Lab Op 1039. I conclude that Carpenter's conduct during this meeting, even as described by Reinecke, was not sufficiently egregious to remove him from the protection of the Act.

As set out in the findings of fact above, I credit Carpenter and McCallum's testimony that on the morning of December 8, 2004, Reinecke threatened to have Carpenter removed from his

position as union president. The Commission has recognized that employer as well as employee tempers may flare during grievance discussions and in collective bargaining negotiations, and has held that supervisors have not interfered with employees' rights under Section 9 of PERA when they shouted or made derogatory comments, even racial slurs, during grievance discussions. *City of Riverview,* 2001 MERC Lab Op 354, 357 (no exceptions); *City of Portage,* 1989 MERC Lab Op 318, 328; *City of Saginaw (Police Dep't),* 1976 MERC Lab Op 996. However, an employer cannot threaten to retaliate against an employee for pursuing a grievance. *Saginaw Twp,* 18 MPER 30 (2005); *City of Lincoln Park,* 1983 MERC Lab Op 362, 364-365. In determining whether an employer's statements constitute an implied or express threat, the Commission looks at both the content and context of the remarks. *New Haven Cmty Schs,* 1990 MERC Lab Op 167, 179. The standard applied is whether a reasonable employee would interpret the statement as a threat. *New Buffalo Schs,* 2001 MERC Lab Op 47, 48; *City of Greenville,* 2001 MERC Lab Op 55. In this case, Reinecke did not explain how she intended to go about having Carpenter replaced as the president of the local union. I conclude that her statement could have reasonably been construed as a threat to discharge him because of his conduct at the December 8 meeting. Therefore, I find that Reinecke's threat constituted unlawful interference with Carpenter's exercise of his Section 9 rights in violation of Section 10(1)(a) of PERA.

Carpenter's Discharge

In order to establish a prima facie case of discrimination under Section 10(1)(c) of PERA, Charging Party must establish: (1) that the employee engaged in union or other protected concerted activity; (2) that the employer had knowledge of that activity; (3) union animus or hostility towards the employee's protected activity; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory actions. *City of St Clair Shores,* 17 MPER 76 (2004); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 706; *Univ of Michigan,* 1990 MERC Lab Op 272, 288. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence that the same action would have taken place even in the absence of the protected conduct, but the ultimate burden of showing unlawful motive remains with the Charging Party. *MESPA v Evart Pub Schs,* 125 Mich App 71, 74 (1982); *Residential Systems Co,* 1991 MERC Lab Op 394, 405.

Carpenter's activities on behalf of Charging Party during its organization campaign and after were clearly protected by PERA. As discussed above, I find that Carpenter's conduct during McCallum's December 8, 2004 grievance meeting was protected. I also find that Carpenter engaged in concerted activity protected by the Act when he read the employees' list of complaints about Tokar to Respondent's board on the afternoon of December 8. This statement was drafted by Local 1671's executive board and included complaints about Tokar's treatment of McCallum and other employees as well as Carpenter. Employees' concerted complaints about the conduct of their supervisors are activity protected by Section 9. *Isabella Co Sheriff,* 1978 MERC Lab Op 168, 175. While the December 8 complaints focused exclusively on Tokar, I see nothing in these complaints that would remove them from the protection of the Act.

There is no real dispute that Tokar knew that Carpenter had engaged in all the above activities. While Tokar testified that she paid little attention while Carpenter read the statement at

the board meeting on December 8, she had received a copy of Carpenter's November 29 letter and surely realized that he was complaining about her.

I also conclude that both Tokar and Reinecke had animus toward Carpenter because of his protected activities. As discussed above, Carpenter's protected concerted activities included making complaints about Tokar herself. Tokar admitted that she felt personally attacked by a group of employees who were union supporters, and Carpenter was the obvious leader of this group. Tokar also admitted that she believed that Carpenter stirred up "unrest" and "hard feelings between employees," and she connected this to the beginning of the union organizing campaign. McCallum credibly testified that Tokar continued to be angry with Carpenter for bringing in the union even in April 2005, after Carpenter had been discharged. As I noted previously, Reinecke was angry with Carpenter because of his behavior at the December 8, 2004 grievance meeting and was, of course, also aware of his role in the employees' complaints about Tokar.

However, the fact that an employer is hostile toward an employee's protected concerted activities does not establish even a prima facie case of unlawful discharge. Charging Party has the burden of showing a causal connection between this hostility and the employer's action. Charging Party asserts that Respondent eliminated Carpenter's custodial job, failed to give him adequate training after he returned to driving a bus, and assigned him to a difficult route so that Carpenter would fail as a bus driver and Respondent could discharge him. However, in January 2005, Carpenter had experience driving a bus. The driver job paid more than his custodial position, and Carpenter had originally applied for a position as a full-time driver. There is nothing in the record to suggest that Respondent might have expected Carpenter to fail as a driver, even with inadequate training. As for Carpenter's route assignment, the record suggests that he was assigned that route because McCallum had just gone on sick leave and the route was vacant. I am not persuaded that Respondent deliberately set Carpenter up to fail as a driver.

Charging Party also argues that but for Respondent's animus against his protected activities, Carpenter would have received some penalty short of discharge for his January 10 accident. Charging Party points out that Carpenter was in training when he had his accident while the only other driver discharged after having an accident had a history of complaints about his driving. It argues that Respondent's failure to punish trainer Martin for his part in Carpenter's accident shows Respondent's disparate treatment of a union activist. I disagree. On January 10, 2005, Carpenter made a serious driving mistake that caused a major accident. Respondent's progressive discipline policy for preventable accidents explicitly stated that Respondent had the discretion to impose more serious discipline than that set out in the policy and provided that drivers would be discharged for negligence. Between Carpenter's accident and his discharge, the driver of the other vehicle, who was not at fault, threatened to sue Respondent. Martin admitted that he could have prevented the accident had he been sitting directly behind Carpenter, but Carpenter had some experience as a driver and it was not evident that Carpenter needed Martin's close supervision. Carpenter's unfamiliarity with the route and his inexperience clearly played a role in the accident. However, although Martin was in the bus, Carpenter did not ask Martin for help instead of taking his eyes from the road to locate his next stop on the manifest. Although Tokar signed Carpenter's discharge letter, the decision to terminate him was ultimately a collective decision of Respondent's board. I conclude that Charging Party did not establish on the evidence as a whole that Respondent's animus toward Carpenter's protected

activities was even a motivating factor in its decision to discharge him. I conclude, therefore, that Carpenter's discharge did not violate Sections 10(1)(a) or (c) of PERA.

In summary, I find that Respondent board chairperson Kristy Reinecke unlawfully threatened Carpenter on December 8, 2004 because of his protected activities at a grievance meeting on that date and that this threat violated Section 10(1)(a) of PERA. I further conclude that Respondent did not discharge Carpenter because of his union or other protected activities on February 23, 2005. In accord with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Eaton County Transportation Authority, its officers and agents, are hereby ordered to:

1. Cease and desist from threatening to discharge employees because of their union or other activity protected by Section 9 of the Public Employment Relations Act or engaging in any other conduct that interferes with, restrains or coerces employees in the exercise of their rights under that section.

2. Post the attached notice to employees in conspicuous places on the Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND **THE EATON COUNTY TRANSPORTATION AUTHORITY** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE 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 threaten to discharge employees because of their union or other activity protected by Section 9 of PERA or engage in any other conduct that interferes with, restrains or coerces employees in the exercise of rights guaranteed by that section.

All of our employees are free to form, join or assist in labor organizations and to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection.

EATON COUNTY TRANSPORTATION AUTHORITY

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 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.