STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MIDLAND COUNTY ROAD COMMISSION,
Public Employer - Respondent,

Case No. C06 F-139

-and-

UNITED STEEL WORKERS LOCAL 12075,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Michael R. Kluck & Associates, by Thomas H. Derdarian, Esq., for Respondent

Kent Holsing, President, USW Local 12075, for Charging Party

DECISION AND ORDER

On May 22, 2008, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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Michael R. Kluck & Associates, by Thomas H. Derderian, for Respondent

Kent Holsing, President, USW Local 12075, 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 Lansing, Michigan on January 3, 2007 before David M. Peltz, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings & Rules, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript, exhibits and post-hearing briefs filed by the parties on or before April 30, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On June 12, 2006, United Steelworkers Local 12075 (the Union) filed this unfair labor practice charge alleging that Respondent Midland County Road Commission (the Employer) violated Section 10(1)(a) of PERA by suspending the unit president of Local 12075 for five days without pay as a result of conduct which occurred during a "heated" grievance meeting.

Findings of Fact:

Charging Party represents a bargaining unit consisting of all nonsupervisory hourly employees of the Midland County Road Commission. The Union and the Employer are parties to a collective bargaining agreement covering the period April 17, 2006 through April 19, 2010. The contract contains a grievance procedure culminating in final and binding arbitration. Employees of the road commission are also subject to a "Rules of

Conduct Policy" promulgated by the Employer's board of commissioners on March 2, 2000. Among the "major" offenses identified in the document are: engaging in or threatening an act of workplace violence; insubordination; and abusive or threatening treatment of members of the public, a supervisor, or another employee.

Brian Hockemeyer has worked for the Employer for 18 years as a loader/grader operator. He became the unit president in April of 2006. Hockemeyer also served as unit president from 1996-2002, and before that was a Union steward for several years. Sometime after 3:00 p.m. on May 30, 2006, Hockemeyer approached the manager of the road commission, Deepak Gupta, and requested an impromptu meeting. At the hearing in this matter, Hockemeyer testified that he informed Gupta that the purpose of the meeting was to discuss the status of grievances previously filed by the Union. Gupta denied that assertion and testified that he did not know why Hockemeyer had requested the meeting. However, Gupta admitted at hearing that he immediately summoned the superintendent of the road commission, James Young, to his office and that it was his practice to have Young in attendance whenever he meets with the Union.

Employees David Rossow and Kevin Mudd attended the meeting in Gupta's office at Hockemeyer's request. The meeting began with a discussion of grievances which had been initiated during Mudd's term as unit president. Two of the grievances involved the Union's claim that the road commission had violated the contract by failing to call Rossow in for work. While discussing the Rossow grievances, Hockemeyer and Young got into a disagreement over the Employer's call-in procedure. When Young told Hockemeyer that the Employer was merely following the contract, Hockemeyer pointed his finger at Young and repeatedly called him a liar. As a result of Hockemeyer's outburst, Gupta ended the meeting. Before leaving Gupta's office, Hockemeyer said to Young, "Judgment day is coming."

At the hearing, Hockemeyer denied making any threats of violence toward Young. He testified that his reference to "judgment day" was in response to what he believed were lies told by Young during the meeting and that he was merely attempting to convey his religious belief that lying was a sin. Although Hockemeyer admitted that he was upset with Young during the meeting, he testified that he never yelled, screamed or cursed at anyone. He also denied that he pounded his fist on the desk or that he got up from his seat at any time during the meeting. Hockemeyer's testimony with respect to the meeting was largely collaborated by Rossow and Mudd, the other Union witnesses in this matter.

Gupta testified that Hockemeyer appeared to be irritated and angry right from the start of the meeting. According to Gupta, "[Hockemeyer's] body language indicated [that] he wasn't coming in to have a meeting of the minds and discuss an issue civilly to get to a result, which would be . . . a win-win situation for both sides." Gupta described the outburst as a "tirade" and asserted that Hockemeyer screamed and yelled to such an extent that his face turned red. Gupta testified that at one point during the meeting, Hockemeyer got up from his seat and approached Young. Gupta claims that he was shocked by the unit president's conduct and that he could not understand why he was so angry. Recalling his state of mind at the time, Gupta testified, "Why is [Hockemeyer] so upset. It's a simple

grievance, and it's actually a minor grievance. Nobody's gotten fired." Gupta testified that Hockemeyer made the "judgment day" comment three times and that he interpreted the statement as a threat of physical violence.

Young testified that Hockemeyer was "virtually screaming" at him during the course of the meeting and that at one point the unit president got up from his chair, went around the desk, and came within three feet of where he was standing. According to Young, Hockemeyer leaned over, pounded his fist on the desk and said, "He's lying. He's a liar. I hate liars." Young descried Hockemeyer's conduct as "out of control." Like Gupta, Young also believed that Hockemeyer was making a threat when he stated, "Judgment day's coming for you." Young recalled being "very shocked" at Hockemeyer's behavior.

The following day, Respondent suspended Hockemeyer for five days without pay for "[a]busive, threatening and insubordinate conduct toward supervisors" which occurred during the May 30, 2006, meeting. Gupta testified that he made the decision to discipline Hockemeyer after consulting with Young. Hockemeyer was served with notice of the suspension on June 1, 2006. Charging Party filed a grievance challenging the suspension on June 8, 2006.

Discussion and Conclusions of Law:

Respondent asserts that dismissal of the charge is warranted in the instant case because the Union failed to establish a prima facie case of unlawful discrimination with respect to the five-day suspension of Brian Hockemeyer. According to the Employer, Charging Party did not meet its burden of establishing anti-union animus or hostility to employees' protected rights. Proof of the Employer's intent, however, is necessary only for purposes of a Section 10(1)(c) violation. The test of whether Section 10(1)(a) of PERA has been violated does not turn on the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions tend to interfere with the free exercise of protected employee rights. Conduct which is inherently destructive of employee rights granted by Section 9 of PERA may violate Section 10(1)(a) of PERA irrespective of the Employer's motivation or rules. See e.g. *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *City of Greenville*, 2001 MERC Lab Op 55; *City of Detroit (Water & Sewerage Dep't)*, 1988 MERC Lab Op 1039; *City of Detroit (Fire Dep't)*, 1982 MERC Lab Op 1220.

This is the same test utilized in cases arising under Section 8(a)(1) of the National Labor Relations Act (NLRA), a provision which is essentially identical to Section 10(1)(a) of PERA.[1] The Supreme Court has held that some conduct is "so inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. *NLRB v Great Dane Trailers, Inc*., 388 US 26 (1967). "That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" *Id.*,

[1] In construing PERA, both the Commission and the courts are guided by the construction placed on analogous provisions of the NLRA. *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540 (1988); *Rockwell v Crestwood Sch Dist*, 393 Mich 616 (1975).

quoting *NLRB v Erie Resistor Corp*, 373 US 221 (1963). Among the conduct which has been identified as being inherently destructive for purposes of the NLRA are actions by the employer which distinguish amongst its employees based upon their participation, or lack thereof, in protected concerted activity. *NLRB v Centra, Inc*., 954 F2d 366 (CA 6, 1993); *Portland Willamette Co v NLRB*, 534 F2d 1331 (CA 9, 1976). See also *Hahner, Foreman & Harness, Inc*, 343 NLRB 1413, 1425 fn 8 (2004) (proof of unlawful motivation not required when employee is disciplined for conduct that is part of the res gestae of protected concerted activities); *Carry Companies of Illinois v NLRB*, 30 F3d 922 (CA 7, 1994); *Mediplex of Danbury*, 314 NLRB 470; *Cooper-Jarrett*, 260 NLRB 1123 (1982); *American Freightways Co*, 124 NLRB 146 (1959).

In the instant case, the discipline of Brian Hockemeyer did not arise out of conduct which occurred as part of the ordinary work relationship between the road commission and its employees. Rather, the evidence overwhelmingly establishes that the five-day suspension was the result of alleged misconduct committed by Hockemeyer while he was serving as the authorized representative of Respondent's employees. Hockemeyer, the unit president, called the meeting for the purpose of determining the status of several grievances, and he brought one of the grievants with him to Gupta's office, along with the former unit president. The fact that Gupta asked Young to participate in the meeting indicates knowledge on the part of the Employer that the meeting would concern Union matters. It is also without question that certain grievances were in fact discussed during the course of the meeting. The incident for which Hockemeyer was suspended occurred while the parties were discussing the Rossow grievances, which related to the Employer's call-in procedure. Hockemeyer's reference to Young as a "liar" was in response to Young's explanation of that procedure. Gupta himself conceded that the outburst occurred while Hockemeyer was engaged in protected activity when he testified that he could not understand why Hockemeyer was so angry over "a simple grievance."

The Commission has long recognized that in the course of collective bargaining and grievance administration, tempers may become heated and harsh words may be exchanged. *City of Riverview*, 2001 MERC Lab Op 354. See also *Benzie County Central Sch*, 1984 MERC Lab Op 838; *Reese Pub Sch*, 1967 MERC Lab Op 489. While there are limits as to what conduct is to be tolerated during the course of protected activity, discipline for offensive behavior occurring in this context should be permitted in only the most extreme of cases. *City of Detroit (Water & Sewerage Dep't)*, 1988 MERC Lab Op 1039, 1046. Rude or insulting remarks, obstreperous comments, and other forms of rough language are protected under PERA when made in the course of protected concerted activity, even where the employee could be legitimately disciplined had such conduct occurred as part of the everyday working relationship between the employer and its employees. *Genessee County Sheriff's Dep't, 18 MPER 4 (2005); Baldwin Comm Sch*, 1986 MERC Lab Op 513.

An employee engaged in protected activity may lawfully be disciplined only when his or her behavior is so flagrant or extreme as to render that individual unfit for future service. *Isabella County Sheriff's Dept*, 1978 MERC Lab Op 689, 174 (no exceptions); *Unionville-Sebewaing Area Sch*, 1981 MERC Lab Op 932, 934. In determining whether an employee's concerted protected activity loses the protection of the

Act, the Commission considers whether the incident took place "on the shop floor" in the presence of other employees or the public, or in a grievance meeting or collective bargaining session. Spontaneous remarks may be protected, whereas a history of similar intimidation or insubordination by the employee militates against finding the conduct protected. *Baldwin Comm Sch*, supra at 520; *Univ of Mich*, 2000 MERC Lab Op 192, 195 (no exceptions). Also relevant is whether the employee was merely responding to heated remarks or insults by the employer. *Baldwin Comm Sch*.

In *Unionville-Sebewaing Area Sch, supra*, the Commission held that an employee's conduct at a meeting with the employer was not sufficiently flagrant as to remove him from the protection of PERA. During the course of a meeting called by the school district to discuss working conditions for custodians, the employee referred to the superintendent as a "liar" in the presence of other employees, and later rose from his seat and made some reference to hitting or punching the superintendent. Affirming the finding of its ALJ, the Commission held that the employee was engaged in protected activity at the time of the incident and that his conduct during the meeting did not render him unfit for further service or remove him from the protection of the Act. Accordingly, the Commission concluded that the employee's subsequent discharge for insubordination was unlawful.

In *Baldwin Comm Sch, supra*, the Commission concluded that the school district violated PERA by disciplining a teacher for conduct which occurred while that individual was engaged in protected activity. During a meeting with the principal and a union representative concerning grievance matters, the teacher became agitated, shouted, pounded his fist on the desk and waived a pencil in the principal's face. In addition, the teacher accused the principal of being a homosexual and of making homosexual advances. The Commission held that the teacher's conduct at the meeting, while offensive, was not so egregious as to remove it from the protection of the Act.

The NLRB has similarly afforded a great degree of latitude with respect to allegedly inappropriate or offensive conduct occurring during the course of protected concerted activities. The Board has repeatedly held that profane and foul language, or what is normally considered discourteous conduct while engaged in protected activity, does not ordinarily justify disciplining an employee who was acting in a representative capacity. *Max Factor & Co*, 239 NLRB 804, 818 (1978); *Postal Service*, 250 NLRB 4 (1980). An employee may be deprived of the protection of the NLRA for committing improprieties in the course of protected activity only in "flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service." *Bettcher Manufacturing Corp*, 76 NLRB 526, 527 (1948). See also *Crown Central Petroleum Corp v NLRB*, 430 F2d 724, 730 (CA 5, 1970). The Board looks to a number of factors in determining whether conduct which occurs during the course of protected activity is sufficiently flagrant as to remove an employee from the protection of the Act. These factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was, in any way, provoked by unfair labor practices. *Atlantic Steel Co*, 245 NLRB 814 (1979).

In *Lana Blackwell Trucking*, 342 NLRB 1059 (2004), the Board concluded that an

employee's allegedly "disrespectful, angry, and shocking outbursts" towards management were protected under the NLRA because they occurred in the context of a series of concerted activities during which the employee challenged various management decisions. In *Union Carbide Corp*, 331 NLRB 356 (2000), the Board held that an employee's conduct was not so "out of line" as to remove him from the protection of the Act where the employee called his supervisor a "fucking liar" while in the course of pursuing his contract rights with representatives of management. In *Syn-Tech Window Systems*, 294 NLRB 791 (1989), a union steward pointed his finger angrily at the employer's representative and threatened him with a "problem" if grievances were not remedied. The Board held that the steward's conduct was not sufficiently egregious to remove him from the protection of the NLRA.

I see no substantive difference between the conduct described in the above cases and the actions for which Hockemeyer was suspended. According to the testimony of the Employer's witnesses, Hockemeyer became agitated during the meeting and began shouting at Young, pounding his fist on the desk, repeatedly calling him a liar and warning him that "judgment day is coming." Gupta and Young further testified that Hockemeyer rose from his seat at one point and came close to where Young was standing. Even if true, I find that the unit president's conduct during the meeting remained protected. The incident occurred in Gupta's office, as opposed to the shop floor, and there is no evidence indicating that any other employee witnessed the outburst. Although Gupta believed that Hockemeyer was agitated from the very start of the meeting, the record overwhelmingly establishes that the outburst was triggered by the parties' discussion of the Rossow grievances. Hockemeyer did not commit an act of physical violence during the meeting, nor did he explicitly threaten either Gupta or Young. While a reference to "judgment day" could be interpreted as potentially threatening, it is just as likely that Hockemeyer was, as he asserted at hearing, referring to retribution in a religious sense. There is nothing to indicate that Hockemeyer had any history of violence or abusive conduct toward his supervisors or fellow employees. Under such circumstances, Hockemeyer's behavior cannot reasonably be deemed so flagrant as to remove him from the protection of the Act.

I conclude that Respondent violated PERA by suspending Hockemeyer for conduct which occurred in the course of protected union activity.[2] Accordingly, I recommend that the Commission issue the order set forth below.

[2] In so holding, I reject the baseless assertion of the Employer's counsel that it was improper for the undersigned to discuss potentially relevant case law with the representatives of both parties prior to the hearing in this matter. Not only is it proper for the presiding judge to engage in such a discussion, it is, in fact, the ALJ's obligation to educate the parties and, when necessary, their representatives as to the basic legal principals and matters of agency practice governing these proceedings. Rule 172(1) of the Commission's General Rules and Regulations, R 423.172(1), specifically authorizes the ALJ to hold pretrial conferences. A review, during the pretrial conference, of prior decisions by the Commission and the courts is often essential for clarification of the issues in dispute and, more importantly, the promotion of settlement and labor peace.

RECOMMENDED ORDER

Based upon the above findings of fact and conclusions of law, Respondent Midland County Road Commission, its officers, agents, and representatives are hereby ordered to:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights to organize together or form, join or assist in labor organization, to engage in lawful concerted activities for the purpose of collective bargaining or negotiations or other mutual aid or protection or to negotiate or bargain collectively with their public employer through representatives of their own free choice, as guaranteed in Section 9 of PERA.

2. Take the following affirmative action to remedy the unfair labor practices found herein and effectuate the policies of the Act:

   a. Expunge from Brian Hockemeyer's personnel file and from all other records, all copies of, or references to, the five-day suspension issued to him for conduct which occurred during the May 30, 2006, grievance meeting, and make him whole for any loss of pay which he may have suffered as a result of the suspension by paying to him a sum equal to that which he would have earned during the suspension, less interim earnings, together with interest at the statutory rate.

   b. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings & Rules

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, MIDLAND COUNTY ROAD COMMISSION, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights to organize together or form, join or assist in labor organization, to engage in lawful concerted activities for the purpose of collective bargaining or negotiations or other mutual aid or protection or to negotiate or bargain collectively with their public employer through representatives of their own free choice, as guaranteed in Section 9 of PERA.

WE WILL expunge from Brian Hockemeyer's personnel file and from all other records, all copies of, or references to, the five-day suspension issued to him for conduct which occurred during the May 30, 2006, grievance meeting, and make him whole for any loss of pay which he may have suffered as a result of the suspension by paying to him a sum equal to that which he would have earned during the suspension, less interim earnings, together with interest at the statutory rate.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

MIDLAND COUNTY ROAD COMMISSION

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 Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.