STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer - Respondent,

Case No. C07 H-200

-and-

STEPHEN CONN and HEATHER MILLER,
Individuals - Charging Parties.
_____/

APPEARANCES:

George T. Roumell, Jr., Esq., for Respondent; Floyd E. Allen & Associates, by Daryl Adams, Esq., for Respondent before the Administrative Law Judge

Scheff, Washington & Driver, P.C., by George B. Washington, Esq. and Shanta Driver, Esq., for Charging Parties

DECISION AND ORDER

On June 12, 2008, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent, Detroit Public Schools, violated Sections 10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) and (c), by unlawfully discriminating against Charging Parties, Stephen Conn and Heather Miller, for engaging in lawful union activity. The ALJ also held that Respondent violated PERA by interfering in the exercise of Charging Parties' protected rights by pursuing disciplinary charges against them, and placing them on unpaid leave status for their involvement in protected concerted activity. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

After requesting and receiving two extensions of time, Respondent filed its exceptions to the ALJ's Decision and Recommended Order, as well as a related motion, on August 13, 2008. Charging Parties filed their brief in support of the ALJ's Decision and Recommended Order on September 8, 2008, along with a motion for a retroactive extension of the filing deadline.

On August 12, 2009, the Commission received a letter from Respondent indicating that the dispute underlying the charge had been settled and requesting leave to withdraw its exceptions. Respondent's request is hereby approved and Respondent's exceptions are

dismissed. Inasmuch as there are no longer exceptions to the ALJ's Decision and Recommended Order said Order is adopted by the Commission.

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

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Respondent-Public Employer,

Case No. C07 H-200

-and-

STEPHEN CONN and HEATHER MILLER,
Individual Charging Parties.
_____/

APPEARANCES:

Floyd E. Allen & Associates, by Daryl Adams, for the Respondent

Scheff, Washington & Driver, P.C., by Shanta Driver, for the Charging Parties

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 multiple days beginning October 4, 2007 and ending December 12, 2007 before Doyle O'Connor, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules (SOAHR), on behalf of the Michigan Employment Relations Commission (MERC). Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before March 17**,** 2008, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge, Positions of the Parties, and Procedural History:

On August 30, 2007, Stephen Conn and Heather Miller (Charging Parties) filed the charge in this matter, which asserts that the Detroit Public Schools and its Board (Respondent or Employer or DPS) violated sections 10(1)(a), (b) and (c) of the Act by removing the two of them from their teaching duties on or about June 29, 2007, in whole or in part on account of their activities which were protected under PERA. By this conduct, Charging Parties assert that DPS has interfered in their exercise of protected rights, retaliated against them because of their exercise of such rights, and additionally that by interfering with Conn, the DPS has unlawfully interfered with the internal workings of the Detroit Federation of Teachers (DFT), of which he is an elected representative.

On October 17, 2007, the charge was amended to add the assertion that *"On or about October 12, 2007 and continuing to date, the Detroit Board of Education has charged Stephen Conn and Heather Miller with misconduct in whole or in part on account of protected activities."*

The DPS asserts that the Charging Parties were not removed from employment and charged with offenses for which their termination is sought because of protected concerted activity, but instead face charges solely as a result of their off duty misconduct occurring at a public demonstration held on May 1, 2007, which occurred, in part, on school premises, and which involved school students and personnel.

On the first scheduled day of hearing, the Respondent sought an adjournment which was initially denied, but was then granted, for two weeks. On the day before the second scheduled day of hearing, Respondent brought a motion to recuse the assigned ALJ, which was denied for reasons stated on the record. Combined with the October 16, 2007, motion to recuse, Respondent brought a motion to adjourn the matter without date pending the outcome of a parallel proceeding. Respondent, through its in-house police department, had arrested both Conn and Miller on May 1, 2007 and sought to delay review of the unfair labor practice charges, pending final completion of the criminal charges it had initiated. Charging Parties were cautioned by the undersigned that proceeding with the ULP hearing would mean testifying and being cross examined under oath as to events potentially relevant to the criminal charges, but they opted to proceed notwithstanding that it meant waiving any 5th Amendment entitlement to avoid being compelled to give potentially incriminating testimony relevant to the criminal proceeding. The DPS motion for indefinite adjournment was denied as unwarranted, where the rights which arguably would be protected by delaying a civil action in deference to a criminal prosecution are ordinarily those of the criminal defendant, not of their opponent in the civil matter.

This matter was heard over multiple days: October 4, 18, 19; November 2, 5, 26, 30; December 3, 5, 7, 11, and 12. A transcript of over 2,000 pages was created and sixty-seven trial exhibits were admitted, including CDs containing a partial but extensive video and audio record, created by the DPS police department, of a public demonstration against school closings held on May 1, 2007. The motion to recuse was renewed on December 5, 2007, on the same grounds as earlier raised and based as well on the ALJ's refusal to quash a subpoena compelling the testimony of the Board's Superintendent, and was denied for reasons stated on the record. Post hearing briefs were initially due to be filed on February 15, 2008, with that deadline repeatedly extended at the request of both parties. Post-hearing briefs were filed on March 17, 2008.

The motion to recuse was again renewed on April 2, 2008, after the filing of post-hearing briefs.[1] Immediately following the filing of the renewed motion to recuse, Respondent, on April

[1] The April 2, 2008, renewed motion to recuse is denied for the reasons given on the record on October 18 and December 5, 2007 regarding the earlier indistinguishable motions. The post-hearing motion to recuse is also denied as it does not meet the mandatory standard of Executive Order No. 2005-1, § II (E) that recusal may be sought "On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification. . .". The latest motion to disqualify was supported not by affidavit, but instead by newspaper clippings (as was the earlier motion), and I find that it was not brought in good faith but rather merely as the prelude to the renewed motion for indefinite stay. Under Executive Order No.2005-1, the denial of the several motions to recuse is not subject to review on exceptions to the Commission.

11, 2008, again sought an indefinite stay of these proceedings, this time based on the pendency of the thrice pursued motion to recuse. That request for a stay of proceedings was denied in an order of April 15, 2008.

The Continued or Renewed Pursuit of Disciplinary Charges Against Conn & Miller During the Administrative Hearing Process

On May 9, 2008, after the filing of post-hearing briefs, Charging Parties sought to amend their charge to add allegations arising from new adverse employment actions taken against them by the DPS, asserting that "*On or about May 5, 2008, the Detroit Board of Education, by its agents Joan Newberry and Charles Mitchell, has threatened to discharge Stephen Conn and Heather Miller in whole or in part on account of their protected, concerted activities*."

The Employer filed a brief, on May 16, 2008, opposing the motion to amend, but acknowledging the occurrence of the new adverse employment action. The pleadings by both parties attached the same series of correspondence, all of which are premised on the events of May 1, 2007, which underlay the present dispute.

In its motion Charging Party asserted that there are no disputes of fact related to the issuance of these letters and that, therefore, no further evidentiary proceedings were needed on the proposed amended charge. Respondent opposed the amendment but did not rebut the assertion that there are no disputes of fact related to the issuance of the letters, nor did it request further evidentiary hearings. Under Commission Rule R 423.166, the proposed post-hearing exhibits would not ordinarily be admissible as they would not "require a different result" than that reached on the existing record; however, based on both parties' submission of, reliance on, and affirmation of the authenticity of the letters, and for the purpose of having a full record for review, I am obliged to accept the four letters in evidence as Post-Hearing Exhibits A-D.[2]

The motion to amend the charge is, however, denied as unnecessary, where the previously amended charge asserted a continuing effort, of which this latest event is an undisputed and indistinguishable part, to charge Conn and Miller with misconduct arising out of protected activity. Any relief which could be claimed under the proposed amendment would be available under the present charge, and is regardless, subsumed in the relief proposed herein.

On May 8, 2008, Wayne County Circuit Court Judge Robert J. Colombo, Jr., issued a temporary restraining order, as expressly authorized under § 16(h) of PERA, maintaining the pre-existing status quo, and temporarily staying the proposed new adverse employment action. The Director of the Employment Relations Bureau has encouraged the expediting of the issuance

[2] The Post Hearing Exhibits are: A. Letter of May 5, 2008, notifying Conn that the Board would vote on May 8, 2008, on whether to proceed on charges in which his termination from employment was sought; B. Letter of May 5, 2008, on DPS Human Resources letterhead, but instead signed by DPS Director of Public Safety Charles Mitchell, specifying nine charges against Conn arising from the events of May 1, 2007, over which his termination was being sought; C. Letter of May 5, 2008, to Miller, seemingly identical to Conn's, advising her that the Board would on May 8, 2008 vote on her termination charges; D. Another letter to Miller of May 5, 2008, similar to Conn's, also signed by police chief Mitchell, specifying ten charges, arising from the events of May 1, 2007, over which her termination was being sought.

of a decision in this matter, in part in response to the pendency of the parallel Circuit Court action.

II. Findings of Fact:

A. Background

The Detroit Public School District is one of the largest in the nation, and apparently the largest in Michigan, with over 100,000 students. During the 2006-2007 school year DPS was faced with a multi-million dollar deficit and then-Interim Superintendent Lamont Satchel lead a plan to close some thirty-six DPS schools. These proposed closures amounted to more than a quarter of the DPS schools. As acknowledged by Respondent, the news of these massive school closings was not well received by a number of citizens and community groups within Detroit. Organized opposition was mounted by, among others, the Detroit Federation of Teachers, which represents a district wide unit of classroom personnel.

The opposition took various forms, including litigation, heightened and at times antagonistic attendance at public meetings of the school board, picketing, and central to this case, a public demonstration critical of the closings, largely comprised of DPS students, on May 1, 2007, a day which was a scheduled school day. At that May 1, 2007 demonstration, both Conn and Miller, who were off-duty at the time, were arrested by the DPS in-house police department. Those arrests and ensuing disciplinary action led to the filing of the charge in this matter.

Stephen Conn is a high school math teacher with DPS, and has been so employed for over twenty years. Heather Miller is married to Conn and has been similarly employed as a middle school teacher with DPS for a period of years. Both are union activists in the DFT and are additionally community activists.

The elected president of the DPS Board is Jimmy Womack. Marie Thornton, Annie Carter, and Jonathan Kinloch are among the members of the elected school board. In the midst of the dispute, in July 2007, Connie Calloway was selected as the new DPS superintendent.

Conn is well known in the community as an outspoken DPS union activist. He has held office in the DFT since 1991 at Cass Tech High school, one of the DPS's largest and premier schools, and has run, unsuccessfully, for the DFT presidency. In response to the proposed school closings, Conn organized Union pickets at school board meetings and personally spoke out at those meetings against the closings. Conn worked with Miller to organize teacher involvement in such events including by using an email and fax system to contact fellow teachers at the many DPS locations to encourage participation in various meetings and pickets. Conn significantly persuaded the DFT membership, over the contrary advice of their legal counsel and elected leadership, to join in a lawsuit, of which Conn was a named plaintiff, which unsuccessfully sought to legally block the closings. Conn has long been a major public advocate for DPS teachers both individually and in his capacity as an elected union representative.

Conn also played an active role in a community group titled Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN). The BAMN group has had a mixed relationship with the DPS hierarchy.

For apparently a number of years, some individual DPS schools found common ground with BAMN over the issue of affirmative action in education and maintained close relationships with BAMN, such that BAMN jointly sponsored what amounted to field trips with the schools, particularly with the Malcolm X Academy, a DPS middle school. Conn was the faculty advisor for a BAMN club at Cass Tech. The relationship between the individual DPS schools frayed, and ultimately ruptured, over BAMN's handling of the school closings issue, and over the fallout from the May 1st demonstration.

Like Conn, Miller is well known by the Employer, the media, and the public as a workplace and community advocate. Miller actively recruited other school employees to take part in meetings, pickets (including by leading a picket at the school board president's home), and the like, over the schools closing issue. Miller was of such sufficient notoriety or stature that local television station Channel 7 tapped her to represent teachers' views in an on-air debate with board president Womack. At that television appearance, Womack made pointed reference to Miller's association with Conn, their involvement in school related issues, and his personal antagonism toward them for that involvement. The local print media has followed this litigation involving Miller and Conn.

The Employer's actual awareness of Conn and Miller's decades of involvement in protected concerted activity was never seriously disputed. The pair were perennial activists in the DFT, and as found above, personally spoke at multiple school board meetings, arranged and participated in picket lines, and initiated and secured broader support for litigation against the school closings. Interim DPS superintendent Satchel acknowledged in testimony that he was personally aware of Conn's involvement. The individual DPS police officers, and even the police videographer, knew the pair on sight, were aware of their marital status, and considered them of sufficient interest to maintain pointed video surveillance of their movements throughout the demonstration on May 1st.

The evidence established that DPS board president Womack, as well as DPS board members Carter, Kinloch and Thornton, were all familiar with Conn and Miller and their roles as workplace advocates and opponents of certain DPS policies. Elected DPS school board member Marie Thornton testified that, in her presence, sometime shortly after the disputed events of May 1st, and apparently prior to any disciplinary charges being levied against the pair, DPS board president Jimmy Womack had asserted that Conn and Miller would not be returning to school in the fall, that he would personally see to it that:

> [B]ecause they were one household, two incomes, and he (Womack) was going to drag it out through the court system and he was going to starve them out . . . and that they were going to be on administrative leave without pay.

The DPS did not cross examine school board member Thornton and did not call Womack to rebut or explain his otherwise uncontested statements to her.

Charging Party Conn also testified that DPS board members Annie Carter and Jonathan Kinloch had each separately approached Conn and warned him directly, both before and after May 1st, that DPS board president Womack had told those board members individually that he

intended to get rid of Conn and Miller over their public opposition to the planned school closures. The Kinloch admissions to Conn regarding DPS board Womack's discriminatory intent and plans were particularly troubling, and were likewise unrefuted. Conn had made a number of speeches at DPS board meetings challenging the school closing plan. Kinloch called Conn, at a point prior to the May 1st events, and warned him that Womack wanted to stop Conn from speaking at DPS school board meetings and that Womack had gone to DPS in-house counsel to find out how he could accomplish silencing Conn. The in-house counsel had, as related by board member Kinloch, advised Womack that "You have a problem. There is the First Amendment to the US Constitution." Undeterred, Womack announced he would instead hire outside counsel to find a way to silence Conn.

Likewise, Miller testified that Womack had directly threatened her job status following a joint appearance on a televised debate, which occurred long before the events of May 1st. Womack, agitated, pointed at Miller and yelled, *"You're going down. You're going down . . . I used to work with you and Steve (Conn), but no more. You're going down."* Again in the absence of contradiction by Womack, and in the absence of any testamentary explanation of the reason for the imposition of the otherwise unprecedented unpaid leave, it must be found that Womack made and implemented or arranged for the decision that the leave would be unpaid, and that he did so for discriminatory reasons, pursuant to his stated plan to "starve out" Conn and Miller while he dragged this dispute slowly through the litigation process.

B. The Events of May 1st

A demonstration was planned for May 1, 2007, in part to protest the planned school closings. Interim superintendent Satchel and DPS police chief Mitchell were aware of the planned demonstration in advance and accordingly deployed officers and video tape technicians that morning. Conn not only sought and secured advance permission to be off work for the demonstrations, but also sought, but did not secure, approval to serve in a formal role as chaperone. Such demonstrations, and resulting walkouts by DPS students, were not uncommon that spring and appear to have occurred essentially without any prior dramatic incidents, arrests, or disciplining of teachers or other staff. The prior student walkouts, either spontaneous or as part of planned demonstrations, took place at Murray Wright High School, Northern High School, and Mackenzie High School. The prior Northern walkout included a march from the school, down Woodward, to the school headquarters at West Grand Boulevard, with the students accompanied en route by Northern High School staff.

Prior to the May 1st demonstration, at least some students at Malcolm X Academy middle school provided the school with parental permission slips to attend the march. Much was made during the hearing of the assertion that at least some, if not all, of the permission slips presented at Malcolm X Academy failed to fully disclose the eventual route taken by the demonstration. There was no testimony linking Conn or Miller to the drafting or submission of the Malcolm X permission slips. Regardless, the students were released from school by the Malcolm X staff to attend the rally against school closings, during a scheduled school day. It did not appear that permission slips were an issue, or were even utilized, at Cass Tech High where Conn was employed, or at Marquette Middle School where Miller worked. There were apparently no permission slips at issue at Northern High School where the demonstration terminated.

The May 1st march began uneventfully at Malcolm X middle school as planned. It proceeded to Cass Tech High School where marchers briefly, and apparently unsuccessfully, exhorted Cass students to join the march. The march itself was led that day by young adults, including Candice Young and Tristan Taylor, who were apparently full time organizers of the group BAMN. Some of those organizers had ongoing relationships with the staff and leadership of Malcolm X Academy. The march was accompanied throughout by a small contingent of DPS police officers and video technicians who recorded, with notable gaps, the events of the day. Much of the hearing was devoted to a detailed review of the resulting police tapes of the events of the day.

Conn and Miller attended the march along with their ten-year old daughter Edith. It appeared that few, if any, students from Cass High or Marquette Middle School attended. Conn and Miller denied having any particular leadership role in organizing for this particular march, in leading the march that day, or even in leading chants. I found their testimony credible and supported both by the testimony of the organizers of the march and by the police videos which consistently show the young organizers leading the march and interacting with police command officers. The videos also equally consistently show Conn and Miller as mere participants in the march. The Employer presented no evidence tending to show that Conn and Miller played any greater role that day than as mere participants in the march.

After the stop at Cass Tech, the march went a considerable distance north on Woodward Avenue headed for Northern High School. The police videotape shows an orderly march. During a portion of the march, City of Detroit police officers also followed along, but seemingly found no reason to interfere, other than to exhort the crowd to keep to the sidewalk at one point when the marchers veered into the street and around a flooded driveway. Although Conn and Miller would later be accused of endangering the students, including their own daughter, for allowing them to walk briefly in the street, the DPS police officers on the scene, including those videotaping the crowd walking in the street, made no effort to shepherd the children back onto the sidewalk.

Trouble began after the crowd made it to Northern High School. The school building is located on the eastern side of Woodward Avenue, facing west toward Woodward, and located approximately one hundred feet back from the street. Between the school building and the street is a large paved plaza or “apron” as it was referred to in testimony. Events occurring on the apron that day were recorded both by the police using hand held cameras and by permanent cameras mounted on the DPS police headquarters which is located directly across Woodward, facing the school. Some of the events are also audible on the recordings, but much was muffled or indistinguishable.

On the initial arrival of the march, some of the rowdier young participants ran up to the building, banged on the front doors and on some windows, and unsuccessfully exhorted the Northern students to walk out. The actions of some of the students appeared disruptive, but again unsuccessful. The Northern principal came out and largely successfully shooed the kids away from the front doors of the school. Some of the children ran around to the side of the school, apparently hoping for a more receptive audience. A handful of students did return to the front of

the building, several repeatedly. The scene was at times mildly chaotic, but clearly not threatening.

The DPS police moved into the apron area and, like the principal, shooed the children away from the building, initially largely successfully and without much use of force. BAMN organizers Young and Taylor can be seen seemingly successfully negotiating with the DPS police over events on the apron, and attempting to calm several young male students who became agitated over the police actions. Taylor in particular can be seen calming one young man who was placed in police custody and encouraging him to not resist the officers. Several such uneventful arrests occurred.

Throughout these events, Conn and Miller are visible on the periphery of the crowd, generally near the southwest corner of the scene, on the public sidewalk abutting Woodward. The police had indicated to the organizers that picketing in that sidewalk area would be tolerated. It was apparent that the police video technicians paid special attention to Conn and Miller, with considerable footage devoted to Conn's unremarkable meandering up and down the sidewalk. The technician claimed to barely know Conn, but admitted to being aware that Miller was married to him. The technicians denied having received any special instructions to monitor Conn, or to avoid filming his ultimate arrest. That denial was not plausible, given their actual devotion of energy to his whereabouts, and where police chief Mitchell approached the Northern High School principal Marvin Youmans earlier in the day to inform him of Conn and Miller's identities and to tell him they had taken personal business days to attend the planned rally.

During the picketing, a group of the younger middle school students had taken up position sitting on a low retaining wall to the south of the Northern High building, drinking water and eating chips. Although no general order was given by the DPS police to disperse, and although that group of students did not, in the video, appear engaged in any disruptive conduct, bedlam ensued when pepper spray, or some other irritating aerosol, was released at or near the group of children. Taylor and Young both saw the use of spray. The DPS police deny responsibility, and told superintendent Calloway that it was the City of Detroit police who were at fault, although they did not appear to be on the scene.[3] The young students began fleeing the apron area, shrieking that they had been "maced", with several having tears running down their faces.

[3] Each of the DPS officers who testified insisted, implausibly, that no one had been pepper sprayed by anyone for any reason that day; that they had heard no one claim to have been sprayed; and that they saw no one exhibiting symptoms of having been sprayed. They maintained the pretense even when confronted with photos of fellow DPS officers aiming pepper spray cans in the faces of students being held down by the testifying officer, and of students having their eyes flushed with bottled water. They continued to maintain the pretense even after the playing of video and audio images in the police station lock-up of a young student whimpering that his hands should be released so that he could wash his eyes out, and even after the remainder of the tape revealed a command officer entering the scene and disgustedly ordering the young man released so that he could wash out his eyes. Corporal Wallace flippantly insisted that the children were just crying because they wanted to "go home to their mommies". The testimony of the officers regarding the use of pepper spray was false and seemingly willfully so. It was obvious from the video, audio, and the testimony, that pepper spray, or a similar agent, had been used. Even school board member Thornton in her testimony presumed that pepper spray had in fact been used on the kids.

At that point an exchange was caught on tape between Corporal Wallace, the ranking DPS officer then on the scene, and Steve Conn whom he had motioned over from Conn's position at the sidewalk. Conn and Wallace can be partially overheard, with Wallace exhorting Conn to get the kids out of there and Conn complaining that he had no control over things, especially after the police had pepper sprayed them. Regardless of the brief exchange between Conn and Wallace, the children were by then running from the apron, toward the sidewalk, and to the march organizers' van to get their eyes washed out with bottles of water.

Conn returned to his earlier placement on the public sidewalk, and despite verbally rejecting Wallace's request that he get the kids out of there, Conn attempted, with limited success, to draw the students into an organized picket line on the sidewalk area which had been approved by the police. Miller meanwhile was a little further to the north of Conn, well off the apron area, and on the public sidewalk with their ten-year old.

The police intervention escalated rapidly, even though the kids were streaming toward the street and away from the school. Near the organizers' van, parked at the Woodward curb, students were having their eyes washed out with bottled water. One of the students tossed an open water bottle through the air, visibly splashing march participants and police officers alike. Corporal Wallace responded by immediately summoning his officers and loudly commanding, "You see Steve Conn, you lock him up." The video reveals no conduct by Conn which would have warranted that order. Needing no further direction or description, the officers fanned out and Conn was arrested by officer Young.[4] There is no video of the actual arrest of Conn, despite the near constant earlier surveillance, as the technician averted his camera, in an implausibly asserted coincidence.

Wallace's own testimony established that he believed he could and should arrest Conn, not for anything Conn did, but because Conn had failed to disperse the crowd quickly enough and Wallace was perturbed by the water bottle incident, which did not directly involve Conn. Wallace acknowledged that he had seen nothing that day to indicate that Conn was in any way in charge of, or playing a leadership role in, the demonstration. Wallace based his conclusion that Conn should have been able to control the crowd on Wallace's earlier observation of the leadership role Conn had played in the past at school board meetings and union events.

Seconds after the arrest of Conn, DPS police officer Hendon, who was admittedly acquainted with both Conn and Miller, is seen on the video approaching Corporal Wallace, with whom he briefly conferred. Hendon then used a hand signal to direct his partner, and within thirty seconds the two of them converged on Miller, seized her, pried her ten-year old's hand out of hers, placed Miller in handcuffs, and shoved her out into traffic on Woodward Avenue. It was apparent that there was no reason, based on anything Miller did that day, for her to be arrested. The only rational conclusion is that she was either arrested merely because her husband had annoyed the police, or the arrest was by pre-arrangement.

[4] The testimony of Young is notable only in that he implausibly and repeatedly denied remembering anything that might possibly contradict anything that might have been said by any other DPS witness while he was sequestered. His performance on the stand was notably dogged, if unpersuasive. It was apparent that, despite his claims to the contrary, he had no reason for arresting Conn, other than the order barked out seconds earlier by corporal Wallace.

Hendon asserted very confidently that he had three times approached Miller, near the school and well into the apron area, and each time warned her to leave the scene, with the final two times cautioning her that she would be arrested if she failed to comply. His testimony as to the supposed events attendant to the arrest came across instead as rehearsed text book testimony in support of an arrest for failing to disperse when ordered to do so by a police officer. Hendon was directly contradicted by the police videotapes, which established that Miller was throughout on the public sidewalk, and that Hendon and his partner rushed over and arrested Miller, without a prior word, upon the direction of Wallace. Hendon astonishingly stuck to his story even after confronted on the witness stand by the videotape. He insisted that he had given the three separate warnings to Miller before arresting her. He asserted, laughably, that it might have occurred hurriedly during the approximately two seconds that the videotape lost sight of Hendon. I found none of Hendon's testimony credible; rather, that he was willfully untruthful throughout.

Part of the DPS charge against Miller is that she exhorted students to resist arrest, and to assist her in resisting Hendon's arrest of her. Based on her testimony, which I found both credible and consistent with the video tapes, I credit Miller's assertion that her only concern on being arrested was the fate of her ten-year old, that she urgently raised that question with Hendon, whose response was to suggest he could arrest the child as well. Hendon then abandoned the child on the street, standing in Woodward Avenue, with both of her parents under arrest.[5] Implausibly in this context, part of the DPS charge against Conn and Miller is that they endangered students, over whom they had no actual authority, by "allowing" them to briefly march as a group into Woodward to get around a puddle.[6]

The entire demonstration at Northern was over in approximately thirty minutes.

C. The Subsequent Disciplinary Actions

When Conn returned to Cass Tech following his May 1st arrest, his principal Lenora Ashford advised him via a counseling memo that the District was removing BAMN as an approved group at Cass. Similarly, the young adult organizers for BAMN at Malcolm X Academy were advised by the principal that BAMN had been banned as a result of the events of May 1st. No immediate action was taken regarding Miller who, like Conn, immediately returned to her teaching duties.

The six remaining weeks of the school year were largely uneventful. Neither Miller nor Conn were questioned or advised that they were facing discipline. The normal procedure for

[5] It is not necessary to the ultimate holding in this case, other than to the extent it further underscores Hendon's lack of credibility, but I found untruthful his assertion that a student attempted to interfere in the Miller arrest and struck Hendon in the chest. It appears from the video that the student saw Miller, a slightly built woman, suddenly pitch forward, head pointed toward the ground, and the student reached out to catch her. Hendon then flailed wildly at the student's head and chest. That student appeared to be the one in the later video taken in the police lock-up suffering from the effects of pepper spray.

[6] In addition to the troubling police abandonment of the Miller child, the video shows multiple instances of DPS police officers thrusting struggling children, some in handcuffs and others barely under control, into traffic on Woodward, in advance of the officer as they transported the students to the lock-up on the far side of Woodward. Even one of the police video technicians was so concerned about the hazards of this effort that he stepped out into traffic to try to divert the cars whizzing by.

DPS when teachers are facing possible discipline is that they have an investigative meeting with management, with union representation, and the teacher is able to respond to or confront witnesses against them. No such meetings were held. Interim superintendent Satchel received an immediate report from police chief Mitchell and issued a press release criticizing the march, but took no immediate action against Conn or Miller.

Conn and Miller continued in their efforts to block the planned school closings. On June 5th Conn was named as a plaintiff in a lawsuit seeking injunctive relief, and Conn and Miller persuaded their fellow DFT members to vote, over the opposition of the elected Union leadership and contrary to the advice of Union counsel, to have the DFT join as a party. The filing of that lawsuit is the only thing of relevance to happen between May 1st and the June 29th letters by Satchel placing Conn and Miller on administrative leave, effective after the close of the schools for the summer.

Satchel issued the initial decision on or about June 29, 2007, on his last day in office, to place Conn and Miller on administrative leave pending a supposed investigation of potential charges against them related to the May 1st events. The testimony established that teachers are routinely placed on paid leave when an investigation is being conducted. Satchel testified, without contradiction, that he had made no determination that the leave would be unpaid. Union president Cantrell testified that no other DPS tenured teacher had ever been placed on an unpaid leave of absence pending an investigation or discipline. It later became apparent after Satchel's departure that, for never explained reasons, the administrative leave was treated as unpaid. The DPS failed to produce any witness to explain why, how, when, or by whom the decision was made to place both Conn and Miller on the suspect and unprecedented unpaid leave.

Satchel asserted that his delay, until June 29th, in placing Conn and Miller on administrative leave, supposedly pending further investigation, was simply to avoid disrupting their students' final two months of school. Notably, suspending Conn and Miller was virtually Satchel's final act as interim superintendent. No substantial explanation was offered why, if the charged conduct was so egregious that the extraordinary step of removal was appropriate, it nonetheless made sense for them to teach for two more months after May 1st. No further action was taken during the summer months regarding Conn and Miller, and no investigation was conducted.

The newly appointed DPS superintendent Connie Calloway testified that she took office in July 2007, after Satchel's departure, that she was not aware of Conn and Miller's advocacy activities, that she played no role in the decision to place them on leave, in the decision that it would be an unpaid leave, or in the decision later announced by Lauri Washington to issue charges. Calloway insisted that she had not sought any report regarding the DPS labor relations or police handling of Conn and Miller, although she did bring to light DPS police chief Mitchell's August report to her, which indicated it had been prepared at her request. That report had not been disclosed during Mitchell's sworn testimony earlier in the hearing. In fact, he denied ever being asked for a report by superintendent Calloway. The disclosure was belated despite all such records having been earlier subpoenaed and despite Mitchell having returned to his office following his testimony in order to search for any potentially relevant records. The report was prompted by Calloway's inquiry into what role the DPS police had played in the

arrest and pepper-spraying of DPS middle schools. Calloway was affirmatively misled by school board members or the DPS police department into believing that the questioned conduct had been carried out by City of Detroit officers, who were in fact not involved.

In August, DFT president Cantrell urgently attempted to contact new superintendent Calloway, to impress on her the unprecedented and improper nature of the treatment of Conn and Miller. Although Calloway insisted in her testimony that she treated any letter from the DFT president as significant, and that she always responded to them, she neither responded regarding Conn and Miller, nor did she make any effort to ascertain the status of the suspensions. On August 30, 2007, a charge was filed asserting that the removal of Conn and Miller from teaching duties was in unlawful retaliation for their concerted activity. The filing of the charge did not cause any direct response by the DPS.

With the first payroll in September, it became obvious that Conn and Miller were not being paid, which had not been apparent during the normal summer hiatus. No formal notice of any sort was sent to Conn, Miller, or their Union to advise them of that unprecedented change in status. Satchel denied being the one who decided that the suspension would be unpaid. Satchel himself admitted that his treatment of Conn and Miller was unprecedented as they were the only teachers ever directly disciplined by a DPS superintendent. The DPS offered no explanation of who made the decision or why the suspensions were unpaid. The testimony by DFT president Cantrell that the unpaid suspensions were unprecedented went unrefuted. Throughout the hearing process, the DPS declined to reveal who cut Conn and Miller out of the payroll system. There exists no paper trail authorizing their removal from the payroll.

Cass Tech principal Ashford testified that at first she put Conn down as absent without leave at the beginning of the school year. Not only had she not been consulted about his removal from teaching; she had not even been informed. She considered him a good teacher and would welcome him back.

On October 4, 2007, the first day of hearing in this matter, the DPS, unable to explain their unprecedented treatment of the pair, restored Conn and Miller to pay status. A week later, on October 12, 2007, DPS executive director of employee relations Lauri Washington issued letters charging Conn and Miller with offenses related to the May 1st demonstration. No evidence was adduced as to her knowledge of Conn and Miller's conduct on May 1st, their prior workplace advocacy, or as to her actual decision making role regarding the pursuit of those charges. There had been no additional investigation conducted since May 1st, and no explanation was ever offered in the long delay in the issuance of formal charges. Simultaneously, the DPS posted a notice at Cass Tech placing Conn on "leave of absence" through June of 2008, and filling his position with a long-term substitute.

Finally, on May 5, 2008, a little over a year after the events at Northern High School, Conn and Miller were sent letters advising them that the DPS board would vote, with three days notice via mail, on May 8, 2008, on the termination of their employment. That final action was stayed by order of the Wayne County Circuit Court pursuant to §16(h) of PERA.

III. Discussion and Conclusions of Law:

A. The violation of Section 10(c)

Section 10(1)(c) of the Act prohibits an employer from discriminating against an employee for engaging in lawful union activity. This portion of the statute is generally analyzed as being violated where specific actions are taken with discriminatory or retaliatory intent.

The ordinary elements of a prima facie case of unlawful discrimination under Section 10(c) of PERA where an adverse employment action, such as discipline, has been taken or threatened, are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employees' protected activities; and (4) either direct evidence or suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Warren Con Schs*, 18 MPER 63 (2005); *City of St Clair Shores*, 17 MPER (2004); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. If a prima facie case of discrimination is shown, the burden shifts to the employer to demonstrate with credible evidence that the adverse employment action would have been imposed, even in the absence of the protected conduct. The ultimate burden of proof remains with the charging party. *UAW v Sterling Heights*, 176 Mich App 123 (1989).

The Charging Parties readily met the first two prongs of the test: they were both well known Union activists and additionally were active in a community group which organized among school employees, as well as others, specifically to seek to alter the DPS school closing plan. The entire DPS hierarchy, from the board president and interim superintendent down to the police video technician, were well aware both of the leadership role on workplace issues played by both Conn and Miller in the past, and of their planned and actual participation in the May 1st rally. The events of May 1st in particular, a demonstration against school closings, constitutes protected concerted activity. Such efforts to change an important decision by a public body having an effect on workplace conditions constitute in general protected concerted activity if engaged in jointly by multiple employees regardless of formal union sponsorship. Here, Conn and Miller participated in the rally both as employees and union activists and solicited the support and participation of other employees in seeking to change what they perceived to be an adverse decision by their employer. Such conduct is unquestionably protected by the Act.

Similarly, the conduct of Conn and Miller in June of 2007 in filing suit to seek injunctive relief to block the school closings was protected activity engaged in by multiple employees for mutual benefit. The successful effort of Conn and Miler to persuade their fellow DFT members, over the advice of the Union leadership and its counsel, to join in that lawsuit was also protected concerted activity.[7]

Proof of the third prong, employer hostility toward the employees' protected activity, was well established by direct, and unrefuted, evidence. Board president Womack threatened Miller to her face, and through her, threatened Conn. The school board president's threats in the presence of other school board members were so frequent and disturbing that several elected school board members contacted Conn to literally warn him to "watch his back". All of the

[7] The advice of the Union counsel was apparently well given, as that lawsuit was unsuccessful.

threats arose from protected concerted activity, and of particular significance, the Womack threats began before the events of May 1st and arose most directly in response to Conn's speaking out at DPS board meetings.

The Commission has held that an adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if the individual may be favorable disposed to the party. *Ionia County and 64A Dist Crt,*1999 MERC Lab Op 523, 526; *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab OP 530, 541. Here such adverse inferences are appropriate as to several central factual questions on which the Employer failed to produce critical witnesses. An inference is appropriate that any witness with knowledge of that decision-making process would have, if testifying truthfully, given testimony adverse to the DPS claims, and that the unpaid and therefore unprecedented nature of the suspension occurred pursuant to Womack's stated goal of "starving out' Conn and Miller.

In the absence of testimony by Womack, an inference must be drawn that Thornton testified accurately regarding Womack's threats, that the similar threats recounted by Carter and Kinloch to Conn were in fact made by Womack, that Womack personally sought to retaliate against Conn and Miller because of their various concerted activities and not for any legitimate reason, and that he, in fact, misused his elected position to carry out his unlawful threats.

The scheme revealed by Kinloch is consistent with the unexplained, and indefensible, departure from normal procedures in disciplining Conn and Miller. It is also consistent with the testimony by superintendent Calloway that it was made clear to her that neither she nor the DPS general counsel's office had any control over this dispute, and that instead, the DPS board's separate outside counsel controlled all aspects of the Conn-Miller dispute. It is consistent with Womack's stated threat to "starve them out". It is consistent with the repeated efforts to secure an indefinite stay of these proceedings. The timing of the original announcement of the scheme to use outside counsel to silence Conn supports a finding that the much later May 1st events were an excuse, rather than the reason, for the imposition of discipline.

The fourth prong of the test, that protected activity was a motivating cause of the adverse employment action, is likewise satisfied by Womack's own words. He intended to silence Conn at school board meetings despite the fact that the DPS general counsel told him there was no lawful way to do it; Womack asserted that he would instead bring in outside counsel so that he would "starve them out".

Furthermore, it is notable that Calloway testified, without contradiction, that despite her role as titular CEO of the DPS, she had been advised, and accepted, that certain cases, including the present dispute, were "school board cases" over which she had no control or authority, and which were to be handled by outside counsel, not by the DPS general counsel. Calloway was insistent that unnamed members of the board, or the board president, had forcefully made clear to her that the case against Conn and Miller was none of her business. PERA prohibits public employers, and their various agents, from unlawfully retaliating against employees for engaging in protected activity. The degree of institutional indifference to the arrest and removal from the work place of two teachers under circumstances which were, at a minimum, suspect is both

troubling and unacceptable. It is undisputed that the initial decision to suspend Conn and Miller was made before Calloway came on board, but the president of the DFT took the unusual step of filing a grievance directly at the superintendent level with Calloway regarding this dispute. Despite that effort to bring the new leadership up to speed on an ugly dispute, the professed hands-off approach continued. It is apparent and unfortunate that Calloway accepted the limited role for herself demanded by Womack. The professed lack of authority by the superintendent, as well as the exhibited indifference, supports rather than refutes the finding that it was Womack's stated animus that led to all of the adverse actions against Conn and Miller. Only the board president's strong interest in ridding himself of Conn and Miller rationally explains Calloway's exceptional deference.

Alternatively, and even discounting the ample direct evidence of unlawful intent present here, inferences of animus and discriminatory motive may be drawn from circumstantial evidence, including the pretextual nature of the reasons offered for the alleged discriminatory actions. *Volair Contractors, Inc*, 341 NLRB 673 (2004); *Tubular Corp of America*, 337 NLRB 99 (2001); *Washington Nursing Home, Inc*, 321 NLRB 366, 375 (1966). The unprecedented unpaid leave of absence, for which no DPS manager was willing to take credit as having ordered and for which absolutely no explanation was offered, is so far out of the norm for this Employer that the imposition of that unpaid leave, standing alone, persuasively supports a conclusion that the disciplinary leave supposedly imposed because of misconduct on May 1st was instead imposed as a pretext to punish Conn and Miller for their advocacy efforts on school issues. The only other possible explanation is that, as to Conn and Miller, the entire DPS hierarchy suddenly forgot the normal rules and acted irrationally. Likewise, in the absence of a substantial and persuasive explanation, the long delay in bringing the initial disciplinary charges, from the beginning of May until the end of June, supports a finding that the final, and temporally proximate, trigger for the discipline was the initiation by Conn of the early June lawsuit seeking an injunction to block the school closings.

The Charging Parties met the fourth prong of the test and established a prima facie claim that the adverse employment actions which followed May 1st were in retaliation for the prior lawful concerted activity and for their lawful concerted activity as participants in the May 1st rally. The burden at that point shifted to the Employer to establish that the disciplinary actions were done for legitimate reasons and would have occurred in the absence of animus arising from the lawful concerted activity by Conn and Miller. The Employer's stated rationale, that Conn and Miller engaged in misconduct on May 1st, was implausible and was contradicted by the most compelling evidence--the DPS police videotapes of the event.

The exhaustive courtroom review of the video images of the events of May1st established no wrongdoing on the part of Conn or Miller. Miller is consistently located on the public sidewalk, where the police had indicated picketing would be tolerated, shepherding her daughter. Conn is frequently at their side or otherwise on the periphery of the crowd. Neither Conn nor Miller is seen exhibiting any leadership role in the demonstration, until very near the end when Conn, unsuccessfully, attempts to gather the children on the sidewalk to organize a more disciplined picket. There was no evidence that Conn or Miller brought students to the rally from their respective schools. There was no basis for the DPS to assert that Conn or Miller had any greater obligation, or ability, to control the rally than did any of the other adults on the scene.

Based on the entire record, I find the Employer's rationale pretextual. Conn and Miller were not removed from the workplace because of their conduct on May 1st, but rather that the events of May 1st were seized upon as an opportunity to be rid of disfavored workplace activists, or as put in the uncontested words of Board President Womack, to "starve them out". In fact, the arrests of Conn and Miller appear to have been ordered pursuant to a desire to facilitate their removal from the workplace, rather than by any legitimate law enforcement concern based on their individual conduct on the scene that day.

The predictable, and therefore presumably intended, impact of the extraordinary retaliation by this Employer is not merely on Conn and Miller, nor perhaps primarily upon them. Conn and Miller were seemingly not deterred by their May 1st arrests from continuing to attempt to lead a campaign against the planned school closures. The major impact is the chilling effect on less stalwart individuals who are effectively deterred from engaging in lawful protected activity by the prospect of facing a similar fate. Accordingly, I recommend that the Commission issue a compensatory and prophylactic order, providing direct relief to Charging Parties and broad notice to other potentially effected employees, as set forth below.

B. The alleged violation of Sections 10(a) & (b)

Section 10(1)(a) of the Act prohibits an employer from interfering with public employees in the exercise of rights protected under section 9 of the Act. That section expressly recognizes and provides statutory protection of the right of public employees to organize labor unions or to otherwise engage in "concerted activities . . . for the purpose of . . . mutual aid and protection." Thus activities such as petitioning, leafleting, or picketing public bodies or events are given the same statutorily protected status as more formal labor union activity, such as grievance filing or processing.

Section 10(1)(b) of the Act prohibits an employer from interfering with the formation or administration of a labor union. This prohibition helps to protect the independence of labor organizations, thereby protecting the right of employees to act collectively to select their own workplace representative without employer interference. This section of the Act is typical enforced regarding alleged efforts by employers to improperly dominate or interfere in the internal workings of a labor union.

The proofs, as discussed in full above, establish that the Employer engaged in unlawful and intentionally retaliatory adverse employment actions against both Conn and Miller based on their engaging in protected concerted activity. Such proof of the Employer's subjective intent, however, is necessary only for purposes of the Section 10(1)(c) violation discussed above, and is not necessary to establish a violation under Charging Party's alternative theory. The test of whether Section 10(1)(a) of PERA has been violated, by interfering in the exercise of rights by individuals, 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. 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. A claimed violation of Section 10(1)(b) by interfering in the administration of a labor organization must be subjected to the same analysis, that is, conduct which inherently interferes in the internal workings of a labor organization may violate Section 10(1)(b) irrespective of the Employer motivation.

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 in prohibiting conduct which interferes in the exercise of rights under the Act.[8] 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.*, 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).

The discipline of Conn and Miller did not arise out of conduct which occurred as part of the ordinary work relationship between the school district and its employees. Rather, the suspension and now threatened terminations were premised on the claim that on May 1st they both engaged in misconduct committed while they were engaged in a public demonstration called, in significant part, to protest the planned closure of schools and the anticipated resulting layoffs of teachers.[9] While not all picket line activities are protected, engaging in peaceful picketing for the purpose of seeking a change in employer policy or practices is protected activity under the Act.

The Commission has long recognized that in the course of labor disputes, tempers may become heated, and harsh words may be exchanged, and of course heated exchanges on picket lines are far from unheard of. *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

[8] 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).

[9] While for purposes of analyzing the 10 (1)(c) violation I found that the Employer's claimed basis for the discipline was pretextual, it is sufficient and appropriate for the present analysis under 10(1)(a) & (b) to accept as true the Employer's assertion that its motivation was solely the events of May 1, 2007.

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. *Genesee 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 the physical context and 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, insults, or provocative conduct 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. 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.

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.

There is no substantive difference between the sort of conduct described in the above cases and the actions of May 1st on which DPS asserts reliance in suspending Conn and Miller and targeting them for removal. Both Conn and Miller were on their own time, although Conn had requested and been denied paid time in exchange for which he had offered to serve as a more official chaperone or trip leader for those students who were to participate in the planned demonstration. Conn and Miller played a role as unexceptional participants in, rather than leaders of, that public demonstration and picket line. Although Conn and Miller witnessed the use of physical force against others in the demonstration, and physical force was ultimately used against them and their child, they did not respond in kind, nor did they encourage or exhort others to use such force. While mild profanity was used[10] in one of the chants during the demonstration, it was not established that either Conn or Miller lead or engaged in that particular chant, and such a level of profanity in that context would regardless not have taken their conduct outside the realm of protected activity. Some student members of the demonstration exhorted students at Northern High School in particular to walk out of school on a school day to join the demonstration. Again, the evidence established that the Northern students did not walkout and the evidence did not establish that Conn or Miller led or participated in that chant, and again, regardless, the exhortation to walkout, while inappropriate[11], was hardly outside the pale where the DPS had tolerated the earlier walkout of Northern High School students protesting the planned closure of their school, despite that walkout having been seemingly facilitated by, and clearly tolerated by, the staff of that school.

As for Conn, the assertion is made that the DPS actions against him are warranted as he inappropriately failed on May 1st at Northern High School to control or disperse the crowd upon request made by the DPS police officers. No basis was offered to establish any duty on Conn's part to control the crowd that day. Moreover, the evidence, including the police videotapes of the event, establishes that Conn promptly sought, ineffectually as it turned out, to encourage the students to leave the immediate area of the school and to picket lawfully on the public sidewalk, which the police had earlier indicated was acceptable. In that regard, Conn's efforts were no more culpable than the similarly ineffective efforts that day by the Northern High School principal and the DPS

[10] Chants of "Jim Crow, Hell No" were shouted, in apparent reference to the allegedly second class education which would arguably result from the protested school closings and teacher layoffs.

[11] For a teacher to call on students to walk out during a school day certainly could warrant an investigation and possible discipline depending on the circumstances.

police officers themselves. Conn's arrest for failing to succeed in his effort to move the crowd, and while he was seemingly lawfully picketing on a public sidewalk, cannot justify targeting him for any adverse employment action.[12]

As for Miller, the DPS likewise faults Miller for allegedly failing to control the crowd, for refusing officers' request for assistance and that she leave, for encouraging students to resist officers' commands, for interfering in ongoing arrests, and resisting her own arrest. The latter charges, if factually established, could warrant severe discipline.[13] The evidence, including the DPS police videos, establish that Miller was not asked to assist the officers and therefore could not have refused any such request, did not encourage students to resist the officers, and did not interfere in ongoing arrests. Rather, the evidence, including in particular the DPS police video tapes, establish that Miller was peacefully picketing on a public sidewalk while holding the hand of her ten year daughter, in an area which the DPS police had earlier indicated was appropriate, when she was arrested for no apparent lawful purpose. The arrest was accomplished with considerable force, by two officers both of whom were significantly larger than Miller. Rather than offer resistance to the arrest, Miller merely pled that consideration be given to the fate of her ten-year old, who was instead left by the officers in a traffic lane on Woodward Avenue.

As found above, the actual conduct of Conn and Miller at that May 1st public demonstration was not so extraordinary as to take their actions, in protesting the planned school closures, outside the realm of protected conduct. I conclude that Respondent interfered in rights under section 10(1)(a) of PERA as to both Conn and Miller individually by pursuing discipline charges against them, by removing them from work and placing them on an unpaid leave status, and by pursuing their permanent removal from the workforce for conduct which occurred in the course of protected concerted activity.

It is axiomatic that peacefully picketing to protest adverse employment related decisions made by the employer is within the realm of protected concerted activity. Disciplining an employee because they have engaged in protected concerted activity not only interferes with the conduct of that employee, but deters other employees who might, but for the employer's adverse reaction, likewise engage in such lawful and protected conduct. The Commission, and the courts, recognize in reviewing such challenged discipline that it is not the mere rights of single employees that are being vindicated by the award of relief, as in the absence of such protection

> [O]ther employees and union officials would be hesitant to avail themselves of their rights, defeating the purpose of the Act. This is akin to a chilling effect on the exercise of free speech and is precisely the harm addressed by PERA . . . such harm is difficult, if not impossible, to quantify, and cannot be undone or compensated by money damages.

[12] It is worth noting that Conn's earlier offer to serve as a more formal chaperone with concomitantly greater authority to control the students was expressly declined by DPS, which nonetheless granted him time off to participate in the demonstration personally. Had he been granted official status by DPS for that rally, he might have been in a better position to alter the course of events, or to have been faulted for failing to better plan or control the situation.

[13] It is notable that these charges against Miller, asserted post-hearing in this matter, go factually much further than the original June 2007 charges.

AFSCME Local 207 v City of Detroit, 20 MPER 94 (unpublished, Michigan Court of Appeals, No. 27321, October 18, 2007, affirming grant of injunctive relief under PERA); see also, *Detroit v Salaried Physicians, UAW*, 165 Mich App 142 (1987). Accordingly, I recommend that the Commission issue a compensatory and prophylactic order, providing direct relief to Charging Parties and broad notice to other potentially effected employees, as set forth below.

Here the Employer has challenged the standing of Conn as an individual union officer to bring a claim that the Employer's conduct interfered with the administration of the DFT, in violation of section 10 (1)(b), with the Employer asserting that only the union itself could bring such a claim. Individuals must be held to have standing to assert such claims, if only to address the obvious hypothetical claim that an employer has, for example, interfered in the administration of a labor union by favoring incumbent union officers to assist in their remaining in office. While the removal of a particular union official from the workplace might be shown to interfere in the administration of a labor organization, I do not find, on these facts, that the removal of Conn as a building representative for a single school in a large school district so interfered in the administration of the Detroit Federation of Teachers as to constitute a violation of Section 10 (1)(b), and therefore, I recommend dismissal of that portion of the charge.

C. The Request for Additional Relief

In their closing argument, and again in their post-hearing brief, Charging Parties have asked that the undersigned recommend that the Commission exercise its expressly granted statutory authority under MCL 423.216 (h) and directly act to seek injunctive relief immediately restoring Conn and Miller to active employment. Respondent has not directly addressed that issue in its closing argument or brief, but is presumably opposed.

The Act does grant to the Commission the authority to seek injunctive relief "as it deems just", not only upon the issuance of a post-hearing Decision and Recommended Order finding a violation, but even on the mere issuance by the Commission of a Complaint. Charging Parties may independently seek injunctive relief, as they have here, under the same provision.

The Commission must determine for itself whether or not this case is the rare instance in which the Commission chooses to use State resources to directly seek injunctive relief, or chooses to join in such a request by the Charging Parties.[14] Here, separate violations of Sections §10(1) (a) & (c) have been established under circumstances involving well known Union activists removed from the workplace under specious and flagrantly pretextual charges of misconduct, initiated in keeping with the stated unlawful discriminatory intent of a high ranking elected official of a major Employer. The Employer's handling of its supposed investigation and the bringing of charges arising from a routine, if rowdy and briefly disruptive, off-duty public demonstration, was extraordinary, where no decision maker was brought to testify on behalf of the Employer, and where the placing of two tenured teachers on an indefinite unpaid suspension pending a supposed investigation of off duty conduct was admitted to be unprecedented. The proofs in this case overwhelmingly establishes that Conn and Miller were not removed from the workplace because of their conduct on May 1st, but rather that the events of May 1st were seized

[14] The Commission has seemingly not ever exercised its discretionary authority to seek such relief as expressly authorized and seemingly anticipated by the drafters of the Act.

upon as an opportunity to be rid of disfavored workplace activists, or as put in the uncontested words of Board President Womack, to "starve them out".

Where the recognized impact of the removal of known activists from the workplace is to broadly chill the exercise by other employees of protected rights, it appears that the purposes of the Act would be served by the issuance of injunctive relief pending the final outcome of this litigation, as was recognized in *AFSCME Local 207 v Detroit, supra,* and *Detroit v Salaried Physicians, supra,* especially where the issuance of a decision at this level in the proceedings makes clear that Charging Parties have a high likelihood of ultimate success on the merits, even in the event of the filing of exceptions to this Decision.[15] Regardless of any relief ultimately secured by Conn and Miller individually, their continued and notorious absence from the workplace would serve to underscore the Employer's powerful ability to disadvantage employees for exercising their statutory rights, and would thereby continue and exacerbate the chilling effect seen as harm warranting injunctive relief in *AFSCME Local 207, supra,* and in *Salaried Physicians, supra*.

I further find that this dispute involves a large and experienced Employer that can be presumed to have a sophisticated understanding of its duties under the Act, with both in-house and outside counsel involved in the matter. The unlawful conduct was ordered, committed, and ratified by, the highest-ranking officials of DPS, including the head of its elected board. The adverse employment actions were premised on allegations solidly refuted by the Employer's own videotaped record of the disputed events. Beyond mere adverse employment action, this Employer has chillingly misused the extraordinary power and force available to it through its in-house police department. The continued pursuit of the adverse employment actions was further premised on sworn testimony which I have found to be willfully untruthful. The delays in the ordinary investigation and processing of the underlying disciplinary matters, and the extraordinary and open-ended delays repeatedly sought in the present proceeding, are consistent with the stated intent of the school board president to improperly use the legal process to "starve out" these two teachers whose lawful advocacy so annoyed him.

Given this extraordinary record, I conclude that a mere traditional make-whole remedy as to the individual employees is inadequate to reasonably deter future unlawful conduct, to rectify the chilling effect of the Employer's conduct on other DPS employees, and to thereby effectuate the policies of the Act. Were it not for the contrary decision in *Goolsby v Detroit*, 211 Mich App 214 (1995), I would in this instance follow the Commission's earlier decision in *Wayne-Westland Community School District*, 1987 MERC Lab Op 381, aff'd, *Hunter v Wayne-Westland Community School District,* 174 Mich App 330 (1989), and award as necessary and compensatory damages to the Charging Parties the actual attorney fees and any costs wrongfully incurred in correcting the unlawful acts willfully committed by the DPS. See also, *Police Officers Labor Council*, 1999 MERC Lab Op 196, 202, 209; *Michigan State University*, 16

[15] In assessing the likelihood of success on further review, it must be recognized that MERC gives due deference to an ALJ's findings of credibility when conducting its review of a recommend order; *Detroit v Detroit Fire Fighters Ass'n,* 204 Mich App 541 (1994). Similarly, the standard for review by the courts is that MERC's "findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole", and MERC's "legal determination's may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law". *Grandville Municipal Executive Ass'n v Grandville,* 453 Mich 428, 436 (1996).

MPER 52 (2003). In reaching this conclusion, I follow the Commission's own prior finding that it believed *Goolsby*, *supra*, wrongly decided, as it inappropriately restricted the Commission's ability to award effective relief in cases of egregious violations. See, *Police Officers Labor Council*, 1999 MERC Lab Op 196.

RECOMMENDED ORDER

The Detroit Public Schools, its officers, agents, and representatives shall:

1. Cease and desist from

    a. Interfering with, restraining, or coercing employees, including but not limited to Stephen Conn and Heather Miller, in the exercise of rights guaranteed in Section 9 of the Act, including the right to pursue grievances, hold or seek union office, participate in otherwise lawful public protests or demonstrations regarding DPS employment issues, or seek remedies from the MERC or the courts.
    b. Discriminating against employees, including but not limited to Stephen Conn and Heather Miller, regarding terms or other conditions of employment in order to encourage or discourage membership or the holding of office in a labor organization.
    c. Subjecting Stephen Conn and Heather Miller to discriminatory adverse employment actions, including the continued pursuit through any means, of charges or claims related to or arising from the events surrounding the public demonstration of May 1, 2007.

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

    a. Immediately restore Conn and Miller to active employment with placement in the school and class room appropriate to their seniority status and the collective bargaining agreement between the DPS and the DFT.
    b. Withdraw and cease all pursuit of charges of any sort, or any other adverse employment action, against Conn and Miller related to or arising from the events surrounding the public demonstration of May 1, 2007.
    c. Remove all references to the threatened disciplinary charges against both Conn and Miller from any and all files and personnel records maintained by the DPS, including any references to the allegations made against them related to or arising from the events surrounding the public demonstration of May 1, 2007.
    d. Make Stephen Conn whole for any loss of pay or other financial or fringe benefits that he may have suffered, including seniority or pension or leave credits which would have but did not accrue during the period when he was removed from the workplace.
    e. Maintain Stephen Conn in his appropriate position and assignment of duties, including in assignments considered discretionary, notwithstanding

any current or future appointed or elected Union office he might seek or hold.

f. Make Heather Miller whole for any loss of pay or other financial or fringe benefits that she may have suffered, including seniority or pension or leave credits which would have but did not accrue during the period when she was removed from the workplace.

g. Place and maintain a copy of the decision and order in this matter in the personnel files of Conn and Miller.

3. Post the attached notice to employees in a conspicuous place at each DPS worksite and post it prominently on any website maintained by DPS for employee access for a period of thirty (30) consecutive days, read the attached notice in full at a regularly scheduled school board meeting, and additionally mail a copy of the notice to each employee in the Detroit Federation of Teachers bargaining unit.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the DETROIT PUBLIC SCHOOLS, a public employer under the PUBLIC EMPLOYMENT RELATONS 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

a. Interfere with, restrain, or coerce employees, including but not limited to Stephen Conn and Heather Miller, in the exercise of rights guaranteed in Section 9 of the Act, including the right to pursue grievances, hold or seek union office, participate in otherwise lawful public protests or demonstrations regarding DPS employment issues, or seek remedies from the MERC or the courts.
b. Discriminate against employees, including but not limited to Stephen Conn and Heather Miller, regarding terms or other conditions of employment in order to encourage or discourage membership in a labor organization.
c. Subject Stephen Conn and Heather Miller to discriminatory adverse employment actions, including the continued pursuit through any means of charges or claims related to or arising from the events surrounding the public demonstration of May 1, 2007.

WE WILL

a. Immediately restore Conn and Miller to the payroll and to active employment with placement in the school and class room appropriate to their seniority status and the collective bargaining agreement between the DPS and the DFT.
b. Withdraw and cease all pursuit of charges of any sort, or any other adverse employment action, against Conn and Miller related to or arising from the events surrounding the public demonstration of May 1, 2007.
c. Remove all references to the threatened disciplinary charges against both Conn and Miller from any and all files and personnel records maintained by the DPS, including any references to the allegations made against them related to or arising from the events surrounding the public demonstration of May 1, 2007.
d. Make Stephen Conn whole for any loss of pay or other financial or fringe benefits that he may have suffered, including seniority or pension or leave credits which would have but did not accrue during the period when he was removed from the workplace.
e. Maintain Stephen Conn in his appropriate position and assignment of duties, including in assignments considered discretionary, notwithstanding any current or future appointed or elected Union office he might seek or hold.

f. Make Heather Miller whole for any loss of pay or other financial or fringe benefits that she may have suffered, including seniority or pension or leave credits which would have but did not accrue during the period when she was removed from the workplace.
g. Place and maintain a copy of the decision and order in this matter in the personnel files of Conn and Miller.
h. Read this notice in full at a regularly scheduled school board meeting.
i. Post this notice for a period of thirty (30) consecutive days on any DPS website to which employees have access.
j. Mail a copy of this notice to each employee in the Detroit Federation of Teachers bargaining unit.

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.

DETROIT PUBLIC SCHOOLS

By:_____

Title:_____

Date:_____

This notice must be posted for thirty (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, Detroit, MI 48202-2988. Telephone: (313) 456-3510.