STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF SAGINAW,
Public Employer-Respondent,

Case No. C09 A-009

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Braun Kendrick Finkbeiner P.L.C., by E. Louis Ognisanti, for Respondent

Douglas M. Gutscher, Assistant General Counsel, Police Officers Association of Michigan, for Charging Party

DECISION AND ORDER

On February 19, 2010, Administrative Law Judge (ALJ) Julia Stern issued her Decision and Recommended Order in the above matter finding that Respondent, City of Saginaw (Employer), violated Section 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a), as alleged in the charge. The ALJ concluded that Respondent applied its e-mail policy in a manner that discriminates against activity protected by Section 9 of PERA. She recommended that we order Respondent to cease and desist from applying the policy in such manner and grant affirmative relief. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. Respondent requested and was granted an extension of time to file its exceptions. Its exceptions were served on Charging Party, Police Officers Association of Michigan, on April 13, 2010, and were filed in our office on the following day. On April 27, 2010, Charging Party filed its response to the exceptions. Inasmuch as this response was untimely, we have not considered it.

In its exceptions, Respondent argues that the ALJ's factual findings are not supported by the record. Respondent excepts to several of those findings, including to the ALJ's determination that employees were allowed to use the e-mail system without restriction and that the employee whose discipline is the subject of the charge in this matter was the only employee disciplined for inappropriate e-mail use. We have considered the arguments set forth in the exceptions and find them to be without merit.

Factual Summary:

Respondent maintains an e-mail system used by members of its police department, including members of the bargaining unit represented by Charging Party. From time to time, employees use the system to send e-mails that are not work-related. Respondent also permits Charging Party to use its system to send e-mails to its members.

Daniel Kuhn, an employee of Respondent, uses the e-mail system to send e-mails to Charging Party's members. Kuhn is a former president of Charging Party's local union and the current vice-president of Charging Party's state organization. Darnell Early is Respondent's city manager, and, in 2008, was elected president of the International City and County Managers Association (ICMA).

Employees participating in Respondent's deferred compensation plan in 2008 were permitted to choose between two vendors, the Hartford Group and the ICMA Retirement Corporation, a separate entity from the ICMA. Sometime in 2008, Kuhn stopped making contributions to his ICMA account and directed his contributions to a Hartford account. On October 16, 2008, in response to questions about why he had switched to Hartford, Kuhn sent the following group e-mail using Respondent's e-mail system.

> To: Police Department Personnel Mailing List
>
> Subject: Hartford and ICMA
>
> Having a third vendor sounds good, I just don't believe the city is of the mind-set to give us any other vendor options. Keep in mind, some of the added costs are probably the result of having a pre-tax employer administered 457 Plan.
>
> I left ICMA because of principle mainly. To have a nickel of my fees paid to lobbyists who campaign against employees' interests, and pay people who train the likes of their new president, bothers me.[1] I have seen no "good faith" bargaining on behalf of our employer to date, in fact, the proposals being taken before the arbitrator are offensive and extremely unappreciative of the police officers who serve this town daily. You wonder if the risk and commitment is worth it.
>
> Also, to dispel a rumor I heard yesterday. I had never met the Hartford representative (Jim McGinnis) until two weeks ago when I met him at the SBU offices.
>
> Be safe all.
>
> Dan Kuhn

[1] Kuhn testified that he was not aware at the time that the plan vendor, ICMA Retirement Corporation, and the ICMA of which Early was president were separate entities.

On January 7, 2009, Kuhn was served with the following notice of a one-day suspension:

> On October 16, 2008, you sent e-mail to "Police Department Personnel Mailing list" which articulated your personal opinions related to the City of Saginaw and other issues. It has been brought to your attention previously as to the inappropriateness of such e-mail communications.
>
> The sending of the e-mail is in direct violation of Saginaw Police Department General order, specifically Policy and Procedure, PP 55 Section 4, Prohibited Uses, Subsection L. In the last twelve months, you have been issued two (2) counseling sessions and two (2) written reprimands. Your repeated failure to adhere to Departmental General Orders is considered serious and it has been determined that you are to be suspended for one working day. Any future violations will subject you to further discipline up to and including discharge.

Policy and Procedure, PP 55 Section 4, Prohibited Uses, Subsection L of the Respondent's e-mail policy states: "The following e-mail uses are prohibited: *** E-mail; is not to be used for conflict resolution or criticism of the administration of the City or the Police Department."

Respondent claims that Kuhn was disciplined because his e-mail disparaged Early, not because he had criticized the City or its police department. According to Respondent, the objectionable portion of Kuhn's e-mail was his use of the phrase, "the likes of their new president," referring to Darnell Early, the city manager.

Discussion and Conclusions of Law:

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain, or coerce public employees in the exercise of their rights under Section 9 of the Act, including the right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." It has long been recognized that the right of employees to communicate regarding their terms and conditions of employment is inherent in the right of self-organization. *City of Bay City,* 20 MPER 96 (2007), *citing*, *Beth Israel Hosp v NLRB*, 437 US 483, 491 (1978).

Kuhn's e-mail to his coworkers was protected concerted activity. In *City of Bay City*, we found the employer violated PERA by disciplining an employee for violating a rule prohibiting employees from speaking to city commissioners about employment-related matters. The employee was disciplined because he mentioned to a city commissioner in casual conversation that he planned to attend a union meeting and mentioned pending labor disputes. We reversed the ALJ's conclusion that the employee was not engaged in protected concerted activity during his conversation with the commissioner because his comments were an outgrowth of the labor dispute pending before MERC at the time. We previously found that an employer violated PERA by suspending a police officer for operating a website for police officers to air their concerns about the police department. *City of Detroit (Police Dep't),* 19 MPER 15 (2006). In

the latter case, MERC held that the officer's comments were protected by the PERA, even though the website was used for purposes that lacked a direct nexus to wages, hours, and working conditions. Here, Kuhn used Respondent's e-mail system to complain about Respondent's conduct in collective bargaining. He also criticized the ICMA for lobbying against employee interests and for its association with the "likes of" the city manager. Kuhn's reference to Early was made in the context of his complaint about Respondent's conduct at the bargaining table. Kuhn's e-mail also suggested that withdrawing money from the ICMA fund was a means to protest his employer's bargaining conduct.

As the National Labor Relations Board (NLRB)[2] pointed out in *Max Factor & Co*, 239 NLRB 804, 818 (1978) "It is settled that an employee . . . who participates in union activities in connection with the administration of a collective-bargaining contract is free to question the veracity of her employer and that this statutory right does not depend upon whether the employee is polite or blunt in doing so." We have followed the NLRB on this issue and have long held that an employee engaged in protected concerted activity cannot be disciplined for misconduct arising out of such activity unless the employee's actions are so flagrant or extreme as to seriously impair the maintenance of discipline or render that individual unfit for future service. *Isabella Co Sheriff's Dep't*, 1978 MERC Lab Op 168, 175-76 (no exceptions). See also, *Bettcher Mfg Corp*, 76 NLRB 526, 527 (1948), In *Bloomingdale Bd of Ed*, 1976 MERC Lab Op 337, we found the employer committed an unfair labor practice when it discharged three employees who signed a letter accusing their supervisor of being unfair and dishonest. The statements in Kuhn's e-mail were certainly no worse. We do not find that Kuhn's conduct was so egregious or extreme as to remove it from the protections of PERA.

We recognize that an employee's right to use his employer's e-mail system for union or other protected communication under Section 9 of PERA is not unlimited. Instead, the Commission has adopted the NLRB's holding in *Lockheed Martin Skunk Works*, 331 NLRB 852 (2000), that an employer may restrict the use of its equipment to work-related purposes and prohibit any personal use of e-mail, telephones, copiers, and other office equipment. See, *Oakland Co*, 2001 MERC Lab Op 385, 391, where we stated, however, that an employer may not exercise its discretion in a content-discriminatory fashion, such as by allowing non-work related e-mails as long as they do not contain union-related information. In the present case, it is clear from reading Respondent's e-mail policy that Respondent did not intend to prohibit all personal e-mail. The fact that Kuhn's e-mail was singled out because he complained that his employer was not bargaining in good faith makes this action discriminatory.

Respondent further excepts to various findings of the ALJ, including her findings regarding: whether employees were allowed unrestricted use of Respondent's e-mail system; whether Kuhn was the only employee disciplined for inappropriate e-mail use; and whether he was suspended for complaining about Respondent's bargaining conduct. While we find no merit to these exceptions, we find that none of these exceptions, if sustained, would alter our

[2] Given the similarity between the language of Sections 9 and 10(1)(a) of PERA and Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA), 29 USC §§151-159, the Commission is often guided by Federal cases interpreting the NLRA. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 260; 215 NW2d 672 (1974), *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44; 214 NW2d 803 (1974) and *U of M Regents v MERC*, 95 Mich App 482, 489 (1980).

conclusion that Kuhn's use of his employer's e-mail system to voice a complaint about Respondent's bargaining conduct was protected activity. This is our conclusion, notwithstanding the reference in the e-mail to Early as that reference, even if viewed as disparaging, was not so egregious as to remove Kuhn's conduct from the protection of the Act.

We have considered all other arguments presented by Respondent and conclude that they would not change the result in this case. Accordingly, we affirm the ALJ's Decision and adopt her Recommended Order.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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

In the Matter of:

CITY OF SAGINAW,
Public Employer-Respondent,

Case No. C09 A-009

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Braun Kendrick Finkbeiner P.L.C., by E. Louis Ognisanti, Esq., for Respondent

Douglas M. Gutscher, Esq., Assistant General Counsel, Police Officers Association of Michigan, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on June 9, 2009, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before August 4, 2009, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Police Officers Association of Michigan filed this charge against the City of Saginaw on January 23, 2009. Charging Party represents a unit of Respondent's nonsupervisory police officers. In the fall of 2008, the parties were negotiating a new collective bargaining agreement. The charge alleges that on January 7, 2009, Respondent violated Section 10(1)(a) of PERA by disciplining Daniel Kuhn for using Respondent's e-mail system in October 2008 to send an e-mail to his fellow unit members on a topic related to these negotiations.

Findings of Fact:

Respondent's E-mail Policy

For a number of years, Respondent has maintained an e-mail system used by members of its police department, including Charging Party's members. Employees have used the system to send e-mails that are not directly work-related without being warned or disciplined for their e-mails. Respondent also permits unions representing its employees, including Charging Party, to use its system to send e-mails to their members.

Daniel Kuhn is an employee of Respondent, a former president of the Charging Party's local union, and the current vice-president of Charging Party's state organization. Like other union officers, Kuhn used Respondent's e-mail system to send e-mails to Charging Party's members regarding union and other matters of general concern. On occasion, Kuhn used e-mails to express his personal opinions on matters of general interest to the bargaining unit. As an example, on July 4, 2008, when he was running for the position of Charging Party's representative on the City pension board, Kuhn sent an e-mail to members of the bargaining unit criticizing certain actions of the current board.

On July 15, 2008, Respondent Police Chief Gerald Cliff promulgated a new written internet and e-mail policy by means of a police department general order.[3] The policy included the statement that all e-mail sent through Respondent's system was the property of Respondent. The section entitled "Use" included the following:

> Internet and e-mail service shall only be used for department related business. E-mail shall not be used to transmit messages that contain statements or material of a derogatory nature toward any specific member or employee, or any race, national origin, gender, sexual orientation, religion, handicap, or age whether or not a recipient has consented or requested such material. Further, department e-mail shall not be used for proselytizing or for promotion of any personal agenda, religious belief or tenet, or for campaigning for or against any ballot proposal or any political candidate or issue. Department e-mail messages will be directed to the member for which the message is intended. Any department-wide or unit-wide dissemination of information via the e-mail system will first be approved by either the Deputy Chief or Chief (or both) and forwarded accordingly.
>
> Blind carbon copies or carbon copies of e-mails to any group of users on the department system is strictly prohibited unless authorized as stated above. In the event that an e-mail contains information that the author believes to be of concern to a wider audience than the person to whom addressed, that recommendation will be included in the message itself so that the appropriate authority may act on that recommendation accordingly. E-mail intended for the administration will follow the chain of command in such a manner as to display comments from each respective level of supervision in the chain.

[3] Article XVI of the parties' collective bargaining agreement gives Respondent, through the chief of police, the right to issues rules and regulations governing the conduct of the police department.

The policy also contained a separate list of "prohibited uses:"

A. The use of e-mail for any purpose which violates federal, state or local law.

B. The use of e-mail for commercial purposes is prohibited.

C. Misrepresenting your identity or affiliation in e-mail communications "Spoofing."

D. Sending harassing, intimidating, abusive or offensive material to or about others.

E. Users shall not initiate or forward chain e-mail. Chain e-mail is a message sent to a number of people asking each recipient to send copies with the same request to a specific number of others.

F. Sending unsolicited e-mail "Spamming." Users shall not send unsolicited non-departmental related e-mail to persons with whom they do not have a prior relationship.

G. The use of someone else's identity and password is prohibited.

H. Downloading of non-police related film files from commercial websites.

I. Storage of non-police electronic attached files of any kind.

J. Downloading or storage of games of any kind.

K. Causing congestion on the network by such things as chain letters or broadcasting inappropriate messages to lists or individuals.

L. *E-mail is not to be used for conflict resolution or criticism of the administration of the City or the Police Department.* [Emphasis added]

The policy also stated:

The above list of prohibited uses is by no means intended to be comprehensive. In the event that a member utilizes the e-mail system or the Internet system for a questionable use not listed above, the administration reserves the right to make a determination as to the appropriateness of such use on a case-by-case basis. The guiding element in all determinations will be the work related nature of the message sent.

Cliff testified that the above policy was put together from a set of model policies. Despite the policy's statement that e-mail was to be only for department-related business, employees

continued to send e-mails not directly related to work and Respondent continued to allow Charging Party to send e-mails to its members.

On July 22, 2008, Scott Bickle, the vice-president of Charging Party's local union, received a written reprimand for sending an e-mail on Respondent's system criticizing the department for making last minute changes before an awards ceremony and failing to notify employees of these changes. Charging Party filed a grievance. Bickle had no previous disciplinary record, and the grievance was settled by an agreement to remove the reprimand from Bickle's file.

Kuhn's October 16, 2008 E-mail

Darnell Early is Respondent's city manager. Sometime in 2008, Early was elected president of a professional organization, the International City and County Managers Association (ICMA).

In 2008, the parties were negotiating a new collective bargaining agreement. By the fall of 2008, the parties' negotiations had broken down and a petition for interest arbitration under 1969 PA 312 had been filed.

Charging Party's members have a defined benefit pension plan. Vesting, service credits, the pension multiplier, and the computation of final average compensation under this plan are all covered by the parties' collective bargaining agreement. In addition to their defined benefit pension, members of the unit are eligible to participate in a City-sponsored 457 deferred compensation plan. In 2008, employees participating in the 457 plan could choose between two vendor/administrators, the Hartford Group and the ICMA Retirement Corporation. The ICMA Retirement Corporation is an entity separate from the ICMA professional organization. Respondent selects the vendors for its 457 plan, and Charging Party has never demanded in contract negotiations to bargain over this topic. However, in the fall of 2008, several members of Charging Party's unit suggested that Respondent bring in a third vendor. Charging Party proposed this to Respondent, and the parties engaged in informal discussions over this topic.

Sometime in 2008, Kuhn stopped making new contributions to his ICMA account and directed all his new contributions to his Hartford account. Kuhn testified that he received questions from other members about why he had taken this step. On October 16, 2008, Kuhn sent the following group e-mail using Respondent's e-mail system.[4]

To: Police Department Personnel Mailing List

Subject: Hartford and ICMA

[4] There is no indication that Kuhn sought permission from the Chief or Deputy Chief before sending this e-mail to all members of the bargaining unit, as Respondent's e-mail policy apparently requires. However, Respondent did not assert that Kuhn was disciplined for this reason.

> Having a third vendor sounds good, I just don't believe the city is of the mind-set to give us any other vendor options. Keep in mind, some of the added costs are probably the result of having a pre-tax employer administered 457 plan.
>
> I left ICMA because of principle mainly. To have a nickel of my fees paid to lobbyists who campaign against employees' interests, and pay people who train the likes of their new president, bothers me.[5] I have seen no "good faith" bargaining on behalf of our employer to date, in fact, the proposals being taken before the arbitrator are offensive and extremely unappreciative of the police officers who serve this town daily. You wonder if the risk and commitment is worth it.
>
> Also, to dispel a rumor I heard yesterday. I had never met the Hartford representative (Jim McGinnis) until two weeks ago when I met him at the SBU offices.
>
> Be safe all.
>
> Dan Kuhn

On January 7, 2009, Kuhn was served with a notice of one-day suspension dated December 9, 2008. The notice read as follows:

> On October 16, 2008, you sent e-mail to "Police Department Personnel Mailing list" which articulated your personal opinions related to the City of Saginaw and other issues. It has been brought to your attention previously as to the inappropriateness of such e-mail communications.[6]
>
> The sending of the e-mail is in direct violation of Saginaw Police Department General order, specifically Policy and Procedure, PP 55 Section 4, Prohibited Uses, Subsection L. In the last twelve months, you have been issued two (2) counseling sessions and two (2) written reprimands. Your repeated failure to adhere to Departmental General Orders is considered serious and it has been determined that you are to be suspended for one working day. Any future violations will subject you to further discipline up to and including discharge.

Charging Party filed a grievance alleging that Kuhn's discipline was without just cause and violated Article 6.1 of the contract. Article 6.1 reads as follows:

> All employees and regular members of the Union, and the lawful representatives of the Union, shall have the right to engage in any lawful concerted action or activities for the purpose of collective bargaining, or for the mutual aid and

[5] Kuhn testified that he was not aware at the time that the plan vendor, ICMA Retirement Corporation, and the ICMA of which Early was president were separate entities.

[6] Kuhn had been previously disciplined for violating departmental rules. There was nothing in the record indicating that this discipline was for violation of the e-mail policy.

> protection of the Union and its members, and to express or communicate any lawful view, grievance, complaint or opinion related to any condition of employment, free from any restraint, interference, coercion, discrimination or reprisal or the threat thereof.

Respondent took the position, both in answer to the grievance and in this proceeding that Kuhn was disciplined not because he had criticized Respondent or the police department, but because his e-mail disparaged Early. According to Respondent, the objectionable portion of Kuhn's e-mail was his use of the phrase, "the likes of their new president," to refer to the city manager.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to "form, join or assist in labor organizations," and to "engage in lawful concerted activities for the purposes of collective negotiation or bargaining." Concerted activity protected by Section 9 includes actions taken by two or more employees to express their views regarding employer's bargaining conduct or bargaining table positions. See, e.g., *Wayne Co Probate Court*, 1988 MERC Lab Op 952 (employees were engaged in protected concerted activity when they wore black armbands and put cotton in their ears during a staff meeting to protest the terms of the new collective bargaining agreement); *Marysville Pub Schs*, 1982 MERC Lab Op 513 (display of signs on cars in employer's parking lot protesting employer's position in contract negotiations was protected.). The Commission has also has found public statements made by a single union representative concerning a labor management dispute to constitute concerted activity protected by Section 9, as long as these statements do not involve the disclosure of confidential information. Compare *Twp of Redford*, 1984 MERC Lab Op 1056: *City of Warren (Fire Dept)*, 1980 MERC Lab Op 590 (no exceptions) and *Meridian Twp*, 1997 MERC Lab Op 457.

It is also well established that an employer may not discipline an employee for engaging in misconduct during the course of protected activity unless the employee's misconduct is so severe as to remove it from the protection of the Act. Rude, insulting, even threatening remarks for which an employee would normally be subject to discipline may be protected if made in the course of protected conduct. See *Unionville-Sebewaing Area Schs*, 1981 MERC Lab Op 932, 934; *Baldwin Cmty Schs*, 1986 MERC Lab Op 513; *City of Detroit*, 18 MPER 27 (2005) (no exceptions); *City of Detroit*, 22 MPER 32 (2009) (no exceptions). The Commission has held that an employee engaged in otherwise protected activity may lawfully be disciplined under PERA only when his or her behavior is so flagrant or extreme as to render that individual unfit for future service. *Isabella County Sheriff's Dep't*, 1978 MERC Lab Op 689, 174 (no exceptions).

As the National Labor Relations Board (NLRB or Board) stated in *Consumers Power Co*, 282 NLRB 130, 132 (1986), where an employee is disciplined for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service. For example, in *Guardian Industries Corp*, 319 NLRB 542 (1995), the Board found that the employer committed an unfair labor practice by disciplining an employee who said to another that their supervisor was "a low life" for ordering a third employee to take a drug

test without a good reason since: (1) the comment was not made maliciously, but out of a good faith belief in the employee's cause, and (2) the use of the mild epithet for their supervisor was not so egregious as to deprive the first employee of the Act's protection.

In the instant case, Kuhn's e-mail criticized the ICMA for lobbying against employee interests and for its association with the "likes of" the city manager. The next sentence of the e-mail complains about the positions taken by Respondent in collective bargaining with the Charging Party. These were positions for which the city manager was presumably at least partly responsible. Respondent's argument that Kuhn's e-mail disparaged the city manager strikes me as disingenuous. Kuhn's e-mail contains nothing that could be interpreted as a personal attack on Early or as disparaging his integrity or character. Rather, it is clear from the context that Kuhn's criticism of Early is actually a complaint about Respondent's conduct at the bargaining table. Kuhn also criticized the ICMA for some of its political positions, but only to suggest a connection between those positions and Respondent's bargaining positions. Finally, Kuhn's e-mail, by implication, urged other employees to follow his lead in withdrawing their money from the ICMA fund as a protest against Respondent's bargaining conduct. [7]

I find that Respondent could not have lawfully disciplined Kuhn for making the statements he made in his e-mail if made in face-to-face conversations with other employees, in a letter or memo to them, at a public meeting, or at any other type of meeting at which discussion of conditions of employment was allowed. The question here, therefore, is whether the discipline was lawful because: (1) the statements were made in an e-mail sent through Respondent's e-mail system, and (2) Respondent's written e-mail policy prohibited "criticism of the administration of the City."

It is well established that an employee does not have an absolute right under Section 9 of PERA to use his employer's e-mail system for union or other communications protected by PERA. *Detroit Water and Sewerage Dept,* 1977 MERC Lab Op 117; *Oakland Co,* 2001 MERC Lab Op 385. In the latter case, at 391, the Commission explicitly adopted the NLRB's holding that an employer may lawfully prohibit employees' personal use of the employer's e-mail system, just as it may lawfully limit the use of employer-provided equipment such as bulletin boards, telephone systems, copiers, and paper. See *Johnson Technology, Inc.* 345 NLRB 762,763 (2005); *EI du Pont de Nemours & Co,* 311 NLRB 893, 919 (1993); *Fleming Co,* 336 NLRB 192 (2001). In *The Register-Guard,* 351 NLRB 1110 (2007), the NLRB rejected the argument of its General Counsel that employers should not be allowed to prohibit all nonwork e-mails just because the employer owns the system, since e-mail has become the most common means of interoffice communication. Instead, the Board reaffirmed its "settled principle" that "*absent discrimination,* employees have no statutory right to use an employer's equipment or media for Section 7 communications."[8] [Emphasis added.]

However, as discussed in *Oakland,* the NLRB has consistently held that an employer cannot lawfully apply its rules against the use of its equipment in a discriminatory fashion to

[7] Kuhn testified credibly that he believed at the time that there was a connection between the professional organization called the ICMA and the ICMA Retirement Corporation which administered the 457 fund. The fact that Kuhn was mistaken about this connection does not affect the protected character of his statements.

[8] Section 9 of PERA was patterned on Section 7 of the NLRA and protects the same type of conduct.

prohibit protected concerted conduct. Prior to *Register-Guard*, the NLRB had held that an employer was guilty of discriminatory enforcement of its e-mail policy if it permitted employees to use the e-mail system for nonwork purposes, but prohibited them from using it to distribute union-related information. In *The Register-Guard*, the Board decided that the employer had not discriminated on Section 7 grounds when it disciplined an employee for sending e-mails urging employees to take actions (attend a rally, wear green) to support union causes, even though it had permitted a variety of nonwork related e-mails, including offers of items for sale. It reasoned that the offending e-mails were solicitations, and there was no evidence that Respondent had permitted employees to use its e-mail system to solicit employees to support any group or organization.[9] It decided, however, that the employer had discriminatorily applied its e-mail policy by disciplining the same employee for sending an e-mail that merely discussed union issues. The Court of Appeals, in *Guard Publishing Co v NLRB*, 571 F3d 53, 60 (CA DC, 2009), rejected the Board's finding that the employer had not discriminatorily applied its e-mail policy when it disciplined the employee for the first set of e-mails. It noted that, whatever the merits of the distinction the Board had drawn between solicitations for organizations and other types of personal e-mail, neither the employer's written e-mail policy nor its enforcement of the policy recognized that distinction. To the contrary, the Court said, when the employer disciplined the employee it explicitly admonished her for sending e-mails concerning union or union/personal business.

Although *Register-Guard* took a different approach to analyzing the discrimination issue, it did not change the basic principle established by Board law and adopted by the Commission in *Oakland.* An employer has the right to establish policies and rules restricting employees' nonwork-related use of its e-mail system, even if these policies and/or rules prevent the employees' from using the system for communications protected by the Act. However, the employer violates PERA if it applies these policies and/or rules in a way that discriminates against protected activities.

In this case, Respondent promulgated an e-mail policy in July 2008 that stated that its e-mail system was to be used only for department business. However, the policy also included specific prohibitions against certain kinds of personal e-mail, including chain e-mail and political campaign material. These provisions made it clear that Respondent did not really intend to prohibit all personal e-mail. In fact, the record indicates that Respondent continued to allow employees to send e-mails not directly related to work. As the policy's last paragraph indicates, Respondent gave itself the discretion to determine on a case-by-case basis whether a particular nonwork-related e-mail was appropriate. I find that Respondent did not violate PERA by maintaining a policy that allowed it to determine what types of personal e-mail would be allowed. However, I also find that Respondent could not lawfully exercise its discretion in a manner that discriminated against Section 9 activity. Respondent suspended Kuhn for sending an e-mail on October 16, 2008 which complained about Respondent's alleged failure to bargain in good faith. Insofar as the record discloses, Kuhn's suspension was the only serious disciplinary action ever issued to an employee for violating the police department e-mail policy. As I found above, Kuhn's remark about Early did not remove his comments from the protection of the Act. I find that by singling out this e-mail for discipline, Respondent applied its policy in a way that

[9] The Board noted, however, that if the evidence had showed the employer's motive for drawing this distinction was antiunion, then the discipline would have been unlawful.

discriminated against activity protected by the Act.[10] I conclude that Respondent violated Section 10(1) (a) of PERA when it disciplined Kuhn in January 2009 for sending this e-mail. I recommend, therefore, that the Commission issue the following order,

RECOMMENDED ORDER

Respondent City of Saginaw, its officers and agents, are hereby ordered to:

1. Cease and desist from:

    a. Applying its police department e-mail policy in a manner that discriminates against conduct protected by Section 9 of PERA.

    b. Disciplining officer Daniel Kuhn for sending an e-mail in October 2008 complaining about Respondent's conduct in the collective bargaining negotiations then taking place between Respondent and the Police Officers Association of Michigan.

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

    a. Remove the discipline issued to Kuhn on January 7, 2009 from his file and make him whole for any monetary losses suffered as a result of this discipline, including interest on the amount owed at the statutory rate of six percent (6%) per annum, computed quarterly.

    b. Post the attached notice on the premises of Respondent's police department, in a place or places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

    .

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____

[10] In *Ingham Co v Capitol City Lodge No 141 of the Fraternal Order of Police, Labor Program, Inc*, 275 Mich App 133 (2007), the Court of Appeals held that an employer could lawfully discipline a union officer for violating its rule against releasing department documents to the public by giving a copy of an internal department memorandum to the union's attorney, conduct that would have been protected but for the rule. However, this case is clearly distinguishable, since there was no suggestion that the police department in *Ingham* had applied its rule in a way that discriminated against protected activity.