STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME LOCAL 3667
RIVERVIEW FIREFIGHTERS ASSOCIATION,

Labor Organization-Respondent,

Case No. CU11 A-001

-and-

CITY OF RIVERVIEW,

Public Employer-Charging Party.
_____/

APPEARANCES:

Cassandra D. Harmon-Higgins, AFSCME Council 25, for Respondent

Pentiuk, Couvreur & Kobiljak, P.C., by Randall A. Pentiuk and Kerry L. Morgan, for Charging Party

DECISION AND ORDER

On March 23, 2011, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent, AFSCME Local 3667, Riverview Firefighters Association (Union), did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ found that no unfair labor practice occurred when the Union issued a press release criticizing Charging Party, the City of Riverview (Employer) and its officials for implementing a central dispatch operation and allegedly failing to properly staff and train the assigned dispatchers. The press release also noted that several grievances were pending before Charging Party on the new dispatch operation. The ALJ concluded that the press release did not constitute unlawful restraint or coercion against the Employer, and the Union's conduct did not violate PERA. The ALJ also held that the Union's efforts in publicizing its side of a labor-management dispute were protected activity under both PERA and the First Amendment since the alleged misconduct did not contain specific threats of harm or coercive behavior. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. After being granted a time extension, Charging Party filed exceptions to the ALJ's conclusions on April 13, 2011. Respondent did not file a response.

In its exceptions, Charging Party argues that the ALJ erred in finding that the Union's actions did not reach a level of misconduct that violates PERA merely because of limited MERC case authority on the particular issue. The Employer also contends that the ALJ erroneously concluded that First Amendment protections preclude a finding of a PERA violation based on these allegations. After considerable review of the arguments raised in Charging Party's exceptions, we find them to be without merit.

Factual Summary:

We accept the factual summary as outlined by the ALJ and will repeat it here, only as necessary. We review the record in a light most favorable to Charging Party to determine the appropriateness of the ALJ's recommendation for summary dismissal of the charge. Respondent is the exclusive bargaining representative for the firefighters employed by Charging Party. In opposition to the Employer's decision to implement a central dispatch system for police and fire emergency services, Respondent issued a press release criticizing the new system as being "unnecessary" and a "spur of the moment" concept of the city manager. The Union further asserted that it filed several pending grievances challenging the new system for various reasons including its concern over the safety of its bargaining unit members, as well as "the citizens [it] protects". The Employer objected and filed the instant charge reasoning that the Union's action in issuing the press release violated PERA as it sought to coerce a favorable resolution on the pending grievances, and to embarrass its representative by suggesting he was incompetent.

Discussions and Conclusions of Law:

In its exceptions, Charging Party requests that we overturn the ALJ's conclusions and instead find that the Union's press release constitutes conduct that contravenes PERA. We disagree. Section 10(3)(a) ii prohibits labor organizations (and its representatives) from engaging in conduct that seeks to interfere, restrain or coerce "a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances." As the ALJ indicates, this Commission has previously found instances of such violative activity to exist where a union's conduct has been either (a) violent in nature or (b) very specific in its act of interference coupled with a refusal to bargain. However, we have generally held employee communications with employer officials on workplace matters to be protected activity under PERA. *City of Menominee*, 1982 MERC Lab Op 1420. This protection extends to public speeches or discussions with elected officials concerning union-management disputes (*Detroit Pub Sch*, 22 MPER 89 (2009)), except where the statements are grossly false and could unreasonably alarm the community (*Meridian Twp*, 1997 MERC Lab Op, 457).

Based on the record here, including an in-depth review of Charging Party's exceptions, we find insufficient basis to reasonably conclude that the press release issued by the Union sought to interfere, restrain or coerce the Employer's selection of a bargaining representative to handle the pending grievances involving the central dispatch

system. At most, we conclude that the press release was an attempt to invoke support from the public (in the Union's favor) on a matter of public concern. Charging Party's mere disagreement with Respondent's position or opinions regarding the central dispatch system does not rise to the level of interference or coercion that violates PERA. In fact, public opinion is regularly sought and used by both labor and management representatives, successfully and unsuccessfully, as component of the overall collective bargaining process. As such, we reject Charging Party's contention that the press releases constituted a basis for an unfair labor practice charge against Respondent under section 10(3)(a) ii of PERA.

Finally, we have carefully reviewed the remaining arguments presented in Charging Party's exceptions and find they would not affect the outcome of this decision. Accordingly, we adopt the factual findings and legal conclusions of the Administrative Law Judge and summarily dismiss the unfair practice charge against Respondent.

ORDER

IT IS HEREBY ORDERED that the charge is summarily dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

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

In the Matter of:

AFSCME LOCAL 3667, RIVERVIEW FIREFIGHTERS ASSOCIATION,
Labor Organization-Respondent,

Case No. CU11 A-001

-and-

CITY OF RIVERVIEW,
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APPEARANCES:

Cassandra D. Harmon-Higgins, staff counsel, AFSCME Council 25, for the Respondent Union

Pentiuk, Couvreur & Kobiljak, P.C., by Randall A. Pentiuk and Kerry L. Morgan, for the Charging Party Employer

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On November 24, 2010, the City of Riverview (the Employer) filed the above charge with the Michigan Employment Relations Commission (the Commission) against AFSCME Local 3667, Riverview Firefighters Association (the Union). [1]The charge alleges that the Union violated Section 10(3) (a) (ii) of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210(3) (a) (ii), by issuing a press release criticizing the actions of the Employer's director of public safety, Don Ginestet, with respect to an issue that was the subject of three pending grievances. It alleges that the press release violated this section of the statute because it was an attempt to coerce Ginestet and the Employer into granting these grievances. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules.

On January 21, 2011, pursuant to my authority under Rules 165 of the Commission's General Rules, AACS 2002 423.165, I issued an order finding that the charge failed to allege facts showing a violation of Section 10(3) (a) (ii) and directing the Employer to show cause why its charge should not be dismissed for failure to state a claim upon which relief could be granted. I noted in my order that while the press release severely criticized the Employer's actions, the charge did not allege that the Union had demanded that the Employer remove Ginestet as its representative for purposes of adjusting grievances or collective bargaining. On February 11, 2011, the Employer filed a response to my order. Based on the facts as alleged in the charge and

[1] The charge was held without being docketed at the request of the Charging Party until January 6, 2011.

response, I make the following conclusions of law and recommend that the Commission issue the following order.

Facts:

The Union represents employees in the Employer's fire department. During the summer of 2010, the Employer announced and implemented a plan to create a central dispatch operation to take over the emergency dispatch functions of its police and fire departments. On June 10, 2010, Union president Ken Boyea filed a grievance over the plan. The grievance was denied by the Employer at the early steps of the grievance procedure, and, on August 2, 2010, Boyea made a demand to arbitrate the grievance. The grievance was heard by an arbitrator on January 18, 2011.

Sometime between October 18 and November 24, 2010, Boyea issued the lengthy press release which is the subject of this charge. The press release was entitled, "Fire Fighters File Multiple Grievances against City." In it, Boyea criticized the Employer's decision to create a central dispatch as unnecessary. Boyea asserted that the central dispatch was a "spur of the moment decision by the city manager, with no research conducted and/or input received," and that it did not save the Employer money. He also argued that the Employer's fire department already provided services at low cost compared to comparable cities. He noted that the Union had filed a grievance over the creation of the central dispatch.

Boyea also criticized the Employer for allegedly failing to properly staff the central dispatch and train the dispatchers. He asserted that since the implementation of the central dispatch, fire fighters had experienced "extreme problems with radio communications." According to Boyea, at a meeting between himself, the director of public safety and the assistant fire and police chiefs, the director of public safety admitted that the Employer had failed to properly staff the central dispatch. According to Boyea, the assistant police chief also admitted that there had been flaws in the implementation of the dispatch operation, and stated that "police communications would get priority over responding to a responding ambulance on the radio." Boyea stated that this meeting led the Union to file a safety grievance. In the press release, Boyea stated, "The grievance isn't just for the safety of firefighters, but for the safety of citizens we protect." He also said, "Someone is going to get hurt," and "The City's failure to properly train and set up for a central dispatch will result in great property loss or god forbid loss of life."

Boyea made a number of other criticisms of the Employer's management of the central dispatch, including that its failure to properly staff the central dispatch had led to the assignment of police officers working overtime to man the central dispatch and resulted in the Union's filing a third grievance. Boyea asserted that due to the Employer's failure to properly staff the central dispatch, dispatch duties had been passed back to fire fighters who were now understaffed. He also maintained that frequent changes in dispatch procedures had "led to mass confusion between the fire department and central dispatch."

The only specific reference in the press release to Ginestet is his alleged admission to Boyea that the Employer had failed to properly staff the dispatch center, as discussed above. The press release did not demand that Ginestet resign or that the Employer replace him.

Discussion and Conclusions of Law:

Section 10(3) (a) (ii) of PERA is modeled on, and uses the same wording as, Section 8(b) (1) (B) of the National Labor Relation Act, (NLRA), 29 USC 158. Both statutes state:

> It shall be unlawful for a labor organization or its agents (a) to restrain or coerce . . . (ii) a public employer in the selection of its representative for purposes of collective bargaining or the adjustment of grievances.

Obviously, in order to violate Section 10(3) (a) (ii), a union's conduct must be both coercive in nature and directed at the employer's selection of its representatives for purposes of collective bargaining or the adjustment of grievances. The Union's press release criticized the Employer's decision to create a central dispatch as unnecessary and ill-considered. It also accused the Employer's representatives of poorly managing the implementation of the change and asserted that Employer had put public safety at risk. Although, as public safety director, Ginestet had overall responsibility for the operation of the police and fire departments, the press release did not explicitly single him out for criticism. It did not demand that Ginestet be replaced.

However, the Employer argues that Boyea's press release violated Section 10(3) (a) (ii) because its purpose was to pressure Ginestet into granting the Union's pending grievance(s). It also asserts that the press release was coercive because it attempted to embarrass Ginestet by suggesting that he was incompetent and creating a public outcry over the risk to public safety he had allegedly created. The Employer argues that even if Boyea's statements constituted protected activity under Section 9 of PERA, this would not prevent them from violating Section 10(3) (a) (ii). However, the Employer's response to my order to show cause did not provide any case authority to support either its assertion that a union's attempt to pressure an employer representative into granting a grievance is conduct prohibited by Section 10(3)(a)(ii) or its claim that the Union's criticism of Ginestet's actions in this case constituted unlawful coercion.

There are relatively few Commission decisions interpreting Section 10(3) (a) (ii) of PERA, and most involve an overt demand by a union that the employer replace its representative. Even when the union has made such a demand, the Commission has been reluctant to find a violation unless it has also refused to deal with the representative. In *Grass Lake Cmty Schs*, 1978 MERC Lab Op 1186, the Commission held that a union did not violate Section 10(3) (a) (ii) by circulating a petition to the school board asking it to replace its chief negotiator. There was a dispute in that case regarding whether the union was responsible for the petition signed by individual teachers, but the Commission held that it was unnecessary to resolve that question since the presentation of a public petition to the governing body of a public employer is clearly protected by the First Amendment. Although the Commission did not say this directly, it seemed to imply that a union can never violate Section 10(3) (a) (ii) by conduct protected by the First Amendment. The Court of Appeals affirmed the Commission's holding, in *Jackson Co EA v Grass Lake Cmty Schs*, 95 Mich App 635 (1979), although it did so on the basis that the teachers who signed the petition were acting as private citizens and not as agents of the union. Following the reasoning of the Commission in *Grass Lake*, an administrative law judge held, in *Transportation Employees Union*, 1981 MERC Lab Op 68 (no exceptions), that a

union did not violate Section 10(3)(a)(ii) by: (1) carrying picket signs bearing a picture of the employer's chief executive and chief negotiator with a target centering on this face; (2) distributing leaflets to the public blaming him for a strike; and (3) publicly calling for his resignation. The administrative law judge reasoned that there was no violation since the union was simply attempting to enlist the aid of the public in its cause and had not refused to bargain with the chief negotiator. In *AFSCME Council 25,* 1993 MERC Lab Op 484, the Commission held that a union did not violate Section 10(3)(a)(ii) by requesting that the employer replace one of the members of its bargaining team because a mere request did not constitute restraint or coercion.

Unlike Section 10(3) (a) (ii) of PERA, there are many cases interpreting Section 8(b) (1) (B) of the NLRA. In addition to conduct applied directly against an employer to force it to select or replace a particular representative for collective bargaining or grievance adjustment, Section 8(b) (1) prohibits conduct applied indirectly against the employer's 8(b) (1) (B) representative in order to "adversely affect" the manner in which the representative performs the covered functions of collective bargaining, grievance processing, or related activities like contract interpretation. See, e.g., *Florida Power & Light Co v Electrical Workers Local* 641, 417 US 790, 804-805 (1974); *American Broadcasting Co v Writers Guild West, Inc*, 437 US 411 (1978); Most of these cases involve fines or other union discipline imposed on supervisors who are also union members. However, in *International Brotherhood of Teamsters, Local No 507, AFL-CIO,* 306 NLRB 118 (1992), the National Labor Relations Board (NLRB) found that a union violated Section 8(b) (1) (B) when its business agent told a non-member supervisor that he "would end up in a hospital" if he did not stop assigning work in accord with the employer's interpretation of the contract.

In this case, however, the Union made no threats of harm, physical or otherwise, against Ginestet. The act alleged to constitute the unfair labor practice was merely a press release which criticized the Employer's actions in connection with the creation of the central dispatch and attempted to rally citizen support for the Union's position that the central dispatch should be abolished. In the public sector, a public appeal is a well established alternative to a prohibited strike, and, absent special circumstances, a union's attempts to publicize its side of a union-management dispute is activity protected by the Act. *Redford Twp,* 1984 MERC Lab Op 1056; *City of Warren (Fire Dept),* 1980 MERC Lab Op 590 (no exceptions). See also *Oak Park Public Safety Officers Ass'n,* 2001 MERC Lab Op 267, 271 (no exceptions). Cf. *Meridian Twp,* 1997 MERC Lab Op 447; *Ottawa Co Sheriff,* 1996 MERC Lab Op 221. I find that the press release in this case did not constitute unlawful restraint or coercion within the meaning of Section 10(3) (a) (ii) and that the Union's conduct did not violate PERA. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____