STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB ACADEMY,
Public Employer-Respondent,

Case No. C09 I-173

-and-

MACOMB ACADEMY EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

LaRae G. Munk, for the Respondent before the Administrative Law Judge; Garan, Lucow, Miller, P.C., by Thomas Paxton, for the Respondent before the Administrative Law Judge and on exceptions;

Pear, Sperling, Eggan & Daniels, P.C., by Harvey I. Wax, for the Charging Party

DECISION AND ORDER

On April 6, 2011, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Macomb Academy (Employer), violated §10(1)(a), (c), and (e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210.(1)(a), (c), and (e). The ALJ concluded that as a result of Respondent's employees' efforts to organize and to obtain representation by Charging Party, Macomb Academy Education Association, MEA/NEA (Union), Respondent restrained and coerced its employees in the exercise of their §9 rights. The ALJ found that Respondent violated §10(1)(a) by: withholding from its employees the benefit of knowing whether or not they would continue to have employment after June 2009; impliedly threatening to retaliate against employees if they chose union representation; and announcing its intention to hire all new employees as "contract employees." The ALJ determined that Respondent violated §10(1)(a) when it terminated the employment of Christine Lowe on June 16, 2009, because of her protected concerted activities, and violated §10(1)(c) when it terminated Karen Matrille on June 16, 2009, because of her perceived role in Charging Party's union campaign. The ALJ also found that Respondent violated its duty to bargain by unilaterally: announcing on June 22, 2009, that it was establishing an "interim pay schedule"; reducing the salaries of two employees for the 2009-2010 school year; altering the time of staff meetings for the 2009-2010 school year; and implementing a new professional liability insurance benefit on October 15, 2009. Further, the ALJ recommended that we order affirmative relief, including requiring Respondent to make

employees whole by compensating them for wages lost due to Respondent's unlawful acts with interest at 6% per annum. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with §16 of PERA.

After requesting and receiving an extension of time, Respondent filed exceptions to the ALJ's Decision and Recommended Order on May 27, 2011. Charging Party requested and was granted an extension of time until July 11, 2011, to file its response to Respondent's exceptions. Charging Party filed its Brief in Support of the ALJ's Decision and Recommended Order and Response to Respondent's Exceptions on July 13, 2011. Because Charging Party's response was untimely, we will not consider it.

In its exceptions, Respondent disputes several of the ALJ's findings of fact, as well as the ALJ's conclusions that Respondent violated §10(1)(a), (c), and (e) of PERA. Respondent contends the ALJ erred by deciding that the Employer's refusal to disclose to employees whether their employment would continue after June 2009 violated §10(1)(a). Respondent also cites as error the ALJ's finding of an implied threat in a letter sent by the Employer's agent, LaRae Munk, to employee Pat Tuzinsky. Further, Respondent excepts to the determination that the hiring of contract employees violated §10(1)(a). Respondent argues that the facts in the record do not support the conclusion that the termination of the employment of Christine Lowe and Karen Matrille was motivated by their participation in protected concerted activity. Respondent also denies that it made unlawful unilateral changes in terms and conditions of employment in violation of §10(1)(e).

We have considered each of the arguments made in Respondent's exceptions, and find them to be without merit.

Factual Summary:

Unless otherwise stated, we adopt the findings of fact contained in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary.

Respondent operates a public school academy that provides instruction in daily living and employment skills to young adults with cognitive impairments. Respondent's charter requires its teaching staff to be State certified with a special education endorsement. During the 2008-2009 school year, Respondent employed seven teachers, at least three of whom had no special education endorsement. All but one of the seven teachers had worked for Respondent without a special education endorsement at some point. Prior to the events that led to the unfair labor practice charges at issue in this case, the teachers were unrepresented and were advised by Respondent that they were "at-will" employees. Respondent determined their compensation and notified them of their salaries before each school year.

Christine Lowe began working for Respondent in 2004 as a substitute teacher and was hired as a regular teacher in the fall of 2005. At the time she was hired, Lowe did not have a permanent certificate or a special education endorsement. However, she obtained her permanent State certification and took classes to earn a special education endorsement while in Respondent's employ.

In December 2008, Lowe received an "undesirable incident" write-up from Betty Yee, Respondent's superintendent and school principal. Lowe, who previously had nothing negative in her personnel file, tried but was unable to persuade Yee to remove the write-up from her file. On January 12, 2009, Lowe received a written reprimand for allegedly asking a parent involved in the incident to write a letter on her behalf. On January 23, Lowe received a written classroom observation evaluation from Yee. Although it contained some observations critical of Lowe, the evaluation praised Lowe's handling of the class and was generally positive.

Lowe appealed the write-up and reprimand to Respondent's board, addressing it at a regular meeting on February 19, 2009. Teachers Karen Matrille, Ruth Brody, Diane Costie, and Patricia Tuzinsky accompanied Lowe, and Matrille spoke to the board on Lowe's behalf. The board chose not to intervene in the dispute between Lowe and Yee.

In late February or early March 2009, Brody contacted the MEA about obtaining union representation. The record does not contain any evidence indicating Respondent knew about the organizing activity before April 28, 2009, when Charging Party petitioned for a representation election.

On March 19, 2009, Yee put a note in Lowe's file accusing Lowe of raising her voice to a secretarial employee. On March 30, 2009, Lowe sent Yee an email asking to do her student teaching at Macomb Academy during the fall, to enable her to complete the requirements to obtain a special education endorsement. Lowe testified that Yee replied, "I can't give you an answer until we have the numbers." When Lowe then asked Yee if that meant that she would not be at the school the following year, Yee again said she would have to wait until they "had the numbers."

In April, 2009, Lowe attended another board meeting stating that she needed to know whether she could do her student teaching at Macomb Academy in the fall. She was told that the board would look into it. Yee told Lowe's university advisor that it would be better if Lowe did her student teaching elsewhere. Yee had allowed other teachers to do their student teaching while teaching a class. She claimed that this was only appropriate when a teacher demonstrated strong teaching skills and that Lowe had not demonstrated strong teaching skills. Because Yee had given Lowe a positive evaluation in January 2009, and no evidence was offered by Respondent to support Yee's assertion that Lowe's teaching skills were inadequate, we agree with the ALJ's conclusion that Yee's testimony on this issue was incomplete and could not be credited.

According to Yee, in April, 2009, the board's finance committee met and made decisions regarding employment contracts for the next school year. On April 28, 2009, Charging Party filed its petition for a representation election in a unit of full-time and part-time teachers, excluding supervisors and executives. The parties entered into an agreement for a consent election in a unit that excluded contract employees. Matrille was excluded from the unit because she was a "contract employee."

Matrille asked Yee to schedule a staff meeting to discuss end of school year issues. The meeting was held on May 15, 2009. At the meeting, Yee introduced Respondent's labor relations attorney, LaRae Munk, and turned the meeting over to Munk. Munk asked Matrille, to leave the meeting because "the MEA had chosen not to represent her." Before leaving the room, Matrille informed Munk that Munk's statement was false, because Matrille was actually a member of the MEA. After Matrille left, Munk read a prepared statement, which asserted that teachers should reject union representation and contained the following:

> Although the Finance Committee met weeks ago to make decisions regarding the employment contracts for 2009-2010 school year, those have now been placed on hold and no notification can be given as to who will be rehired or who will not be rehired because under the union organizing laws such notifications may be viewed by the union as promises or threats which are illegal.

On June 3, 2009, Munk sent a letter to all of Respondent's teachers containing more arguments against the union. Around the same time, Munk sent a note to teacher Patricia Tuzinsky. Tuzinsky had recently received a poor evaluation, and was eventually put on an improvement plan for the 2009-2010 school year. Munk's note to Tuzinsky read as follows:

> Thank you for carefully considering the long term consequences of your vote. On a personal note, please know that Dr. Yee understands your anxiety about next year and would love to alleviate that but would be breaking the law if she told you anything until after the vote.

On June 4, Lowe received a memo from Yee criticizing her for: failing to sign out at the end of the day; carrying a mug while supervising students' preparations for an awards program; and sending two students to the office, apparently without attempting to assist them to resolve their differences.

On June 8, 2009, Charging Party was selected as the exclusive bargaining agent in a unit of Respondent's full-time and part-time teachers from which contract employees were excluded. On June 11, 2009, Respondent's board passed a resolution that "all new employees will be offered employment as 'contracted services.'"

On June 16, 2009, Matrille and Lowe were notified that their employment contracts would not be renewed for the following school year. Lowe's letter cited concern over her lack of a special education endorsement. The ALJ credited Lowe's testimony that she had never discussed her lack of a special education endorsement with Yee. Matrille's letter thanked her for her service and stated that her contract would not be renewed. Matrille did not question Yee but did ask board member Michael Bommarito why she had been fired. According to Matrille, Bommarito replied that Yee had said that Matrille was costing too much, and that Yee had called Matrille a "shitster [sic]."[1] He told Matrille, "You must have made a statement at the meeting that really pissed her off," and asked if she had started the "the union stuff." Bommarito told her that Yee thought that Matrille was responsible for starting the unionization efforts.

[1] Although the word appears " shitster," in the transcript, the ALJ has suggested that this was an error that might have been corrected to read as "shit stirrer." However, neither party sought to correct the transcript.

Yee denied calling Matrille a "shitster," or anything similar, but did not deny that she complained to the board about Matrille or that she believed Matrille was involved in the union campaign. The ALJ credited Matrille's testimony as to what Bommarito told her.

Yee testified that Matrille's evaluations were excellent, but that her contract was not renewed because she was one of the highest paid teachers. When the decision regarding Matrille was made, Matrille was being paid less than Brody and Tuzinsky, Respondent's only other teachers with special education endorsements.

In a June 22, 2009 memo to the teaching staff, Respondent's board announced that it had adopted an interim pay schedule with a base pay of $30,000 per teacher. No pay schedule was attached to the memo, and it was not sent to Charging Party.

During the summer of 2009, three new teachers were hired and the four teachers remaining from the previous school year were notified of their placement on the interim pay schedule. Tuzinsky and Brody received pay cuts of $5,000 each. The salaries of the other two teachers, who were paid less, remained the same. Charging Party was not given notice of Respondent's pay decisions.

In August 2009, Respondent distributed a document entitled "Events," in which teachers were told that four of five staff meetings would begin at 4:00 p.m. instead of 3:00 p.m. Previously, the teachers' workday ended at 4:00 p.m. Respondent did not give Charging Party an opportunity to bargain over the length of the work day on staff meeting days.

On September 28, 2009, Charging Party filed its unfair labor practice charge. On October 15, 2009, Respondent notified the members of Charging Party's unit that it had purchased professional liability insurance policies from the American Association of Educators (AAE) for each bargaining unit member. On February 2, 2010, Charging Party amended its unfair labor practice charge to include the allegation that Respondent was bargaining in bad faith. Although the parties had met and bargained, they had not come to an agreement. The amended charge also protested Respondent's unilateral decision to purchase professional liability insurance from AAE. The MEA provides professional liability insurance to its members at no cost.

Discussion and Conclusions of Law:

In its exceptions, Respondent contends the ALJ erred by deciding that the Employer's refusal to disclose to employees whether their employment would continue after June 2009 violated §10(1)(a). It argues that the evidence fails to show that Respondent was motivated by anti-union animus. Respondent's argument lacks merit since proof of a violation of §10(1)(a) does not require a showing of animus. An employer's actions violate §10(1)(a) when they may reasonably be said to have interfered with the free exercise of the rights protected by §9. See *St Clair Co Intermediate Sch Dist*, 1999 MERC Lab Op 38. Respondent argues that the May 15, 2009 notification that the decisions had been made but would not be disclosed was "made prior

to the employees' organization efforts and clearly prior to the Employer's notice of those efforts." In fact, the May 15 notification was given by Munk, Respondent's labor counsel hired in response to Charging Party's April 28, 2009 petition for a representation election.

Respondent suggests that disclosing which employees would be recalled might have been viewed as a threat. However, we agree with the ALJ that this departure from Respondent's practice of giving ample, advance notice of its staffing decisions was a reminder to employees that they were dependent on Respondent's good will, which might be forfeited if they elected to be represented by a union. Respondent did not postpone its staffing decisions. It announced that the decisions had been made, but would not be disclosed because of the pendency of Charging Party's petition for a representation election. Accordingly, the employees could reasonably interpret Respondent's statement as a threat to retaliate against them, if they chose union representation. Munk's note to Tuzinsky was, minimally, a further manifestation of the threat implicit in the announcement of the withholding of Respondent's staffing decisions.

Respondent takes exception to the ALJ's finding that its resolution to hire all new teachers as contract employees, who would be automatically excluded from Charging Party's bargaining unit, violated §10(1)(a). Respondent claims that the resolution was motivated by economic considerations. The claim is based upon Yee's testimony, which the ALJ did not credit. The ALJ is in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. This Commission will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary. See *Redford Union Sch Dist*, 23 MPER 32 (2010); *City of Lansing (Bd of Water & Light)*, 20 MPER 33 (2007); *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499, 507; 9 MPER 27097. We agree with the ALJ that Respondent's resolution gave notice to the employees that Respondent did not intend to tolerate a union and that the effort to exercise rights conferred by PERA was doomed by a policy that would cause the bargaining unit to disappear through attrition. Accordingly, for the aforementioned reasons, we agree with the ALJ's conclusion that Respondent violated §10(1)(a).

Respondent claims that the ALJ erroneously held that Lowe was terminated because of her concerted activity. It argues that there is no evidence that Lowe engaged in concerted activity. However, the evidence establishes, and the ALJ correctly found, that Lowe was engaged in protected activity on February 19, 2009, when she appeared at a board meeting accompanied by Matrille and other teachers, and was joined by Matrille in voicing objections to the discipline meted out to her by Yee. This concerted activity was followed by Yee's refusal to approve Lowe's student teaching request, and by Lowe's termination. By refusing to approve Lowe's student teaching request, Yee treated Lowe differently from others making similar requests and provided no credible reason for doing that. When Lowe was terminated soon thereafter, Respondent asserted that her discharge was premised on her lack of a special education endorsement. Accordingly, we agree with the ALJ's conclusion that Lowe was denied the opportunity to student teach and was discharged because she engaged in protected concerted activity. Respondent's actions therefore violated §10(1)(a) of PERA.

Respondent claims that the ALJ erroneously held that Matrille was terminated because of her concerted activity. It argues that there is no evidence that Matrille engaged in obvious

concerted activity. However, it does not dispute that Matrille appeared at Respondent's February 19, 2009 board meeting, along with Lowe and other teachers, and addressed the board on Lowe's behalf. Matrille engaged in protected concerted activity when she spoke on Lowe's behalf at the board meeting. When asked to leave a staff meeting because she "was not represented by the MEA," Matrille stated, in front of Yee, Munk, and a room full of teachers, that she was a member of the MEA. Thus, Respondent was aware of both Matrille's protected concerted activity and her union membership. Respondent discharged Matrille shortly after Charging Party was selected as the employees' bargaining representative. Respondent claims that Matrille, who had a special education endorsement, was let go to reduce costs. We agree with the ALJ that Respondent's claim is not credible in light of the fact that two other teachers with special education endorsements, one of whom was on an improvement plan because of performance problems, were retained even though their salaries were greater than Matrille's. As with Lowe's discharge, Respondent has no credible business justification for Matrille's discharge. It is evident that not only did Respondent discharge Lowe for having the temerity to ask the board to overrule Yee's discipline of her, it discharged Matrille for similar reasons.

Respondent contends that the ALJ accepted inadmissible hearsay by considering Matrille's testimony about what she was told by Respondent's board member Michael Bommarito. Respondent disagrees with the ALJ's conclusion that this testimony was admissible because Bommarito's statement is a party admission pursuant to MRE 801(d)(2). Even if we did not agree that Matrille's testimony about what she was told by Bommarito can be considered as a party admission, we would still agree with the ALJ that there is sufficient circumstantial evidence to find that Matrille's discharge was motivated by her protected concerted activity and is unlawful.

Respondent also argues that its unilateral changes to the rates of pay and hours of work of bargaining unit members did not violate its duty to bargain in good faith because it had made such changes unilaterally before the duty to bargain was established and, therefore, such unilateral changes constituted the status quo. We find this argument to be without merit. An employer must maintain the status quo relating to mandatory subjects of bargaining and bargain in good faith until impasse is reached. *AFSCME Council 25 v Wayne Co*, 152 Mich App 87, 93-94; 393 NW2d 889, 892 (1986); *Local 1467, IAFF v City of Portage*, 134 Mich App 466 (1984), lv denied, 422 Mich 924 (1985). An employer violates its duty to bargain when it institutes changes in mandatory subjects of bargaining while the parties are bargaining a first contract. *NLRB v Katz*, 369 US 736, 746 (1962). Respondent's failure to maintain terms and conditions of employment in this case is a violation of its duty to bargain under §10(1)(e) of PERA.

After carefully considering each of the arguments set forth by Respondent in its exceptions and brief, we uphold the ALJ's Decision and Recommended Order. We note, however, that the correct statutory interest rate is five percent as prescribed by MCL 438.31. *Solakis v Roberts*, 395 Mich 13 (1980); *Oakland Co Rd Comm*, 1983 MERC Lab Op 727; *Genesee Christian Day Care Service, Inc*, 1982 MERC Lab Op 1660. We, therefore, modify the ALJ's Recommended Order as set forth below.

ORDER

The Order recommended by the Administrative Law Judge shall become the Order of the Commission, with the following modification. Paragraphs 2(a) and (b) of the Order shall be modified to read:

> a. Offer Christine Lowe and Karen Matrille full, immediate, and unconditional reinstatement to the positions from which they were terminated on June 16, 2009, remove any reference to these terminations from their personnel files, and make them whole for any loss of earnings or other benefits resulting from their unlawful terminations by paying them the amounts they would have earned in wages and benefits from the date of their termination to the date they are either reinstated or they reject Respondent's unconditional offer, minus any interim earnings, plus interest on the amounts owed at the statutory rate of five percent (5%) per annum computed quarterly.
>
> b. Rescind the unlawful unilateral changes Respondent made to the salaries of Ruth Brody and Patricia Tuzinsky in August 2009, pending satisfaction of Respondent's obligation to bargain in good faith over wages and other benefits, and reimburse Brody and Tuzinsky for the wages and benefits they lost as a result of this unlawful change, including interest at the statutory rate of five percent (5%) per annum computed quarterly.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **MACOMB ACADEMY** TO HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed by Section 9 of PERA, including the right to form, join, or assist in labor organizations and the right to bargain collectively through representatives of their free choice, by withholding from employees, because they sought to organize, the benefit of knowing whether they would continue to be employed after June 2009; by implicitly threatening to retaliate against employees if they selected a union; or by announcing, after our employees voted to select the Michigan Education Association (MEA) as their bargaining representative, that we would all hire all new employees as "contract employees" and that, therefore, the employees' efforts to organize had been futile.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed by Section 9, including the right to engage in lawful concerted activities for the purposes of collective bargaining or other mutual aid and protection, by taking adverse employment actions against Christine Lowe, resulting in the termination of her employment on June 16, 2009, because she and other employees complained that Lowe had been unfairly disciplined.

WE WILL NOT discriminate against employees regarding terms and conditions of employment in order to encourage or discourage membership in a labor organization by terminating the employment of Karen Matrille on June 16, 2009 because we believed she was responsible for initiating the MEA's organizing efforts.

WE WILL NOT impose changes in terms and conditions of employment, including wages, work hours, and benefits, without giving the MEA/Macomb Academy Education Association, the duly certified bargaining representative of its employees, the opportunity to bargain over these changes.

WE WILL offer Christine Lowe and Karen Matrille full, immediate and unconditional reinstatement to the positions from which they were terminated on June 16, 2009, remove any reference to these terminations from their personnel files, and make them whole for any loss of earnings or other benefits resulting from their unlawful terminations by paying them the amounts they would have earned in wages and benefits from the date of their terminations to the date of their reinstatement or rejection of our unconditional offer, minus

any interim earnings, plus interest on the amounts owed at the statutory rate of five percent (5%) per annum.

WE WILL rescind the unlawful unilateral changes we made to the salaries of Ruth Brody and Patricia Tuzinsky in August 2009, pending satisfaction of our obligation to bargain in good faith with the MEA over wages and other benefits, hours, and terms and conditions of employment, and we will reimburse Brody and Tuzinsky for the wages and benefits they lost as a result of this unlawful change, including interest at the statutory rate of five percent (5%) per annum.

WE WILL rescind the unlawful unilateral change in work hours we made at the beginning of the 2009-2010 school year and terminate the professional liability insurance benefit we unilaterally instituted on October 15, 2009, pending satisfaction of our obligation to bargain in good faith with the MEA over wages, hours, and other terms and conditions of employment.

> As a public employer subject to PERA, we acknowledge that all of our employees are free to organize together and to form, join or assist in labor organizations, to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection, and to negotiate and bargain collectively with their employer through representatives of their own free choice.

We also acknowledge that, as a public employer subject to PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment or other conditions of employment.

MACOMB ACADEMY

By: _____

Title: _____

Date:_____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case No. C09 I-173

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

In the Matter of:

MACOMB ACADEMY,
Public Employer-Respondent,

Case No. C09 I-173

-and-

MACOMB ACADEMY EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
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APPEARANCES:

Garan Lucow Miller P.C., by Thomas R. Paxton, for Respondent; LaRae G. Munk, for Respondent

Pear, Sperling, Eggan & Daniels, P.C., by Harvey I. Wax, 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 March 8, 9, and 10, 2010, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission (the Commission) Based upon the entire record, including post-hearing briefs filed by the parties on June 21, 2010, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Macomb Academy Education Association, MEA/NEA, filed this charge on September 28, 2009 against the Macomb Academy, a chartered public school academy and public school district under the Michigan School Code. The charge was amended on February 2, 2010. On June 8, 2009, the Michigan Education Association, (MEA), Charging Party's parent organization, was selected as the exclusive bargaining representative for a bargaining unit of Respondent's full-time and regular part-time teachers after an election conducted by the Commission. Prior to the election, these employees were unrepresented. The charge alleges that Respondent violated Sections 10(1)(a), 10(1)(c) and 10(1)(e) of PERA by acts committed both before and after the union election.

The charge, as amended, alleges that Respondent threatened and coerced its employees in the exercise of their Section 9 rights in violation of Section 10(1)(a) of PERA by: (1) on May 15, 2009, compelling and/or deceitfully inducing employees to attend a meeting whose sole purpose was to persuade them to vote against the union; (2) excluding a known union supporter, teacher Karen Matrille, from this meeting; (3) during this meeting, impliedly threatening that employees would lose their jobs and employee compensation and benefits would be reduced if the union was selected; (4) during this meeting, making false statements concerning unions in general the MEA and its affiliate, the National Education Association (NEA), in particular; (5) on June 3, 2009, in a letter sent to all employees, making additional false statements about the consequence of unionization and about the MEA and NEA; (6) on or around this same date, sending personal notes to employees to attempt to persuade them to vote against the union, including one which impliedly threatened loss of employment if the union was selected; and (7) announcing, shortly after Charging Party had won the election, that all new employees would be hired as "contract employees."

The charge, as amended, alleges that Respondent discriminated or retaliated against teachers Karen Matrille and Christine Lowe in violation of Sections 10(1)(a) and 10(1)(c) of PERA by terminating their employment on or about June 16, 2009 because of their union and/or other protected concerted activities.

The charge, as amended, alleges that Respondent violated its duty to bargain after the MEA's certification by the following acts: (1) in June 2009, unilaterally altering terms and conditions of employment for members of the unit by eliminating classroom aide positions, thereby increasing the teachers' daily work load; (2) between June and August 2009, hiring three new teachers as "contract" employees;" (3) on or about August 11, 2009, unilaterally reducing the salaries of teachers Ruth Brody and Patricia Tuzinsky; (4) in August 2010, unilaterally changing the school schedule and increasing the length of the teachers' workday on days when there were stafff meetings; (4) on October 15, 2009, instituting a new employment benefit, professional liability insurance, without notifying Charging Party or giving it an opportunity to bargain over this benefit; and (5) during the parties' negotiations for a first contract, engaging in surface bargaining with no intention of reaching a good faith agreement.

Findings of Fact:

Events Prior to the Election Petition and

Lowe's Employment

Respondent was first authorized to operate as a public school academy by Central Michigan University over twenty years ago. It is governed by a board of directors (hereinafter the Board). It provides instruction in daily living and employment skills to students with cognitive impairments between the ages of 18 and 26. The students typically spend about half their day at a job with a job coach and the other half with teachers in a classroom. Respondent provides instruction in daily living skills like cooking, laundry, shopping and handling money.

Its teachers conduct structured lessons designed to also help the students expand their vocabulary, math skills, social skills, and general knowledge.

About three-quarters of the school's revenue comes from the State of Michigan and the majority of the rest comes from the federal government. Respondent's charter requires teachers at the school to be certified by the State with a special education endorsement. Because its students have a range of disabilities, Respondent accepts certification in any of a number of special education areas, including learning disabled (LD), cognitive impairment, and autism.

Until the Charging Party was selected as their bargaining representative, Respondent's teachers were unorganized. Each teacher was explicitly advised that her employment was "at-will" and required to sign a statement each year reaffirming this. Respondent determined before the beginning of each school year what each teacher would be paid, and the teachers were notified of their salaries for the upcoming school year in August.

During the 2008-2009 school year, Respondent employed seven teachers. Betty Yee was employed by Respondent as its superintendent and school principal. Yee had held those positions since the beginning of the 2006-2007 school year.

Christine Lowe began working for Respondent as a long-term substitute in the fall of 2004, and was hired as a regular teacher in the fall of 2005. Lowe initially did not have a permanent certificate, and she had no special education endorsement. While working for Respondent, Lowe became permanently certified and took classes to obtain a special education endorsement. Certified teachers without special education endorsements may be approved to teach students with disabilities by the Michigan Department of Education, Office of Special Education and Early Intervention Services (hereinafter MDE). However, the district employing those teachers must certify that it conducted a search and no fully approved teacher was available. The MDE's approval is for one school year only, but can be continued from year to year upon the condition that the teacher completes at least six credit hours each year toward full certification. See Michigan Administrative Code, R 340.1783. For each year that Lowe taught, Respondent received permission from the MDE to employ Lowe even though she was not fully certified to teach students with disabilities. [2]

During the 2008-2009 school year, at least three of Respondent's seven teachers had no special education endorsement. Moreover, except for Karen Matrille, all of the teachers employed by Respondent during the 2008-2009 school year had worked for Respondent without a special education endorsement at some point. Respondent regularly obtained grant money for tuition reimbursements to help its teachers to obtain their special education endorsements, and Lowe received about $2300 for this purpose during her employment. Respondent had also permitted at least three teachers, Ruth Brody, Patricia Tuzinsky and Sue Sczomak, to fulfill the student teaching requirements for their special education endorsements while teaching classes and being paid a salary. In these cases, the student teacher and her supervising teacher

[2] Yee testified that the teacher, and not the district, applies for this approval. The form to request approval requires the signature of both the teacher and the school district. The letter from the MDE approving Lowe's employment for the 2008-2009 school year was addressed to Yee and stated that Respondent would have to apply for continuing approval to employ Lowe for another school year.

maintained separate classrooms. Brody completed the student teaching requirement for her LD endorsement while working for Respondent and, in the fall of 2008, student taught again while working toward a second endorsement in cognitive impairment. There was no evidence that Respondent had turned down any teacher's request to satisfy her student teaching requirement this way until Lowe asked to do this in the spring of 2009.

In December 2008, Lowe received an "undesirable incident" write-up from Yee after a parent discovered that a particular classroom aide had been assigned to supervise her student despite the parent's request that this not occur. Lowe felt that she had not been responsible for the mistake, but was unsuccessful in persuading Yee to remove the write-up from her file. On January 12, 2009, Lowe received a written reprimand for allegedly asking the parent involved in the incident to write a letter on her behalf. Shortly thereafter, on January 23, Lowe received a written classroom observation evaluation from Yee. The parties disagree over whether the evaluation was positive or negative. On the day of the observation, Lowe's class was operating the school store. When asked what she would do if she were to teach the lesson again, Lowe offered only one suggestion. In the evaluation, Yee criticized this as inadequate and offered five or six suggestions of her own. Yee also criticized Lowe for holding a coffee mug in her hand. However, the evaluation also praised specific techniques used by Lowe and the way the class was handled generally. Although the evaluation did not provide for a numerical rating, I find it to be a positive evaluation.

After failing to persuade Yee to remove the write-up and reprimand from her personnel file, Lowe decided to appeal to Respondent's Board. Lowe spoke to the Board at its February 19, 2009 regular meeting. Respondent's teachers rarely attended Board meetings. On February 19, teachers Karen Matrille, Ruth Brody, Diane Costie and Patricia Tuzinsky attended the meeting with Lowe, and Matrille addressed the Board on Lowe's behalf. After listening to Lowe and Matrille, the Board told Lowe that it did not want to become involved in any dispute between her and Yee. Claudia Schulte, one of the Board members, told Lowe not to worry about the write-up because it would never go anywhere except her file.

The teachers who attended the meeting were disappointed with the Board's response to Lowe's complaints. After discussing this with other teachers, in late February or early March 2009, Ruth Brody contacted the MEA about obtaining union representation. Shortly thereafter, a MEA representative met with a group of teachers including Brody, Lowe and Matrille. There is no evidence in the record that Respondent knew about the organizing activity before Charging Party filed a petition for a representation election with the Commission on April 28, 2009.

Prior to the December 2008 write-up, Lowe had nothing of a negative nature in her personnel file. On March 19, 2009, Yee put a note in Lowe's file accusing Lowe of raising her voice to a secretarial employee.

In the spring of 2009, Lowe needed only one more class and to do her student teaching to obtain her LD endorsement. On March 30, 2009, Lowe sent Yee an email stating that her university would permit her to do her student teaching at Macomb Academy during the fall of 2009, that another teacher had agreed to act as her supervisor, and that after the fall of 2009 she would have her LD endorsement. On March 31, when Lowe had not received a response to her

email, she asked Yee about it. According to Lowe, Yee said, "I can't give you an answer until we have the numbers," and "We are all at-will employees." Lowe testified that she asked Yee if that meant that she was not going to be at the school next year, and Yee said again that she couldn't tell her that until they "had the numbers." Yee asserted that she did not recall this conversation.

In April, Lowe attended another Board meeting and explained to the Board that her university needed to know as soon as possible whether she would be allowed to do her student teaching at Respondent in the fall or whether she had to make some other arrangement. Board member Schulte told Lowe that the Board would look into it. Sometime around this time, Yee called Lowe's university advisor and told her that she felt it would be better if Lowe did her student teaching elsewhere.

Yee testified that, although she had approved other teachers to do their student teaching while teaching a class, she felt that this arrangement was only appropriate when the teacher had previously demonstrated strong teaching skills. According to Yee, based on her previous observations, Lowe had not shown that she had sufficiently strong teaching abilities to student teach without direct supervision. As discussed above, in January 2009, Yee gave Lowe a positive evaluation. Respondent did not present any evidence which corroborated Yee's testimony that in March 2009 she believed that Lowe' teaching skills were lacking. Because Yee's testimony on this critical issue was incomplete, I do not credit it.

After hearing from her adviser that she would not be allowed to do her student teaching at Respondent, Lowe came to Yee's office and asked for an explanation. According to Yee, she told Lowe that she had concerns about her teaching strategies and that she would benefit more from having a supervising teacher in the classroom. Yee testified that Lowe angrily told her that she would go to the Board even though "the Board was in (Yee's) pocket."

Yee testified that sometime in April the Board's finance committee met and made decisions regarding employment contracts for the next school year. After the election petition was filed, the Board put the decisions on hold until, according to Yee, it could determine what the union's collective bargaining demands would be.

Events between the Filing of the Petition and the Election and

Matrille's Employment

On April 28, 2009, Charging Party filed a petition for representation election with the Commission for a unit of all full-time and part-time teachers, excluding supervisors and executives. Respondent proposed to exclude Karen Matrille from the unit on the basis that she was a "contract employee." The parties eventually entered into an agreement for a consent election in a unit which explicitly excluded contract employees.

Before she joined Respondent's teaching staff, Matrille taught for twenty-eight years in another school district; she had a LD endorsement and a master's degree. While teaching at the other school district, Matrille served off-and-on as a building representative for the MEA-affiliated union at that school district and was a delegate to several NEA conventions. In

addition, her then-husband also served for many years as the MEA affiliate's president in that school district. However, there is no evidence that Respondent knew these facts.

After Matrille retired from the other school district and began receiving a pension from the Michigan Public School Employees Retirement System (MPSERS), she started substitute teaching at Respondent. At the beginning of the 2006-2007 school year, Matrille began working as a full-time teacher for Respondent. Matrille worked fixed hours, had charge of a classroom and worked under the supervision and direction of Yee. Respondent does not dispute that Matrille met the definition of a public employee under Section 1(e) of PERA. However, throughout her employment, Matrille was considered by Respondent to be a "contract employee." Yee testified that the purpose of this was to avoid affecting Matrille's pension. [3]

In accord with the Commission's election rules, Respondent was advised by the Commission after the consent election agreement that it was required to provide the Charging Party and the Commission with a list of the names and addresses of all the employees in the proposed bargaining unit. On May 11, Yee sent a memo to its teachers notifying them that it had provided their names and addresses to Charging Party because it was required by law to do so even though it regarded the information as confidential. Yee apologized for the invasion of their privacy. On May 13, Respondent hired LaRae Munk as its labor attorney with the understanding that Munk would conduct an information campaign to persuade the employees to vote against the union. Munk is or has been affiliated with the Association of American Educators (AAE). The AAE is a professional teachers' organization which actively opposes the unionization of teachers.

Around this same time, Matrille asked Yee to schedule a staff meeting to discuss end of school year issues. The meeting, held on May 15, was announced to teachers as a meeting to finalize end of year plans. At this meeting, Yee introduced Munk to the teachers and then turned the meeting over to her. Munk started by asking Matrille to leave the room because "the MEA had chosen not to represent her." Matrille replied that she had no problem with leaving the meeting, but that the MEA had not chosen not to represent her; she was a member of the MEA. Matrille then left and went back to her classroom. After Matrille had left the room, Munk read a prepared statement giving numerous reasons why the teachers should reject union representation. Of the statements contained in this document, Charging Party singles out the following as having a coercive effect on the employees' exercise of their Section 9 rights:

> Although the Finance Committee met weeks ago to make decisions regarding the employment contracts for 2009-2010 school year, those have now been placed on hold and no notification can be given as to who will be rehired or who will not be rehired because under the union organizing laws such notifications may be viewed by the union as promises or threats which are illegal.
>
> . . .

[3] A participating school district is not required to make contributions to MPSERS on behalf of a MPSERS retiree whom it employs.. However, a MSPERS retiree working for a participating Michigan public school is subject to limitations on the amount of money he or she can earn. See MCL 38. 1361.

> Engaging the union in the operation of the Academy could raise expenditures for legal fees that we would prefer to expend on salaries, benefits and improving working conditions as well as continuing to improve the physical plant.

Munk passed out copies of her statement and several handouts. The first handout, headed "Your Future in the Union's Hands – Job Security or Job Insecurity?" contained excerpts of newspaper articles discussing layoffs in a number of Michigan school districts, and included this question, "The Michigan Education Association isn't protecting its current member teachers jobs in public schools; will they protect teachers in schools they philosophically oppose?" The document concluded with this statement, "The union is unable to deliver on the promises of job security, improved wages, benefit and working conditions. Only your employer can provide those within the framework of their mission and budget. The promises union organizers make often contribute to job insecurity." A second document, entitled "Facts about the Michigan Education Association Efforts to Represent the Macomb Academy Teachers in Collective Bargaining," listed a series of miscellaneous "facts" about collective bargaining, including:

> A union never runs for reelection so its performance is rarely subject to scrutiny.
>
> Under a union contract your benefits may not necessarily continue as they are now. You could get more, you could get less, or you could continue to get exactly what you have now.
>
> Collective bargaining does not start at a base of current wage benefits and working conditions. Everything is subject to negotiations, including present levels of pay and benefits.
>
> No union – this one or another – can get more than management is able to give. No matter what a union may say or imply, management is always free to reject any union demand. There will be good faith bargaining should you choose a union, but that doesn't automatically mean there will be an agreement that aligns with the union's demands.
>
> The union talks about job security, but it cannot create or maintain jobs. Obviously unions don't help an employer get additional business and therefore, do not contribute to an employer's growth or stability.
>
> What job security is the MEA willing to guarantee?
>
> The election will be decided by a majority of the employees who vote, not by a majority of those employees eligible to vote.
>
> Job protection benefits and 2 million in liability insurance coverage, plus other benefits and discounts are available through alternative professional associations such as Association of American Educators at 2/3 lower cost than the MEA dues.

This same document also included a quote from an education professor stating that dedicated teachers didn't need unions to improve communication with administrators, and that unionizing teachers at charter schools would distract them from the job of educating students; a quote from the president of the Detroit Federation of Teachers about organizing charter schools as a means to check their spread; and a quote from the vice-president of that union about terminating teachers who did not pay their union dues.

A third handout, entitled "Did You Know?" used quotations from the MEA's website, including statements about teacher certification requirements, to suggest that the protections provided by collective bargaining were not worth the dues union members paid. The third handout included this sentence, "MEA legal coverage is good only if the Union agrees with your position," followed by a statement from the MEA website that members were not entitled to legal representation in "proceedings in which the individual member asserts a claim adverse to matters or the interest or position of the Association or its affiliates."

In addition to reading from her prepared statement, Munk related a story about a teacher whom the union had refused to represent in a legal dispute. She gave the teachers the name and a telephone number of that teacher and told them that they could call and get the information first hand if they had any questions. Munk also told the teachers not to discuss what had happened in the meeting with anyone outside the room. After Munk said this, she left the meeting, Matrille was called back, and the staff discussed end of the year events.

On June 3, 2009, five days before the election, Munk sent a letter to all of Respondent's teachers containing more arguments for why they should vote against the union. Charging Party singles out two statements in this letter as coercive. The first was that in the election, the employees "have the opportunity to decide whether all of the future terms of your employment will be controlled by the Michigan Education Association." The second suggested that the dues of MEA and NEA members went to support social agendas that the employees might not want to support.

At about this same time that she sent this letter, Munk mailed a personal handwritten note to teacher Patricia Tuzinsky. Tuzinsky had recently received a poor evaluation, and was eventually put on an improvement plan for the 2000-2010 school year. Munk's note to Tuzinsky read as follows:

> Pat,
>
> Thank you for carefully considering the long term consequences of your vote. On a personal note, please know that Dr. Yee understands your anxiety about next year and would love to alleviate that but would be breaking the law if she told you anything until after the vote.

Around the same time, Ruth Brody received a note that was not signed, but was on the same stationary as the note Tuzinsky received. Brody's note asked her, "as a person of faith," to consider the consequences of her vote. Although the note was not signed, I conclude that the structure of the note and the stationary justify the inference that it was also sent by Respondent.

On June 4, Lowe received a memo from Yee criticizing her for failing to sign out at the end of the day, carrying a mug while supervising students' preparations for an awards program, and sending two students to the office without apparently attempting to assist them to resolve their differences.

June 11, 2009 Board Meeting and Matrille's and Lowe's Terminations

On June 8, 2010, Charging Party was selected as the exclusive bargaining agent in a representation election by a vote of four to zero. No objections to the election were filed, and on June 17 the Commission certified Charging Party as the bargaining agent for Respondent's teachers.

On June 11, 2009, Respondent's Board held a meeting during which, according to its minutes, it went into closed session to discuss collective bargaining strategy. At the end of the meeting, the Board passed a number of resolutions. One of these was that "all new employees will be offered employment as 'contracted services.'" According to the minutes, the Board also voted to create a new "contract services" position, Transition Coordinator, and to accept Yee's recommendations for staffing for the 2009-2010 program year.

The Board's minutes do not indicate what staffing recommendations the Board accepted. Yee testified that she recommended, and the Board agreed, that the salary of every teacher who made more than $32,000 per year be reduced for economic reasons. Yee testified that $30,000 had been the salary Respondent offered to new teachers for the 2008-2009 school year, and that the Board agreed that this salary should remain the base salary for the 2009-2010 school year. She also testified that the Board did not want to reduce the salary of the one teacher who made $32,000. However, according to Yee, she recommended, and the Board agreed, to reduce the salary of the other two returning teachers, Tuzinsky and Brody, by $5,000 each to $34,000 per year because of reductions in the amount of funding Respondent was receiving from the State. The Board minutes do not reflect any discussion of salaries at the June 11 meeting.

On June 16, 2009 both Matrille and Lowe received letters from Yee advising them that their employment contracts would not be renewed for the 2009-2010 school year. Lowe's letter stated that there had been ongoing concern over her lack of a special education endorsement and that, given budget constraints, it was essential that all staff members have proper certifications and endorsement to allow for maximum flexibility in the placement of staff. Lowe testified that she and Yee had never had a conversation specifically about her lack of a special education endorsement, and I credit her testimony. In the fall of 2009, Lowe did her student teaching in another school district and completed the requirements for her special education endorsement. At this school district, Lowe student taught in the classroom of and under the daily supervision of her supervising teacher.

Matrille's letter simply thanked her for her service and stated that her contract was not being renewed. Matrille testified that she was very surprised and that she had no indication at all before receiving the letter that her contract would not be renewed. Matrille did not ask Yee why her contract had not been renewed. However, on June 16, Matrille encountered Michael

Bommarito, then a member of Respondent's Board, whom she had known before she came to work for Respondent. Matrille asked Bommarito why she had been fired. According to Matrille, Bommarito told her that Yee had said that she (Matrille) was costing too much. Bommarito told Matrille that when he questioned this statement at the Board meeting, Yee called Matrille a "shitster [sic]." [4] Bommarito also told Matrille, "You must have made a statement at the meeting that really pissed her off." Matrille testified that Bommarito then asked her if she started the "the union stuff." When Matrille said that she had not, Bommarito told her that Yee thought she had.[5]

Yee denied calling Matrille a "shitster," or anything similar, but did not deny that she had complained to the Board about Matrille or that she believed that Matrille had been instrumental in starting the union campaign. I find Matrille to be a credible witness and I credit her testimony as to what Bommarito told her.

Yee testified that Matrille's teaching evaluations had been excellent and that the decision not to renew Matrille's contract was based solely on the fact that she was one of the highest paid teachers. According to the documents in the record, for the 2008-2009 school year Matrille was Respondent's third highest paid teacher. Matrille was paid less than Brody and Tuzinsky, Respondent's only other teachers with special education endorsements.

Alleged Unilateral Changes After Charging Party's Certification

In June 2009, Respondent announced a reduction in the number of classroom aides/teacher assistants for the upcoming school year. Prior to the 2009-2010 school year, Respondent had between three and four full-time equivalent (FTE) aid positions at any one time. During the 2008-2009 school year, Respondent employed three full-time aides and one part-time aide. During the 2009-2010 school year, however, there were only three part-time aides. According to testimony, the reduction in the number of aides had a significant impact on the teachers, who relied on the teacher assistants to help them with the behavioral issues of the student population, to provide individualized help to students, and to assist when teachers took their students on trips into the community. Yee testified that the reduction in the number of teacher assistant positions was based on economics and that Respondent began utilizing parent volunteers in the classroom during the 2009-2010 school year.

On June 22, 2009, Respondent's Board sent the following memo to its remaining teachers:

> As you know, the Macomb Academy staff has elected to organize as a collective bargaining unit. While most issues related to terms and conditions of employment become subject to the negotiations process, including salary, Macomb Academy

[4] The word appears in the transcript as "shitster," rather than "shit stirrer," and neither party sought to correct the transcript.

[5] Respondent objected to the admission of Bommarito's statements to Matrille as hearsay. I overruled the objection on the basis that these statements constituted party admissions. In this case, Bommarito did not purport to speak for the Board when he told Matrille what Yee had said about her. While it is axiomatic that a school board speaks only through its resolutions, I disagree with Respondent that individual school board members are not agents of a school board or that their statements should not be considered party admissions. See MRE 801(d) (2).

> must prepare for the 2009-10 academic year and allocate teaching responsibilities as well as set initial compensation levels. It is necessary for Macomb Academy to continue functioning as an educational establishment.
>
> Therefore, in order to start this school year, while we recognize that your compensation will be subject to negotiations, the Board has set an interim pay schedule for all teaching staff. Again, we want to emphasize this compensation may be adjusted up or down during the collective bargaining negotiation process as well as the economic conditions that may become known over the course of the negotiations and the next year.
>
> The interim base pay is set at $30,000 per teacher. All working conditions and responsibilities will remain unchanged pending collective bargaining outcomes.

Although the memo refers to a pay schedule, no pay schedule was attached to the memo sent to the teachers. The memo was not sent to Charging Party.

In July or August 2009, Yee hired three new teachers. Although the Board's June resolution directed Yee to hire new employees as "contract employees," and Charging Party's certification explicitly excluded "contract employees," Yee testified that Respondent considered the new teachers to be part of Charging Party's unit. The record does not indicate whether the new teachers had individual contracts or other documents designating them as "contract employees."

Respondent's usual practice was to send each teacher, in August, a document/contract stating what his or her salary would be for the upcoming year, along with a statement reiterating that they were at-will employees. Employees were required to sign and return these documents to Respondent prior to the start of the school year. On about August 11, 2009, the four teachers remaining from the previous school year received memos from Respondent telling them what their "interim placement on the pay schedule would be." Tuzinsky and Brody each received pay cuts of $5,000 each. The salaries of the other two teachers, who were paid less, remained the same. Respondent did not give Charging Party any notice that it intended to send this memo.

Respondent also had a practice of giving all employees a document entitled "Employee Guidelines" at the beginning of each school year. The document contained leave policies and other miscellaneous rules and also set out the numbers of days and hours of work. In August 2009, Respondent distributed a new document covering the 2009-2010 school year. The only change from the previous year was a reduction in the number of days teachers were required to work by four; the Respondent reduced the number of teacher professional development days from four to three and the number of teacher record days from five to three. A provision was also added stating that Respondent would pay the cost for staff to attend its annual holiday ball and awards celebration. At about the same time, in a document entitled "Events," teachers were informed that four of the five staff meetings held each year would take place at 4:00 pm instead of 3:00 pm. In 2009-2010, as in 2008-2009, the teachers' workday normally ended at 4:00 pm. Respondent did not provide Charging Party with copies of the documents entitled "Employee

Guidelines or "Events," or give it an opportunity to bargain over the lengthening of the work day on staff meeting days.

On October 15, 2009, Respondent notified the members of Charging Party's unit that it had purchased professional liability insurance policies from the AAE for each bargaining unit member. AAE requires that individuals become members of its organization before purchasing liability insurance from it, but there is no indication that Respondent's teachers were individually required to become members. The MEA provides professional liability insurance to its members at no cost.

The Parties' Contract Negotiations

On June 29, 2009, Charging Party Uniserv Director Daniel Hoekenga sent an email to Munk demanding that Respondent cease and desist from "any and all changes in the wages, hours and/or working conditions in existence as of the date of the petition for election and/or the date of certification, whichever are more favorable to the employees." The email demanded that Respondent rescind all improper unilateral changes, including the failure to renew the contracts of unit members and the termination of instructional support personnel. The email also requested certain information from Respondent, including copies of employment contracts, policies, and work rules, and copies of the minutes of all Board meetings after July 1, 2008. There was a delay in Respondent's response due to the fact that Hoekenga's email was sent to a wrong address.

On July 27, Munk replied, indicating that Respondent was gathering the requested information and suggesting a date to begin bargaining. Munk stated that no employee with the proper credentials had been released from employment, and that the contracts of independent contractors were reviewed annually to determine whether their services remained necessary. She also stated, "Decisions made regarding those staff members not covered by the certification of the bargaining unit remain within the scope of authority of the administration under PERA and all other relevant state laws."

The first negotiation session was scheduled for September 17, 2009. Respondent was represented at the September 17 meeting by Munk, Yee, a member of Respondent's Board, and Respondent's business manager. Hoekenga served as Charging Party's chief spokesperson, and Brody and Costie constituted the bargaining committee. No proposals were exchanged at this meeting.

Between the first and second bargaining session, held on September 30, Charging Party received the information it had requested, including information about the budget and minutes of Board meetings. On September 30, Charging Party presented Respondent with a 33-page proposal which included proposed language on all subjects to be covered by the contract except the dollar amounts of wages. These included, but were not limited to, management rights language stating that, except as limited by the agreement, Respondent would have the rights guaranteed it by the Constitution and applicable laws; a "zipper" clause; a provision requiring unit members to become members of Charging Party or pay a service fee; a provision for payroll deduction of membership dues and fees; an association rights clause that permitted association

officers or their representatives to use their preparation periods for union business; a grievance procedure ending in binding arbitration; provisions governing seniority, the filling of vacancies, layoff and recall, preparation periods, equalized teaching loads, hours and schedules; a provision detailing the procedures for conducting evaluations; a provision requiring just cause for discipline or discharge; leave policies; a compensation provision recognizing experience and educational attainment; a cost of living clause; and fringe benefits provisions providing health, dental, vision and life insurance benefits. Respondent's representatives had no questions about the proposals and there was no discussion of them at this meeting. After the September 30 meeting, Munk sent Hoekenga an email stating that the September 30 proposal included illegal demands, although she did not specify what these were.

The parties met again briefly on November 4, but again did not engage in any discussion of Charging Party's proposals. At the next meeting, on November 18, Respondent presented Charging Party with a document entitled "Proposal #1 – Response to MEA proposal of 9/30/2009. Proposal of Macomb Academy Board." The proposal included the following provisions:

> *Management's Rights and Responsibilities*
>
> It is the responsibility of the Board to operated [sic] under the terms of the laws of the State of Michigan, including by way of example and not limitation the Revised Public School Code (Act 451 of Public Acts of 1976, MCL 380.1 to 380.1852 et seq), the governing documents of the Academy, including but not limited to the articles of incorporation, the bylaws of the board of directors, the charter contract issued by Central Michigan University, and the policies adopted from time to time by the Board.
>
> Certain rights are fundamental to the ability to manage and operate the Academy to meet its responsibilities. They include the Board's right to hire, promote, suspend or discharge employees; to direct the work of employees, to adopt and approve the budget and to establish operating policies. It is understood and agreed by the parties that the Employer possesses the sole and exclusive power, duty and right to operate and manage the Academy.
>
> The powers, authority and discretion of the Employer to exercise its rights and carry out its responsibilities shall be limited only by the specific and express terms of this Agreement. All rights not specifically limited by this agreement are unilaterally reserved to the Academy administration and Board.
>
> *Working Conditions, Hours of Employment, Calendar, Assignments, Benefits*
>
> See Employee Guidelines for 2009-10 Academic Year as provided to each employee (Same as 2008-09 except for date change and necessary calendar changes based on state law.)

Work load and class size to be established in accordance with the constraints of state and federal law, Academy budget and individual needs of the students as set forth in IEPS and applicable law/rules and regulations.

Evaluations shall be completed with process established by the Board.

Salary Schedule

To be established by the Board in compliance with the Academy budget once revenues have been established.

The document also included a proposed preamble; a recognition clause that included full-time and part-time certified teachers but excluded contract employees; a definition of terms clause; and an association rights and responsibilities clause which did not include a union security provision. It stated that a grievance procedure proposal would be provided at a later date.

Hoekenga reacted angrily to Respondent's proposal, and the November 18 meeting did not last long. Hoekenga testified that he concluded, from Respondent's November 18 proposal, that it had no intention of reaching a good faith agreement. Hoekenga decided not to meet again with Respondent until he could secure the assistance of a mediator. Respondent proposed bargaining dates during the week between Christmas and New Year's Day, which Hoekenga rejected. In December 2009, Munk sent Hoekenga several emails asking him for possible dates in January and February. On January 7, 2010, Hoekenga notified Munk that in light of the proposal Charging Party had received, he had decided to request the assistance of a mediator. On February 2, 2010, Charging Party amended its unfair labor practice charge to include the allegation that Respondent was bargaining in bad faith. As of the date of the hearings in March 2010, the parties had scheduled a future session with a mediator, but had not actually met since November 2009.

Discussion and Conclusions of Law:

Allegations of Restraint and Coercion

Between the date Charging Party filed its petition for representation and the date of the election, Respondent made a sustained effort to persuade its employees to vote against Charging Party's representation. This campaign was conducted almost entirely through the distribution of written materials; even when Munk met with employees on May 15, 2009, she mostly read from a prepared statement that was then distributed to employees. It included statements about Charging Party, the MEA, and unions in general which, according to Charging Party, were deceptive, misleading, and in some cases untrue.

Because employer campaigns of this nature have heretofore been relatively rare in public employment in Michigan, there are few Commission cases involving the types of anti-union propaganda used by Respondent in this case. There are, however, many cases involving anti-union statements similar to those made by Respondent arising under the National Labor

Relations Act (NLRA), 29 USC 150 et seq., the statute on which PERA is patterned and to which the Commission regularly looks to for guidance in interpreting PERA. Charging Party points out that PERA does not contain an provision similar to Section 8(c) of the NLRA, which explicitly prohibits the finding of an unfair labor practice based on the expression of "views, argument or opinion" if the expression contains no threat of reprisal or force or promise of benefit. However, the Court of Appeals held, in *Local 79, SEIU v Lapeer Co General Hospital,* 111 Mich App 441 (1981), that the absence of a provision analogous to Section 8(c) in PERA did not forbid a public employer from conducting a campaign to prevent the organizing of its employees or from expressing its negative views on organization. The Commission has consistently held that an employer's criticism of a union, or unions in general, does not violate Section 10(1)(a) in the absence of an implied threat or promise of benefit. *City of St. Clair Shores,* 17 MPER 76 (2004); *Edwardsurg Public Schs,* 1994 MERC Lab Op 870, 874 (no exceptions); *City of Southfield,* 1986 MERC Lab 126; *Redford Twp,* 1982 MERC Lab Op 1289, 1300.

According to the charge, Respondent's first violation of Section 10(1)(a) of PERA consisted of compelling or deceitfully inducing employees to attend the May 15, 2009 staff meeting at which Munk made an anti-union presentation. Charging Party argues that Respondent induced teacher attendance by misrepresenting that the purpose of the meeting was to discuss job related issues, and that their compelled attendance constituted illegal interference, restraint or coercion of their right to unionize. However, Charging Party provides no support for its argument that an employer interferes with its employees' Section 9 rights merely by compelling them to attend a meeting whose purpose is to present anti-union propaganda, even if, as Charging Party maintains, this propaganda includes factual untruth and distortions. I find that since Respondent could lawfully have ordered its teachers to attend the May 15 meeting, whether it misled them about the purpose of the meeting is irrelevant.

I also find no merit to Charging Party's claim that Respondent unlawfully interfered with Matrille's Section 9 rights by ordering her to leave the May 15 meeting. Charging Party argues that Munk's statement that Charging Party' had not chosen to represent Matrille was patently false, and that the real reason for excluding Matrille was that she was a known union supporter. However, the National Labor Relations Board (NLRB) holds that an employer does not interfere with employee rights by excluding known union supporters from campaign meetings held during work time to combat union organizational efforts if the union supporters are not thereby deprived of a benefit received by the employees who attended the meeting, such as a free lunch or dinner. *Saia Motor Freight,* 333 NLRB 929, 931 (2001). In *Wimpy Minerals USA, Inc,* 316 NLRB 803 (1995), which the Charging Party cites as authority, the Board held that the employer discriminated against three union supporters by depriving them of the overtime pay received by employees who attended after-work meetings held by the employer to transmit its anti-union message. There is no indication in the record that Matrille was deprived of any benefit by being excluded from the May 15, 2009 meeting. I conclude that Respondent did not violate Section 10(1)(a) of PERA by excluding Matrille from the meeting even if the real reason for her exclusion was that it perceived her to be a union supporter.

Charging Party also alleges that Respondent violated Section 10(1)(a) by threats and other statements contained in the materials Munk read and distributed at the May 15 meeting, in the letter sent to employees on June 3, and in the personal notes Munk sent to Brody and

Tuzinsky before the election. An implicit or explicit threat to terminate employees, reduce their wages or benefits or adversely change their working conditions if or because they chose to be represented by a union violates Section 10(1)(a) of PERA. Whether a particular statement constitutes a threat does not depend on the employer's motive or whether the employee was actually coerced, but whether a reasonable employee would interpret the statement as a threat. *City of Greenville,* 2001 MERC Lab Op 55, 56. In applying the "reasonable employee" standard, the Commission examines both the content of the statement and the context in which it was made. *City of St Clair Shores,* 17 MPER 76 (2004).

Charging Party asserts that Munk's statement that unionization could result in Respondent spending money for legal fees that it might otherwise spend on wages and benefits constituted "an implied threat that by supporting the union in its organizational campaign or later bargaining, a teacher may be responsible for reducing her own compensation, benefits, or working conditions." In my view, however, this statement contains nothing but a truism, i.e., money an employer spends on legal fees cannot be used for salaries, benefits or other improvements. I conclude that a reasonable employee could not interpret this statement as a threat to reduce employee wages or benefits if the union is selected.

However, the other statement singled out by Charging Party in Munk's May 15 letter was less generic. Respondent told employees that although its finance committee had apparently made decisions about who would be rehired for the next school year, it could not notify employees of these decisions because "under the union organizing laws such notifications may be viewed by the union as promises or threats which are illegal." Charging Party alleges that this statement misstated the law and also constituted an implied threat that teachers would lose employment if the union was voted in.

Although an employer cannot lawfully give employees an unscheduled benefit during an organizing campaign, if it withholds a benefit from employees because they are seeking to organize, it commits an unfair labor practice. *Washtenaw Co,* 1979 MERC Lab Op 13; *Charter Twp of Harrison,* 1983 MERC Lab Op 1105. An employer is obligated to proceed as if no petition had been filed to avoid giving the appearance of attempting to affect the results of the election. *Oakland Cmty College,* 1998 MERC Lab Op 32, 41-42 (no exceptions).

Respondent had the right to, and did, terminate teachers at the end of each school year. Respondent normally decided and announced each spring which teachers it would continue to employ the following school year. The teachers, therefore, received this critical information about their future well before the end of the school year. By refusing to tell its employees what it had decided in 2009 until after the union election, Respondent withheld from employees the benefit of knowing that they would continue to have a job and did so because the employee had decided to organize. Moreover, since Charging Party was unlikely to have challenged the announcement that all the teachers would have their contracts renewed as an improper grant of a benefit, Respondent's statement that the Board's finance committee had made decisions regarding employment contracts but had put them "on hold" also implied that the committee had, in fact, decided to terminate some teachers. Accordingly, Respondent's May 15 statement reminded the employees of their dependence on Respondent's goodwill in the context of a plea to employees to reject the union. I conclude that a reasonable employee would have interpreted

this statement as an implied threat to retaliate against the employees if the union was selected. I conclude that Respondent violated Section 10(1)(a) both by withholding from employees, because they had sought to organize, the benefit of knowing whether or not they would continue to have a job after June 2009 and by its announcement of this fact on May 15.

Charging Party also asserts that Respondent violated Section 10(1)(a) by the statements made in the notes sent to Tuzinsky and Brody shortly before the election. Munk told Tuzinsky, "Please know that Dr. Yee understands your anxiety about next year and would love to alleviate that, but would be breaking the law if she told you anything until after the vote." As the record indicates, in May 2009 Tuzinsky had particular reason to worry that her contract might not be renewed because she had recently received a poor evaluation. Munk's statement that Yee "would love to alleviate" Tuzinsky's anxiety appears on its face to be an attempt to reassure her. However, the note also serves to remind Tuzinsky, in the context of an appeal for her to vote against the union, that whether Tuzinsky continued to be employed rested solely on Respondent's goodwill. I conclude that a reasonable employee in Tuzinsky's situation would have understood the note to contain an implicit threat that her job would be in jeopardy if the union were selected.

Although Brody was offended by the notes reference to her religious faith, I find that this note did not explicitly or implicitly threaten to take any action against her because of her union support or if the union was selected. I conclude, therefore, that this note did not violate Section 10(1)(a).

In addition to the alleged threats discussed above, Charging Party alleges that Respondent violated Section 10(1)(a) by "dishonestly portraying the MEA as an organization which deliberately ignores its statutory obligation to protect the job security of the teachers it represents in the May 15 handouts;" by citing news articles discussing situations in which the layoffs of teachers were financially mandated as examples of the MEA's failure to protect its members; by the statement in the "Facts About the Michigan Education Association" handout, attributed to a professor, that unions are unnecessary in a school environment; by the untruthful statement in the "Facts" handout that job protection and liability coverage could be obtained from the anti-union AAE at a cost lower than the MEA dues; by the untrue statement in the "Did You Know" handout that MEA legal coverage was available only if the union agreed with the teacher's position; by suggesting to employees, in the June 3 letter, that if the union was elected Charging Party would control, and Respondent would have no say in, their future terms and conditions of employment; and by suggesting that the MEA and NEA have "social agendas" contrary to the interests of employees.

As discussed above, the Commission has held that negative statements by an employer about a union's motives or effectiveness do not violate Section 10(1)(a) unless they explicitly or implicitly promise benefits or threaten employees' job security or terms or conditions of employment. Accordingly, in the absence of an express or implied threat or promise, the Commission does not evaluate whether the employer's statements are unfair, misleading or based on incorrect facts. Apart from First Amendment considerations, this policy is based on the recognition that merely providing employees with false or misleading information does not normally interfere with their exercise of their Section 9 rights since employees generally have the

ability to evaluate the competing claims of the parties and to sort out facts from false statements and half-truths. I conclude that none of the statements discussed in the paragraph above violated Section 10(1)(a) of PERA.

The threats and alleged threats discussed above were made before the election. Three days after the election, the Board adopted a resolution directing Yee to hire all new employees as "contract employees." The MEA had agreed prior to the election to exclude "contract employees" from the bargaining unit, and its certification when issued reflected that fact. By the terms of the Board's resolution, therefore, Charging Party's bargaining unit would consist only of the teachers employed at the time of the election. As these teachers left, or were terminated, the unit would wither away. I find that the Board's resolution unambiguously communicated to its employees that Respondent did not intend to tolerate a union for long or to bargain with it in good faith, and that the employees' efforts to organize had been futile. I note that, although I do not credit Yee's testimony that the Board's motive was purely economic, whether an employer's conduct violates Section 10(1)(a) does not depend on the employer's motive, but whether the employer's conduct may be reasonably said to have interfered with the free exercise of employee rights under the Act. *City of Detroit (Fire Dept),* 1982 MERC Lab Op 1220, 1226; *St Clair Co Intermediate Sch Dist*, 1999 MERC Lab Op 38. I conclude that the Board's June 11, 2009 resolution directing Yee to hire all new employees as "contract employees" met this test, and that it violated Section 10(1) (a) of PERA.

Alleged Discrimination and Retaliation

Charging Party alleges that the terminations of Matrille and Lowe violated Sections 10(1) (a) and/or Section 10(1)(c) of PERA because they constituted retaliation for the employees' union and/or other concerted protected activities. To establish a prima facie case of unlawful discrimination under Section 10(1)(c) of PERA, Charging Party must establish: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility towards the protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. See *City of Livonia,* 23 MPER 96 (2010); *Northpointe Behavioral Healthcare Systems,* 1997 MERC Lab Op 530, 551-552. Proof of animus and discriminatory motive may be based on direct evidence or inferred from circumstantial evidence. *Fluor Daniel, Inc* NLRB 970 (1991); *Ronin Shipbuilding, Inc,* 330 NLRB 464 fn 5 (2000). If a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch.*, 125 Mich. App 71, 74 (1983); *Wright Line, a Division of Wright Line, Inc.*, 662 F2d 899 (CA 1, 1981).

Lowe' Termination

The charge alleges that Lowe was discharged because of her union or other activities protected by Section 9. I note that Respondent's refusal to approve Lowe's request to student teach preceded her termination and apparently caused it. In the spring of 2009, Lowe was so close to obtaining her special education endorsement that, without doing her student teaching, she might not have been able to meet MDE's requirement that a nonendorsed teacher complete at least six credit hours during the year toward the endorsement. In any case, it is clear that Lowe

wanted to do her student teaching in the fall of 2009, not simply to continue to teach without an endorsement. Therefore, it is Respondent's refusal to approve Lowe's student teaching request, and not her termination per se, that constituted the alleged discrimination. This point is significant because Respondent maintained that it was not aware of any union activity before it received Charging Party's April 28, 2009 election petition, and there is no evidence to the contrary. However, on March 31, almost a month before the petition was filed, Yee was already putting off Lowe's request to do her student teaching in the fall, telling Lowe that she couldn't give Lowe an answer "until they had the numbers." Because the record suggests that Yee decided not to grant Lowe's request to student teach before she learned of the organizing activity, I conclude that Lowe's support of the MEA's organizing effort or Respondent's perception of her support for them was not the cause of Respondent's refusal to approve her request.

Lowe's union activities, however, occurred in the close proximity to the February 19, 2009 Board meeting at which Lowe appeared, with Matrille and other teachers, to complain that Lowe had been unfairly disciplined. Section 9 of PERA, like Section 8 of the NLRA, protects not only union activities but also other "lawful concerted activities for the purpose of . . . mutual aid or protection," including complaints made to an employer about working conditions. An employer violates Section 10(1)(a) if it takes an adverse employment action against an employee because he or she has engaged in concerted activity protected by Section 9. Once the activity is found to be concerted, a violation of Section 10(1)(a) will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue was motivated by the employee's protected concerted activity. *City of Detroit (Police Dept),* 19 MPER 15 (2006), citing *Meyers Industries (Meyers I*), 268 NLRB 493, 497 (1984) and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1982), aff'd sub nom *Prill v NLRB*, 835 F2d 1481 (CA DC 1987). See also *American Red Cross Blood Services,* 322 NLRB 1259 (1996) and *Globe Security Service System,* 301 NLRB 1219 (1991*).* Union animus is not a necessary element of a violation of Section 10(1)(a). *City of Detroit Water & Sewerage Dep't*, 1993 MERC Lab Op 157, 167. As with a claim of unlawful discrimination because of union activity, if the evidence shows that the adverse employment action was motivated by activity protected by Section 9, the burden shifts to the employer to provide evidence that it would have taken the same action in the absence of the protected activity. *Globe Security,* at 1223.

Activities engaged solely by and on behalf of an employee himself are not concerted, *Meyers I,* at 497. However, employee complaints about their supervisor's treatment of employees, if made concertedly, constitute protected activity. *Calvin D Johnson Nursing Home*, 261 NLRB 289 (1982). Complaining to an employer's board about a manager, or even demanding that the manager be replaced, may constitute protected activity. See, e.g., *Senior Citizens Coordinating Council,* 330 NLRB 1100 (2000). Lowe's complaints to the Board on February 19 concerned her own discipline. However, Matrille's expressions of support for Lowe, and the other teachers' attendance at this particular meeting, showed the concerted nature of these complaints. I conclude that Lowe was engaged in concerted protected activity within the meaning of Section 9 of PERA when she complained to Respondent's Board on February 19, 2009 that Yee had disciplined her unfairly.

When Respondent decided to terminate Lowe's employment by denying her request to student teach, Lowe had worked for Respondent as a full-time teacher for almost four years without a special education endorsement. In addition to obtaining approval from the MDE to employ her each year, Respondent had arranged for Lowe to be reimbursed for tuition. That is, Respondent had made some investment in helping Lowe to obtain the credentials she needed to continue to work for it. In the spring of 2009, Lowe was close to obtaining these credentials. Respondent had similarly assisted other teachers who lacked special education endorsements when it hired them, and had also allowed them to fulfill the student teaching requirement for their special education endorsements while earning a salary. According to the evidence presented at the hearing, until she received a write-up in December 2008, Lowe had nothing of a negative nature in her personnel file. On January 23, 2009, after this write-up, Yee gave Lowe what I find to be a positive evaluation. However, on March 19, one month after the February Board meeting, Yee put a note in Lowe's file about her raising her voice to another employee. Two weeks later, Yee responded equivocally to Lowe's request to do her student teaching in the fall, knowing that if the request was not granted Lowe could not continue to work for Macomb Academy.

Yee testified that her decision to deny Lowe's request was based on the fact that Yee did not believe that Lowe's teaching skills were sufficiently strong for her to student teach without a supervising teacher in the classroom. There is no direct evidence that Yee was angry at Lowe for complaining to the Board or any direct evidence that Lowe's complaints caused Yee to deny her student teaching request. However, the circumstantial evidence, as set out above, strongly supports both conclusions. Yee's testimony that her decision was based on her previous observations of Lowe's teaching was not corroborated by any other evidence, and I do not credit it. I conclude, based on the evidence discussed above, that but for Lowe's concerted protected activity of complaining to the Board about Yee's discipline, Respondent would have permitted her to student teach while earning a salary in the fall of 2009 and she would not have been terminated.

Matrille's Termination

Like Lowe, Matrille was among the employees who met initially with the MEA organizer, although she was not the employee who made the initial contact. Matrille was also member of the MEA, having formerly taught at a school district where the MEA represented the teachers. In any case, according to the statement of Board member Bommarito, Yee believed Matrille had "started the union stuff."

As explained in exhaustive detail above, I have found that most of the written materials distributed by Respondent as part of its anti-union campaign contained no explicit or implicit threats or promises of benefits and did not constitute unlawful interference, restraint or coercion. These materials, although clearly communicating Respondent's opposition to the unionization of its employees, do not demonstrate that Respondent had anti-union animus. However, I conclude that Respondent's anti-union animus was established by its commission of unfair labor practices both before and after Charging Party's certification, including its withholding of information about the renewal of its teachers' contracts because they were seeking to organize and its announcement after the election that it would hire all new employees as "contract employees," as well as the violations of its bargaining obligations discussed below.

In June 2009, Matrille had completed her third year as a full-time teacher for Respondent when, eight days after Charging Party's election, she was notified that her contract would not be renewed for the next school year. Respondent's explanation of its decision was that it needed to reduce its costs, and Matrille was among its highest paid teachers. However, Matrille was paid less than Brody and Tuzinsky, Respondent's other teachers with special education endorsements. Tuzinsky, moreover, had performance problems which caused her to be put on an improvement plan during the 2010-2011 school year, while the parties agreed that Matrille's teaching was excellent. Based on Respondent's anti-union animus, Yee's belief that Matrille was responsible for initiating the union campaign, the fact that Matrille's contract was not renewed with no prior notice immediately after Charging Party was selected as bargaining representative, and Respondent's failure to present a credible reason for its decision to terminate Matrille's contact, I conclude that Respondent's anti-union animus caused Matrille's termination and that, but for Charging Party's organizing campaign, Matrille's contract would have been renewed.

Alleged Unilateral Action

On June 22, 2009, a few days after Charging Party's certification, Respondent unilaterally announced that it was implementing an "interim pay schedule" for all teaching staff pending the outcome of salary negotiations with Charging Party. The memo announced that the "base pay" would to be $30,000. According to the record, this was the salary Respondent had paid to new teachers during the 2008-2009 school year. The memo did not indicate whether it intended to pay any teacher more than the "base pay," or, if so, what that would be. In August 2009, Respondent told two of its four returning teachers, Brody and Tuzinsky, that their salaries for the 2009-201 school year would be $5,000 less than their previous year's salaries.

As the Supreme Court held many years ago in the seminal case of *NLRB v Katz*, 369 US 736, (1962), an employer violates its duty to bargain when, without first consulting the union, it institutes changes in mandatory subjects of bargaining while the parties are bargaining a first contract, regardless of the employer's motive for instituting these changes. The Court concluded that an employer's unilateral change in conditions of employment under these circumstances was a circumvention of the duty to negotiate which frustrated the objectives of the law as much as did a flat refusal to bargain. The Supreme Court held in *Katz* that an employer violated its duty to bargain by implementing merit increases during negotiations for a first contract, even though the employer had a longstanding practice of granting quarterly or semi-annual merit reviews, since the "increases were in no sense automatic, but involved a large measure of discretion." *Katz*, at 746. *Katz*, therefore, stands for the principle that after a union is selected an employer is required to maintain the status quo as to terms and conditions of employment until it reaches either agreement with the union or a good faith impasse in bargaining.

Respondent argues that in its case, the status quo included the practice of adjusting the salaries of individual teachers each year to reflect economic conditions. Therefore, it asserts, the reduction in Brody's and Tuzinsky's salaries was consistent with the status quo as it existed prior to the election. However, the NLRB does not recognize an unorganized employer's previous practice of exercising complete discretion in setting individual wages rates as an element of the status quo which continues after the union's election while the parties are bargaining. See e.g.

Washoe Medical Center, Inc, 337 NLRB 202 (2001), in which the Board held that where an employer's practice of setting individual wage rates for new employees involved a substantial amount of discretion, the employer could not continue that practice after the union was elected without giving the union notice and an opportunity to bargain. The reasons for refusing to recognize an unorganized employer's exercise of discretion as the "status quo" were succinctly described by the administrative law judge in *Vanguard Fire & Supply Co, Inc.* 345 NLRG 1016, 1031 (2005):

> The Board does not consider the exercise of discretion to be a binding past practice for a rather obvious reason related to the change which occurs when employees designate a union to be their exclusive representative. When the duty to bargain collectively arises, bilateral negotiation replaces unilateral discretion.
>
> Stated another way, in the absence of a union, an employer typically exercises discretion to set *all* terms and conditions of employment. Such unilateral decision making is the norm before employees select a union. However, to protect the union's right to negotiate concerning all mandatory subjects of bargaining, this norm cannot be allowed to define the "status quo." Indeed, if such unilateral decision making did "set a precedent" to be maintained after a majority of employees selected a union then the negotiating process would be empty and the employees' choice meaningless.

Prior to Charging Party's election, Respondent had unlimited discretion to set the salaries of its employees, and it exercised this discretion to pay them different amounts and to adjust their salaries from year to year as it determined best. After the election, however, Respondent had an obligation to bargain with Charging Party over its teachers' compensation. It no longer had the right to unilaterally adjust their salaries or to establish an "interim pay schedule" which differed from the salaries it had been paying prior to the union's election. I conclude that Respondent violated its duty to bargain with Charging Party when it unilaterally announced on June 22 that it was implementing an "interim pay schedule" different from that which existed prior to the date and when in August 2009 it unilaterally reduced the salaries of Patricia Tuzinsky and Ruth Brody.

Charging Party alleges that after its certification, Respondent unilaterally changed terms and conditions of employment by reducing the number of classroom aides/teacher assistants for the upcoming school year. This action, it asserts, had an impact on the teacher's conditions of employment because it increased their daily work demands. However, a public employer's inherent managerial rights under PERA include the right to reduce the number of employees. *Local 1277 AFSCME v Centerline*, 414 Mich 642, 660 (1982). I conclude that Respondent had no obligation to bargain with Charging Party over its decision to eliminate teacher assistant positions. Respondent had an obligation to bargain, upon demand, over the impact of this reduction on members of Charging Party's bargaining unit, but there is no evidence that Respondent refused to bargain over this issue.

Charging Party also alleges that Respondent violated its duty to bargain by designating three newly hired employees as "contract employees" and excluding them from the bargaining

unit. As discussed above, I conclude that the June 11, 2009 Board resolution announcing its intention to hire all new employees as contract employees constituted unlawful interference with its employees' exercise of their Section 9 rights. However, Respondent does not now dispute that the three new teachers hired in the summer of 2009 are part of Charging Party's bargaining, and there is no evidence that they were ever considered excluded. I conclude that the record does not support a finding that Respondent refused to recognize Charging Party as the bargaining agent for these teachers.

Charging Party also alleges that Respondent unilaterally altered teachers' work hours when it announced, in August 2009, that four of the five yearly staff meetings would take place at 4:00 pm, after the end of the normal workday, instead of at 3:00 pm as in previous years. Both the number of hours and the particular hours and days of the week that employees are required to work are mandatory subjects of bargaining. *Detroit Board of Ed,* 1986 MERC Lab Op 121, 123. An increase of four hours per year is a very small change. Had this been Respondent's only unilateral change, I would have recommended to the Commission that it dismiss the allegation on the basis that the change was de minimis. In light of Respondent's other conduct, however, I find that Respondent also violated its duty to bargain over hours of work by unilaterally changing the time of staff meetings to require employees to work past their normal quitting time.

I also find that Respondent violated its duty to bargain when, on October 13, 2009, it announced that it was providing employees with professional liability insurance from the AAE without giving Charging Party notice and an opportunity to bargain over this new benefit. I find that the implementation of this new benefit, even though employees were not required to become members of the AAE, violated Respondent's obligation to maintain the status quo as to terms and conditions of employment.

Alleged Surface Bargaining

Charging Party alleges that Respondent's conduct during the bargaining process evidenced its intention not to reach a good faith agreement on a contract. This conduct includes the fact that Respondent did not present Charging Party with a counterproposal until November 18, 2009, six weeks after receiving Charging Party's initial proposal. More significant, according to Charging Party, is that fact that Respondent's proposal consisted of a broad management rights clause, had no grievance procedure, and reserved to Respondent the right to unilaterally set almost all terms and conditions of employment including work loads, class size, evaluation procedures and salaries. Charging Party argues that insistence on these types of unreasonable demands is indicative of illegal surface bargaining. See, e.g., *Oakland Cmty College*, 2001MERC 273, 278. Moreover, it asserts that since Respondent failed to modify or supplement its proposal at any time after November 18, 2009, its intention to insist to impasse on its unreasonable demands was clear. I do not agree. After November 18, Respondent was willing to meet to bargain, but Hoekenga decided that meeting would be futile without the presence of a mediator. The parties did not meet at all between November 18, when Respondent presented its proposal, and the date of the unfair labor practice hearing. As the Commission stated in *Oakland Cmty College,* a finding of surface bargaining depends on an analysis of the totality of the party's bargaining conduct. I conclude that the Respondent's conduct in this case, which essentially consisted of presenting Charging Party with one bargaining proposal, does not support a finding

that Respondent engaged in surface bargaining with no intention of reaching a good faith agreement.

Summary of Findings and Conclusions

I conclude that Respondent restrained and coerced its employees in the exercise of their Section 9 rights in violation of Section 10(1)(a) of PERA by withholding from employees, because they had sought to organize, the benefit of knowing whether or not they would continue to have a job after June 2009; by implicitly threatening to retaliate against employees if the union was selected in a statement read to employees by Munk on May 15, 2009 and in a personal note sent to Patricia Tuzinsky by Munk shortly before the election; and by announcing, on June 11, 2009, its intention to hire all new employees as "contract employees." I conclude that Respondent also violated Section 10(1)(a) of PERA when it terminated Christine Lowe on June 16, 2009 because of her concerted protected activities, and that Respondent violated Section 10(1) (c) of PERA when it terminated Karen Matrille on June 16, 2009 because of her perceived role in Charging Party's union campaign. I conclude that Respondent violated its duty to bargain in good faith by unilaterally announcing on June 22, 2009 that it was establishing an "interim pay schedule;'" by unilaterally reducing the salaries of Ruth Brody and Patricia Tuzinsky for the 2009-2010 school year; by unilaterally altering the time of staff meetings for the 2009-2010 school year so that employees were required to work past their normal quitting time; and by unilaterally implementing a new professional liability insurance benefit on October 15, 2009. For reasons set forth above, I conclude that all other allegations of the charge should be dismissed. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Macomb Academy, its officers, agents, and representatives, are hereby ordered to:

1. Cease and desist from:

   a. Interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 9, including the right to form, join or assist in labor organizations and the right to bargain collectively through representatives of their free choice, including, but not limited to:

      1. Withholding from employees, because they sought to organize, the benefit of knowing whether they would continue to be employed after June 2009;

      2. Implicitly threatening to retaliate against employees if a union was selected;

      3. Announcing, after its employees voted to select the MEA as their bargaining representative, that it would all hire all new employees as

"contract employees" and, therefore, the employees' efforts to organize had been futile.

b. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed by Section 9, including the right to engage in lawful concerted activities for the purposes of collective bargaining or other mutual aid and protection, including by taking adverse employment actions against Christine Lowe which resulted in the termination of her employment because she and other employees had complained that Lowe had been unfairly disciplined.

c. Discriminating against employees regarding terms and conditions of employment in order to encourage or discourage membership in a labor organization, including terminating the employment of Karen Matrille on June 16, 2009 because it believed she was responsible for initiating the MEA's organizing efforts.

d. Imposing changes in terms and conditions of employment, including wages, work hours, and benefits, without giving the MEA/Macomb Academy Education Association, the duly certified bargaining representative of its employees, the opportunity to bargain over these changes.

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

a. Offer Christine Lowe and Karen Matrille full, immediate and unconditional reinstatement to the positions from which they were terminated on June 16, 2009, remove any reference to these terminations from their personnel files, and make them whole for any loss of earnings or other benefits resulting from their unlawful terminations by paying them the amounts they would have earned in wages and benefits from the date of their termination to the date they are reinstated or reject Respondent's unconditional offer, minus any interim earnings, plus interest on the amounts owed at the statutory rate of six percent (6%) per annum.

b. Rescind the unlawful unilateral changes Respondent made to the salaries of Ruth Brody and Patricia Tuzinsky in August 2009, pending satisfaction of Respondent's obligation to bargain in good faith over wages and other benefits, and reimburse Brody and Tuzinsky for the wages and benefits they lost as a result of this unlawful change, including interest at the statutory rate of six percent (6%) per annum.

c. Rescind the unlawful unilateral change in work hours made at the beginning of the 2009-2010 school year and terminate the professional liability insurance benefit unilaterally instituted on October 15, 2009, pending satisfaction of Respondent's obligation to bargain in good faith

with the MEA over wages, hours, and other terms and conditions of employment.

d. Post the attached notice to employees in conspicuous places on the Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) calendar days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____