STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAVERLY COMMUNITY SCHOOLS,
Public Employer-Respondent in Case No. C05 C-056
Employer in Case No. R05 B-031,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 517M,
Labor Organization-Charging Party in Case No. C05 C-056
Petitioner in Case No. R05 B-031.
_____/

APPEARANCES:

Jacklin Blodgett, Assistant Superintendent for Finance and Personnel, for the Employer

Krista Sturgis, Organizing Director, for the Labor Organization

DECISION AND ORDER

On September 13, 2005, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

Dated: _____

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Jacklin Blodgett, Assistant Superintendent for Finance and Personnel, for the Employer

Krista Sturgis, Organizing Director, for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This case, involving an unfair labor practice charge and objections to an election, was heard at Lansing, Michigan on June 13, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission, pursuant to Sections 10, 12, and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, 423.212, and 423.16. Based upon the entire record, including post-hearing briefs filed by the parties on July 8, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Petition:

On February 28, 2005, the Service Employees International Union, Local 517M, (the Union) filed a petition for a representation election seeking to represent a unit of all full-time and regular part-time nonsupervisory instructors, instructor assistants and site supervisors employed by the Waverly Community Schools (the Employer) in its child care program (Case No. R05 B-031). The parties entered into a consent election agreement for a mail ballot election. This agreement became final on April 20, 2005, when the

Union faxed a copy of the agreement with its representative's signature to the Commission. Ballots were mailed to all eligible voters on April 14, 2005 and were to be returned to the Commission's office no later than April 28, 2005. On April 29, the Commission issued a tabulation of election results showing four votes for representation by the Union and fifteen votes against. There was one spoiled ballot. The Union challenged the ballots of Cheri Arning, the director/coordinator of the child care program, and Constance Hamilton, the assistant director, on the basis that they were supervisors.

The Objections:

On May 5, 2005, Petitioner filed the following timely objections to the election:

1. On or before March 3, 2005, Program Director Cheri Arning told workers one on one and in a staff meeting that the school district will shut down the program if workers organized. This statement was confirmed on March 16, 2005 by Assistant Superintendent Jacklin Blodgett on a conference call with SEIU and a MERC election officer. Ms. Blodgett stated her objection to the petition was if workers organize she will have to shut down the program.

2. On or about April 14, 2005 through April 25, 2005, Program co-Director Constance Hamilton required workers to bring in their secret ballot to her so she could make copies of the secret ballot to be sure everyone voted.

The Unfair Labor Practice Charge:

On March 10, 2005, the Union filed an unfair labor practice charge against the Employer alleging that it had violated section 10(1)(a) of PERA. The charge read:

On March 2, 2005 at about 5:30 p.m. Cheri Arning attempted to dissuade workers from forming a union by threatening loss of their jobs if they decided to seek union affiliation. As an employee was preparing to leave the classroom at the end of the day, Ms. Arning approached the worker and told her to tell the others that if they tried to form a union and administration got hold of that they would shut the program down and they would lose their jobs. She further stated that administration would take back all of the rooms and everything in them.

The charge and objections were consolidated for hearing and decision.

Findings of Facts, Discussion and Conclusions of Law:

Arning's Alleged Threats – Charge and Objection No. 1.

The Employer operates before and after school, preschool, and summer child care programs.

Approximately twenty-five employees work in these programs, which are based at five different schools. A site supervisor/instructor and one or more instructors and/or instructor assistants are assigned to each site. Cheri Arning is the director/coordinator of the Employer's child care programs and also serves as the site supervisor/instructor at Winans School. Hamilton, the assistant director, is a site supervisor at another school. As assistant director, Hamilton answers questions and responds to emergencies when Arning is not at work.

The only evidence with respect to the alleged threats came from Arning's own testimony. She testified:

> I had a conversation with employees as a co-worker before I knew anything about the union, about what you do, what the procedure is, what the procedure is not. I had a conversation expressing that we could not afford to pay health benefits, which is what some of the girls had mentioned and the guys, that we could not afford to pay health benefits, and that they could close us down. … Well, I don't think I used "close us down" but that we could not afford health benefits, that we are just making our way in Waverly because our enrollment has gone down. That we could not afford to pay health benefits if that is what the employees were going for, and that the school district could privatize and use our rooms.

Arning could not recall when this conversation took place, except that it was sometime between 2003, when Arning first remembered employees discussing unionizing, and when Arning first learned that a representation election was going to be conducted in this case.

The Commission has consistently held that in order for conduct to form the basis for setting aside an election, it must occur in the "critical period" between the date of the consent election agreement and the election. *Branch Intermediate Sch Dist,* 2000 MERC Lab Op 19, 22. See also *Bellevue Community Schs,* 1987 MERC Lab Op 535; *Univ of Mich,* 1980 MERC Lab Op 903; *Greenfield Donuts,* 1976 MERC Lab Op 399. The date of the consent election agreement, for this purpose, is the date the last signed consent election agreement form is received by the Commission. *Branch*, at 22. Here, the last signed consent election agreement form was not received until April 20, after the ballots had been mailed to voters. The Commission cases do not address the question of when the "critical period" begins or ends under these circumstances. However, it is unnecessary to address this question because the Union did not establish that Arning made her alleged threat on March 2 or 3 as alleged in the charge and objections, or at any time close to the filing of the petition. I conclude that objection No. 1 should be dismissed because the record does not establish that the alleged threat was made at a time when it could have affected the results of the election.

Under Section 16(a) of PERA, the Commission lacks the authority to find an unfair labor practice based on conduct occurring more than six months prior to the filing of the charge with the Commission and the service of a copy upon the respondent. The Commission has held that the statute of limitations under Section 16(a) is jurisdictional and is not waived by a respondent's failure to raise it as a defense. *AFSCME Local 1583,* 18 MPER 41 (2005); *Walkerville Rural Communities Schs*, 1994 MERC Lab Op 582,

583. Here, the record did not establish that Arning made the alleged threat within six months of March 10, 2005, the date the Union filed the unfair labor practice charge. I therefore conclude that the charge must be dismissed because the record failed to show that the alleged unfair labor practice occurred within the statutory period.

Objection No. 2

Tabatha Elkins is a child care instructor assigned to Winans Schools. Elkins testified that on April 24 or 25, 2005, Arning asked her to bring her ballot in so that Arning could make a copy of it. According to Elkins, Arning said that she wanted to make a copy so that the Employer could make sure that everybody got their votes in. Elkins did not give her ballot to Arning.

Arning denied asking Elkins for a copy of her ballot. Arning testified that she and the other site supervisors discussed the importance of everyone voting in the Commission election and agreed to ask employees to copy their own ballots before mailing them in case some question arose later. Arning testified that right after meeting with the site supervisors she told Elkins that "we wanted to ensure that all of the ballots were turned in."

Although the objection asserts that Hamilton required employees to bring her their ballots to copy, there was no evidence that Hamilton asked to see any employee's ballot. Hamilton testified that she attended the site supervisor meeting with Arning, and that after this meeting, she told employees at her school to bring in their ballots and make copies for themselves. According to Hamilton, she did not look at or ask to look at anyone's ballot.

A party seeking to have an election set aside must show by specific evidence not only that improper conduct occurred, but also that it interfered with the employees' exercise of free choice. *Safeway, Inc*, 338 NLRB No. 63 (2002). Isolated instances of interrogations or threats which were not disseminated to the other unit employees and could not reasonably have affected the results of the election do not form a basis for setting aside an election. See, e.g., *Bon Appetit Management Co*, 334 NLRB 1042, 1044 (2001), where the National Labor Relations Board (the Board) found that an employer's asking an employee how she would vote and stating that if employee voted for the union her pay would be cut was unlawful and an objectionable interrogation and threat. The Board concluded, however, that given the lack of evidence that the threat had been disseminated to other employees, and the lopsided vote, this isolated threat could not have affected the results of the election.

Here, one employee, Elkins, testified that her immediate supervisor, Arning, asked to copy her ballot. Secrecy of the ballot is essential to the exercise of the right to free choice in an election, and I agree that Arning's request, if it occurred, was inherently coercive and clearly improper. However, the Union presented no evidence that this was anything other than an isolated incident. Nothing in the record indicated that Arning made a similar request of any other employee, that Hamilton asked to copy anyone else's ballot, or that Elkins discussed Arning's request to copy her ballot with any other employee. Given that the Union lost the election by a margin of eleven votes, I conclude that Elkins' testimony, even if credited, would not

be sufficient to set aside the election in this case. I conclude, therefore, that objection No. 2 should be dismissed.

In sum, I conclude that the Union failed to show that the Employer unlawfully threatened employees in violation of Section 10(1)(a) of PERA within the six-month statutory period established by Section 16(a) of the Act. I also conclude that the Union has failed to demonstrate that the Employer engaged in conduct during the critical period before the election in this case that could have affected the results of that election. I recommend that the Commission dismiss both the charge and the objections, and that it issue the following order.

RECOMMENDED ORDER

The charge in Case No. C05 C-056 is hereby dismissed in its entirety. The objections to the election held in Case No. R05 B-31 are also hereby dismissed, and an appropriate certification of results for this election shall issue.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____