STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN STATE UNIVERSITY (POLICE DEPARTMENT),
Public Employer - Respondent,

-and- Case No. C10 I-230

CAPITOL CITY LODGE #141, FRATERNAL ORDER OF POLICE
Labor Organization - Charging Party.
_____/

APPEARANCES:

Keller Thoma P.C., by Daniel L. Villaire, Jr., and Radhika Pasricha, Assistant General Counsel, for Respondent

Wilson, Lett & Kerbawy, P.L.C., by Steven T. Lett, for Charging Party

DECISION AND ORDER

On November 7, 2012, Administrative Law Judge David M. Peltz issued a Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MICHIGAN STATE UNIVERSITY
(POLICE DEPARTMENT),
Respondent-Public Employer,

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-and-

CAPITOL CITY LODGE NO. 141,
FRATERNAL ORDER OF POLICE,
Charging Party-Labor Organization.
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APPEARANCES:

Keller Thoma, P.C., by Daniel L. Villaire, Jr. and Radhika Pasricha, Assistant General Counsel, for the Public Employer

Wilson, Lett & Kerbowy, P.L.C., by Steven T. Lett, for the Labor Organization

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 assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcripts of hearing and oral argument, exhibits and post-hearing briefs filed by the parties on or before November 30, 2011, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On September 10, 2010, Capitol City Lodge No. 141, Fraternal Order of Police (FOP) filed an unfair labor practice charge against Michigan State University (Police Department). The charge alleged that the Employer violated Section 10(1)(a) of PERA by conducting an internal investigation of, and later disciplining, Detective Anne Stahl after Stahl attempted to assert her rights under the collective bargaining agreement. The charge further asserted that the Employer threatened to retaliate against Stahl for engaging in protected concerted activity by disseminating an email soliciting employees to apply for training as a polygraph examiner, a position held at the time by Stahl.

On December 27, 2010, Respondent filed a motion seeking dismissal of the charge on summary disposition. Respondent asserted that the charge was moot because the discipline issued to Stahl had since been removed from her personnel file, and because Charging Party had failed to plead facts establishing a claim for discrimination under PERA. Charging Party filed a response to the motion on January 28, 2011. The parties appeared before the undersigned for oral argument on June 14, 2011, during which the Union's attorney, Steven Lett, conceded on the record that the allegation concerning the discipline issued to Stahl was moot and that any assertion concerning that event no longer formed a basis for the charge. However, the Union argued that it had established a valid claim under the Act with respect to its allegation that the Employer threatened to retaliate against Stahl by sending out an email soliciting employees for a position within Respondent's polygraph examination unit. After considering the arguments of the parties, I concluded that questions of fact existed which required an evidentiary hearing and, consistent with Lett's stipulation, indicated that the hearing would be limited to the issue of whether the dissemination of the email was unlawful.

Findings of Fact:

The following facts are derived from the transcripts, including the factual findings set forth within the Opinion and Award of Arbitrator Kathleen R. Opperwall, which was admitted as a joint exhibit in this matter at hearing. I also relied on the stipulations of the parties as set forth on the record at oral argument.

I. BACKGROUND

Capitol City Lodge No. 141, FOP represents a bargaining unit consisting of approximately 141 full-time non-supervisory police officers employed by the Michigan State University (MSU) Police Department. The collective bargaining agreement between the parties contains several provisions which make it clear that overtime must be authorized by the Employer. For example, Paragraph 75 of the contract includes the sentence, "Overtime and call-back time shall be authorized by management." The contract also contains a grievance procedure which culminates in final and binding arbitration.

The MSU Police Department maintains a set of work rules governing employee conduct and performance. Rule 9 of that rule set, which is entitled "Adherence to Orders" provides, "Members obey lawful orders. Members do not act in any way that implies failure to recognize and accept the authority of any supervisor. While members may request clarification, they willingly comply with a written or oral directive. They may confer with the issuing or a higher authority at a later time."

II. CREATION OF POLYGRAPH EXAMINER POSITION

In addition to their normal duties as police officers, members of Charging Party's bargaining unit may be assigned to perform "special assignment" work. At the time of the hearing in this matter, the MSU Police Department had approximately 80 special assignments, including the motorcycle unit, special events, accident investigators, crime scene investigators, the computer forensic unit and the K-9 unit.

Prior to 2007, the MSU Police Department did not have a special assignment position for conducting polygraph examinations. Instead, the department utilized polygraph examiners assigned to the Michigan State Police (MSP) post in Lansing. However, MSU Police Chief James Dunlop found the MSP's response time to be slow and contrary to the department's goal of being "self-sufficient." Accordingly, Respondent sent out an email soliciting employee interest in training for an in-house polygraph examiner position. Ultimately, Anne Stahl, a detective with the MSU Police Department and a member of Charging Party's bargaining unit, was selected to become qualified as a polygraph examiner.

In April of 2007, Respondent sent Stahl to attend a 14-week training program at the Defense Academy of Credibility Assessment at Fort Jackson, South Carolina. The cost of the training and equipment was approximately $30,000, which was paid for in full by Respondent. Stahl successfully completed the program in July of 2007. Thereafter, she returned to work at the MSU Police Department, where she began conducting polygraph examinations for both Respondent and neighboring law enforcement agencies under the supervision of a lieutenant from the Kent County Sheriff's Department. Stahl testified without contradiction that she was essentially responsible for creating Respondent's polygraph examination unit, including obtaining the necessary examination and viewing rooms and helping to establish policies and procedures applicable to the examinations. At the same time, Stahl continued to perform her regular assignments as a police detective investigating fraud and criminal sexual conduct cases.

After completing 200 polygraph examinations, Stahl was eligible under Michigan law to take the examination to become licensed as a polygraph examiner. Beginning in late 2009, Stahl had conversations with her supervisors during which she expressed concern over whether she had sufficient time to study for the polygraph licensure examination while at work. Stahl put those concerns in writing in an email to her immediate supervisor, Lieutenant Doug Monette, dated January 18, 2010. The email stated, in pertinent part:

> As I have mentioned, I am registered to take the State of Michigan Polygraph Licensure exam, but I do not have a date yet. Due to cases and polygraphs, I have not been able to start studying. I am more than willing to continue to follow-up whatever cases are assigned to me, however, I am going to have to study for this exam. Another option is I can study at home on overtime.

Monette responded to Stahl by email dated January 21, 2010. In the email, Monette wrote:

> I agree preparing for the State of Michigan Polygraph Licensure Exam is important to obtain your certification. I have supported you in many different ways since your selection to this position. With that being said, I will continue to support you.

* * *

> It will be necessary to continue to assign you cases to investigate. A supervisory review of these cases will be conducted before they are assigned. . . .
>
> It may be necessary to temporarily limit the number of polygraphs you conduct to accommodate the time needed for study. I would like for you to only conduct polygraphs two days a week. This would allow you three work days to focus on pending cases and your upcoming exam. Studying at home for over time [sic] is not an option.
>
> The work time you have requested 08:00-16:30 hours, will continue to be kept. It is my expectation that if you need to modify these working hours by using compensation, flex, vacation and personal time for personal appointments will remain as options, with prior approval from your supervisor.
>
> * * *
>
> Please provide me with contact information so I may assist in setting up the pending Polygraph Licensure Exam.
>
> You may have some questions in regarding to this email [sic], I am happy to set up a time to meet to clarify any questions you have.

In addition to instructing Stahl to limit the number of polygraphs to two per week prior to taking the polygraph licensure examination, Monette also promised to reduce Stahl's geographic work area to Ingham County. Stahl testified that despite these changes, she still felt overwhelmed with having to study for the test and complete her normal duties as a detective. Ultimately, she decided to study at home prior to taking the polygraph licensure examination on March 12 and 18, 2010.

III. REQUEST FOR COMPENSATORY TIME

On April 16, 2010, Stahl submitted a request for compensatory time for 36 hours which she spent studying at home between January 25, 2010 and March 15, 2010. After receiving Stahl's request, Monette discussed the matter with his immediate supervisor, Inspector Kelly Roudebush. At hearing, Roudebush testified that she and Monette decided that the request should be denied because Stahl had not received prior approval from her supervisor before working overtime, as specified in the collective bargaining agreement. At the same time, Roudebush requested copies of all documentation pertaining to Stahl's request so that she would be prepared in the event that an internal investigation was initiated. Later that day, Monette formally denied Stahl's request in an email which stated, in pertinent part:

> On January 18, 2010, in an email you expressed the option of studying for your polygraph exam at home for overtime. As indicated in the email from me dated January 21, 2010, you were told that studying at home for overtime was not an option. Within this same email you were instructed to limit the number of polygraphs you conducted to accommodate the time needed for study. In fact,

> with the release of INV 14, you were instructed to conduct polygraphs for [only] those agencies located within the county unless supervisor approval was gained. This coupled with a reduction of case assignments and proper time management should have allowed adequate time for study at the workplace.

After receiving the email from Monette, Stahl contacted her Union representative, Steve Brandman. Stahl testified that she and Brandman met with Assistant Police Chief Michael Rice at 8:00 a.m. the following morning, April 20, 2010, to discuss the denial of her request for compensatory time. According to Stahl, Rice indicated that he was not very familiar with the collective bargaining agreement and promised to look into the issue further before responding. At hearing, Stahl could not recall whether the word "grievance" was used during the meeting, which she testified lasted between 15 and 20 minutes.

Stahl testified that at approximately 1:40 p.m. on April 20, 2010, Rice came to her office, closed the door and indicated that he was denying her request for compensatory time because the issue had not been brought to his attention in a timely manner. According to Stahl, Rice stated that he should have been made aware of the issue back in January after Monette first denied her request to study at home. Stahl testified that after Rice left her office, she again met with Brandman. During that meeting, which occurred sometime between 2:00 p.m. and 3:30 p.m., Stahl signed a grievance which asserted, "Employee worked overtime hours on duties required by the Employer (polygraph)." The grievance requested that Stahl be paid overtime or granted compensatory time for the hours worked. According to Stahl, Brandman then hand delivered the grievance to Rice.

In contrast, Rice denied having met with Stahl or Brandman during the morning or early afternoon hours of April 20, 2010. Rather, Rice testified that Stahl first came to his office late that afternoon to file a grievance concerning the denial of her request for compensatory time. According to Rice, Stahl was accompanied by an FOP representative who Rice did not identify at hearing. Rice testified that after receiving and signing a copy of the grievance form and listening to Stahl's concerns, he declared that he would be denying the grievance because it had not been timely filed pursuant to the terms of the collective bargaining agreement.

The Employer issued a written denial of the grievance at Step 1 on April 20, 2010, stating "No Compensation. Employee should have raised the issue within 5 days of the January 2010 email correspondence. Time has expired." The Union advanced the grievance to Step 2 on April 23, 2010, asserting that the time for filing the grievance should not have begun to run until Stahl formally submitted her written request for 36 hours of compensatory time on April 19, 2010. In denying the grievance at Step 2, the Employer raised, for the first time, the allegation that Stahl had violated work rules by studying at home. The written grievance denial, which was signed by Chief Dunlap, stated, "Working the OT after being told it was not approved to do so by 1st supervisor may constitute insubordination and internal investigation will be conducted to see if that is the case."

Roudebush conducted the internal investigation of Stahl. On April 30, 2011, Respondent issued a "written record verbal" warning to Stahl, which concluded:

> Internal investigation substantiated Rule #9 Violation. Detective Stahl's request to study for a work related exam at home (off-duty for overtime compensation) was denied on January 21, 2010. On April 16, 2010, she submitted an overtime request form for various dates of study off-duty from January 25-March 2010 which totalled [sic] 36 hours.

The disciplinary notice indicated that Stahl was to take the following corrective action:

> Obey directives of supervisor. Follow appropriate channels outlined in the Values Based Management System and FOP contract to dispute supervisor decision.

On May 5, 2010, the Union filed a second grievance on Stahl's behalf, this time challenging the verbal warning. The grievance asserted that Stahl had "received a verbal reprimand unjustly. She was charged with adherence to orders and has not violated this rule. Remove verbal warning from employee's file". Both grievances were advanced to arbitration and a hearing was held before arbitrator Kathleen R. Opperwall on October 19, 2010. At the arbitration hearing, Roudebush testified that the action which the Employer considered to be insubordination was the submission by Stahl of the request for overtime compensation.

Arbitrator Opperwall issued an Opinion and Award on January 6, 2011. With respect to the grievance challenging Stahl's request for compensatory time, the arbitrator agreed with the Employer that the grievance was not timely under the contract because it was not filed within five days after Monette denied her original request to study at home. Opperwall found in favor of the Union, however, with respect to the disciplinary grievance. While expressly recognizing the importance of chain of command in a police setting, the arbitrator concluded that the submission by Stahl of an overtime request did not rise to the level of insubordination or disobeying an order. In so holding, the arbitrator noted that although Monette had told Stahl that studying at home was "not an option", he did not explicitly forbid her from doing so, nor did he order her not to renew her request at a later date. The arbitrator concluded that by submitting her overtime request, Stahl was merely seeking reconsideration of the previous denial. According to Opperwall, such action was in compliance with Rule 9, which permits an officer to request clarification and to confer with the issuing authority at a later time. The arbitrator also expressed concern that "it could have a chilling effect if officers had to worry about being charged with insubordination if they pursued a request such as occurred in this case." Accordingly, the arbitrator ordered that Respondent remove the record of verbal discipline from Stahl's personnel file. There is no dispute that the verbal discipline had in fact been removed from Stahl's file by the time of the hearing in this matter.

IV. SOLICITATION FOR SECOND POLYGRAPH EXAMINER

Sometime between 11:00 a.m. and 12:00 p.m. on April 20, 2010, the same day that Charging Party filed a grievance concerning Respondent's denial of Stahl's request for compensatory time, Rice asked Roudebush to prepare a memo gauging employee interest in training for a second polygraph examiner position. Rice testified that at the time he gave this instruction to Roudebush, he was aware that Stahl had requested compensatory time for studying at home. Roudebush prepared a draft memo and emailed it to Rice at 3:16 p.m., with the subject

"how is this???". Rice testified that he had Roudebush submit the memo for his review because Chief Dunlap was on vacation at the time and because the memo pertained to a "fairly profound personnel matter." After Rice approved the draft, Roudebush sent the memo by email to the rest of the department at 3:51 p.m. The memo stated:

> The department is considering the possibility of supplementing the polygraph unit with an additional examiner. The school is approximately 13 weeks long and is quite academically challenging. While we have no definite time period in mind at this time, I would like to see if there is any interest in this special assignment and training. Please send me an email by May 12th if you would like to express interest in being considered for any future addition to the unit.

Upon receipt of the Roudebush memo, Stahl went to meet with Rice. During the meeting, which occurred at approximately 4:00 p.m., Stahl told Rice that the timing of the events of the past few days, including the dissemination of the Roudebush email, was "highly suspicious." Rice attempted to explain the purpose of the email by telling Stahl that Respondent was looking for an additional polygraph examiner so that it would have backup when Stahl was out of the office or otherwise unavailable, and because the department needed a succession plan in the event that Stahl left employment with the department. In addition, Rice told Stahl that Respondent wanted to give other police officers the opportunity for cross-training.

Immediately following her meeting with Rice, Stahl called Chief Dunlap who, as noted, was on vacation at the time. Stahl told Dunlap about the events of the previous few days, including her request for compensatory time and the dissemination of the email soliciting interest in a polygraph examiner position. According to Stahl, Dunlap indicated that there may have been some discussion awhile back within the department about bringing on an additional polygraph examiner, but that "nothing had been brought up since that time." Stahl testified that Dunlap told her that he did not know about the Roudebush email or the ongoing issue concerning Stahl's request for compensatory time. Stahl told Dunlap that she felt the timing of the solicitation email was "retaliatory" and "playing dirty." According to Stahl, Dunlap promised to sort everything out when he returned from vacation.

Dunlap testified that he discussed sending out an email soliciting interest in an additional polygraph examiner position with Rice before he left for vacation, and that Rice had called him while he was out of town to approve the dissemination of the memo which Roudebush had prepared. Dunlap testified that he first learned that the email had actually been sent out from Stahl, who called him while he was in California. According to Dunlap, Stahl was upset and concerned about her special assignment. Dunlap testified that he reassured Stahl that her assignment was not in jeopardy and that the department's intention was simply to add a second polygraph examiner. Dunlap asserted at hearing that he was not aware that Stahl had filed a grievance seeking compensatory time until Stahl referenced the issue during the phone call.

Dunlap testified that he first began thinking about adding another polygraph examiner back in 2007 when Stahl's position was first created. Dunlap asserted that he had various discussions with Rice and Deputy Chief Dave Trexler about adding a second polygraph examiner during a series of meetings beginning in 2010. Rice corroborated Dunlap's testimony,

describing various morning "coffee klatch" meetings starting in early 2010 at which the issue of an additional polygraph examiner was considered. Polygraph examiner is the only special assignment within the department staffed by a single person, and both Dunlap and Rice testified that a second polygraph examiner was needed to provide backup for Stahl. Although Dunlap conceded that he could utilize the MSP or hire a private polygraph examiner if Stahl was unavailable, he testified that having an additional in-house polygraph examiner was necessary to ensure that the department was "self-sufficient."

Neither Dunlap nor Rice consulted with Stahl before deciding to solicit interest in an additional polygraph examiner position. Rice testified that prior to disseminating the memo, he investigated the number of polygraph exams conducted by Stahl. At hearing, however, he could not recall any specifics concerning the volume of Stahl's polygraph examination work. Stahl testified that she was very busy in 2009, when she conducted 149 polygraph examinations or approximately 3 per week, but that the number of polygraph examinations fell by 86 percent in early 2010. According to Stahl, about 5 percent of her polygraph work is conducted specifically for the MSU Police Department, a number which Stahl claims has remained fairly consistent since she began the assignment in 2007.

V. AFTERMATH

Four employees of the MSU Police Department responded to the Roudebush email and expressed interest in an additional polygraph examiner position, including patrol officer Melissa Congleton, who submitted her response on May 3, 2010. However, no one was ever selected by Respondent to be sent for training or even contacted further concerning the position. At the time of hearing in this matter, Stahl was still the only individual working for Respondent as a polygraph examiner. Dunlap and Rice testified that the position was never filled because management discovered during the summer of 2010 that the department was facing a 5 to 15 percent budget reduction. In addition, Dunlap and Rice testified that there were a number of officers on light duty assignment that summer and that management was concerned the department would be short-handed if it sent an employee away for training for an extended period of time.

Discussion and Conclusions of Law:

In its post-hearing brief, Charging Party alleges that the verbal reprimand issued to Stahl was motivated by anti-union animus and that it interfered with her exercise of rights protected under PERA. There was indeed much evidence presented at the hearing concerning the events surrounding Respondent's decision to discipline Stahl for working at home. Respondent did not object to the introduction of such evidence; in fact, Respondent elicited testimony from its own witnesses concerning the verbal reprimand. However, at the earlier oral argument on Respondent's motion for summary disposition, the Union's attorney conceded that the issue concerning whether the disciplinary action violated PERA was moot. Specifically, Lett stated, "It is the Union's position that . . . the e-mail posting of the additional polygraph examiner, that is the unfair labor practice in this instance. The denial of overtime and the oral reprimand obviously have [already] been dealt with." Accordingly, I find that Charging Party has waived consideration of this issue. While evidence pertaining to the disciplinary action may be relevant

to whether the Employer's subsequent dissemination of the Roudebush email was unlawful, the discipline itself cannot form the basis of a PERA violation.

With respect to the email soliciting employee interest in an additional polygraph examiner position, the Union asserts that the email was sent to employees by management in retaliation for Stahl's attempt to exercise her contractual right to seek overtime compensation. Conversely, Respondent asserts that dismissal of the charge is warranted because Charging Party failed to present evidence establishing that management knew of Stahl's intention to file a grievance at the time that Roudebush sent the email at 3:51 p.m. on April 20, 2010. Respondent further contends that the Roudebush email cannot reasonably be interpreted as a threat of retaliation since the document explicitly states on its face that the department is considering "supplementing" the polygraph unit with an "additional" polygraph examiner. Finally, the Employer asserts that it had legitimate and substantial business justifications for announcing its intention to supplement the polygraph examination unit.

It should be noted initially that this case is not about whether Stahl was entitled to overtime or compensatory time for studying at home for the polygraph licensing examination, nor does this matter concern whether Stahl's conduct in fact constituted a violation of Respondent's work rules. Those issues are contract matters which were properly submitted to the grievance arbitrator for resolution. While Respondent was undoubtedly and, perhaps justifiably, annoyed by Stahl's attempt to seek compensatory time after having been previously told that studying at home was "not an option," that fact is also not relevant to resolution of this dispute. Although it is important that chain of command be followed in a police department, the existence of a paramilitary operation does not grant the Employer an exemption from the requirements of PERA. For purposes of the unfair labor practice charge, the gravamen of this dispute is whether Respondent retaliated against Stahl by sending the April 20, 2010 email soliciting employee interest in an additional polygraph examiner position.

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to public employees under Section 9 of the Act, including the right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." It is well-established that a public employee is protected by Section 9 of PERA when, acting in good faith, he or she files a grievance based on a provision in a collective bargaining agreement. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 261-262 (1974), aff'g 1970 MERC Lab Op 967. An implicit or explicit threat to terminate employees, reduce their wages or adversely change their working conditions if or because they have filed grievances or engaged in other types of activity protected by the Act violates Section 10(1)(a) of PERA. *New Haven Cmty Schs*, 1990 MERC Lab Op 167, 179; *City of Lincoln Park*, 1983 MERC Lab Op 362.

At oral argument and in the various briefs filed by the parties in this matter, there was much discussion of whether the Union had satisfied its burden of establishing that the Roudebush email was unlawfully motivated. It is true that anti-union animus must be proven in order to establish a claim under Section 10(1)(c) of PERA, and the Commission has repeatedly held that suspicious timing is not sufficient, by itself, to establish hostility toward an employee's exercise of protected activity. See e.g. *City of Detroit (Water & Sewerage Dept)*, 1985 MERC Lab Op

777, 780. However, conduct which is inherently destructive of employee rights may violate Section 10(1)(a) of PERA irrespective of the Employer's motivation. See e.g. *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *City of Greenville*, 2001 MERC Lab Op 55; *City of Detroit (Water & Sewerage Dep't)*, 1988 MERC Lab Op 1039; *City of Detroit (Fire Dep't)*, 1982 MERC Lab Op 1220. It is the chilling effect of a threat and not its subjective intent that would violate PERA. *Univ of Michigan*, 1990 MERC Lab Op 272, aff'd unpublished Opinion of the Court of Appeals, Docket No. 128678 (7/16/92). Thus, the test of whether Section 10(1)(a) of PERA has been violated does not turn on the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions tend to interfere with the free exercise of employee rights. *Huron Valley Sch Dist*, 26 MPER 16 (2012); *Macomb Academy*, 25 MPER 56 (2012). In determining whether a public employer's statement constitutes a threat in violation of Section 10(1)(a), both the content of the employer' s statement and the surrounding circumstances must be examined. *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *New Haven Cmty Sch*, 1990 MERC Lab Op 167, 179; *Black Angus*, 1974 MERC Lab Op 29.

This is the same test utilized in cases arising under Section 8(a)(1) of the National Labor Relations Act (NLRA), a provision which is essentially identical to Section 10(1)(a) of PERA. The Supreme Court has held that some conduct is "so inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. *NLRB v Great Dane Trailers, Inc*, 388 US 26 (1967). "That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" *Id*., quoting *NLRB v Erie Resistor Corp*, 373 US 221 (1963). Among the conduct which has been identified as being inherently destructive for purposes of the NLRA are actions by the employer which distinguish amongst its employees based upon their participation, or lack thereof, in protected concerted activity. *NLRB v Centra, Inc*, 954 F2d 366 (CA 6, 1993); *Portland Willamette Co v NLRB*, 534 F2d 1331 (CA 9, 1976). See also *Hahner, Foreman & Harness, Inc*, 343 NLRB 1413, 1425 fn 8 (2004) (proof of unlawful motivation not required when employee is disciplined for conduct that is part of the res gestae of protected concerted activities); *Carry Companies of Illinois v NLRB*, 30 F3d 922 (CA 7, 1994); *Mediplex of Danbury*, 314 NLRB 470; *Cooper-Jarrett*, 260 NLRB 1123 (1982); *American Freightways Co*, 124 NLRB 146 (1959).

In the instant case, the Roudebush email followed immediately on the heals of Stahl's request for compensatory or overtime time for studying at home, conduct for which Stahl was subsequently disciplined. Respondent was well aware that Stahl was seeking compensatory or overtime time as early as April 16, 2010, when she initially submitted her written request to Monette. However, the Employer did not discipline her at that time, nor did it commence an investigation into her conduct immediately following receipt of the request. Rather, Rice responded three days later by telling Stahl that the department was denying her request. Later that same day, Monette sent an email to Stahl formally notifying her that the request for compensation had been denied because it was contrary to his earlier instructions. Again, no reference was made to any pending disciplinary action. It was not until after the Union filed a grievance on Stahl's behalf on April 20, 2010 and then advanced that grievance to Step 2 that Chief Dunlap declared that the department was commencing an investigation into whether Stahl's conduct constituted insubordination. The commencement of an internal investigation

was announced just three days after the Roudebush email was disseminated and one week after Stahl first submitted her request for compensatory time. Given the content of the email and the context in which it was disseminated, I find that a reasonable employee would interpret the message as a direct response to Stahl's attempt to seek enforcement of her contractual claim to overtime compensation and an implied threat to retaliate against her if she continued to engage in conduct protected by Section 9 of PERA.

Respondent contends that the Roudebush email could not reasonably be interpreted by Stahl as a threat of retaliation since the document explicitly stated on its face that the department was considering "supplementing" the polygraph unit with an "additional" polygraph examiner. I disagree. The fact that the Employer did not specifically express an intent to replace Stahl within the email does not obviate the potentially threatening nature of the message. At the time the email was sent, Stahl was the only employee on staff capable of performing polygraph examinations. As noted, training to become a polygraph examiner involves attendance at an off-site facility at considerable expense to the Employer and several months of study, in addition to a potentially lengthy apprenticeship period. The possible addition of a second polygraph examiner carries the suggestion that Stahl could be quickly and easily replaced at any time by another employee of the department trained to conduct polygraph examinations. Moreover, supplementing the department with another employee capable of taking over some of the polygraph duties could potentially reduce the amount of work available to Stahl and, thus, limit her opportunities for overtime. Under such circumstances, I find that the Roudebosh email could reasonably be construed by Stahl as a threat to retaliate against her which, if carried out, could impact her employment with the department.

Respondent next asserts that the Roudebush email could not form the basis for a valid claim under PERA because Charging Party had not engaged in protected activity at the time the email was disseminated. It is true that the grievance challenging Respondent's decision to deny Stahl's request for compensatory time was not filed until sometime around 4:00 p.m., a few minutes after Roudebush sent the email soliciting interest in the additional polygraph examiner position at 3:51 p.m. However, Stahl had, by that time, already engaged the Employer in an attempt to enforce her rights under the collective bargaining agreement. As noted, Stahl formally requested 36 hours of compensatory time on April 16, 2010, when she sent a memo to Monette explaining why she believed she was entitled to such a benefit. Monette discussed the matter with Roudebush before sending Stahl an email on April 19, 2010 denying the request. Stahl testified credibly that she and Brandman met with Rice early the next morning, April 20, 2010 to further discuss her request for compensatory time. Although Rice testified that he did not actually meet with Stahl until later that afternoon, he admitted at the hearing in this matter that he was already aware of Stahl's request for compensatory time when he instructed Roudebush to send out the solicitation email to the rest of the department. Accordingly, I conclude that it would be reasonable for Stahl to conclude that the email was sent in retaliation for her attempts to engage in activity protected under Section 9 of PERA and to intimidate her from further engaging in such conduct. See e.g. *New Buffalo Bd of Ed*, 14 MPER 32 (2001).

Additionally, I find that Respondent's stated reason for disseminating the Stahl email was mere pretext. Respondent would have this tribunal believe that the decision to solicit employee interest in an additional polygraph examiner just four days after Stahl submitted her request for

compensatory time was mere happenstance. I find this contention far-fetched. Dunlap and Rice purportedly began discussing adding another in-house polygraph examiner several years prior to the events giving rise to this dispute. In fact, Dunlap testified the he started thinking of bringing on an additional examiner at the time Stahl started the assignment in 2007. Furthermore, Rice described the hiring of an additional polygraph examiner as "a fairly profound personnel matter" and the record indicates that the candidate selected for the position would have to undergo a lengthy and expensive training program. Yet, Respondent presented no evidence to support the testimony of Dunlap and Rice. Given the alleged significance of adding another polygraph examiner and the costs associated with supplementing the polygraph unit, it is institutionally implausible that no paper trail was created corroborating Respondent's contention that the matter had been under consideration for several years. It is equally unlikely that Respondent would have considered taking action on such a "profound" personnel matter without ever consulting with Stahl, the individual who was essentially responsible for creating the department's polygraph unit and the employee with the most intimate knowledge of the needs and workload of that unit. The fact that Rice directed Roudebush to prepare the email just days after Stahl submitted a request for compensatory time, which management later interpreted as violation of a direct order, also makes Respondent's purported business justification extraordinarily suspect.

The events occurring after April 20, 2010 further support a finding that the Employer's stated reason for sending the Roudebush email was pretextual. Respondent's witnesses testified that the search for candidates for another polygraph examiner was called off due to scheduling issues and budgetary concerns. Yet, according to Dunlap, the department did not become aware of those issues until the summer of 2010, several months after the email was disseminated. Rice similarly testified that Respondent learned of the budget and personnel issues "well into the summer". Yet, the deadline for responding to the Roudebush email was May 9, 2010, and management never once contacted any of the four employees who expressed interest in the position. The department's subsequent silence concerning the additional polygraph examiner strongly suggests that Respondent never actually had any intention of filling the position when it sent out the Roudebush email. Moreover, despite Dunlap's insistence that the department be self-sufficient with respect to special assignments and the repeated testimony of Respondent's witnesses as to the importance of having backup available for Stahl, it is undisputed that Stahl was still the only employee within the department's polygraph unit at the time of hearing in this matter, more than a year-and-a-half after the Roudebush email was disseminated and more than four years after Dunlap purportedly first recognized the need for an additional polygraph examiner. Based on the entire record, I find that the Employer's asserted rationale for sending out the Roudebush email on April 20, 2010 was subterfuge and that the action was taken not because of an imminent need to find backup for Stahl, but rather for the purpose of threatening her for seeking to enforce her rights under the collective bargaining agreement and to deter any further efforts by her to engage in protected activity.

Based upon the content of the Roudebush email and the context in which that message was disseminated, I conclude that a reasonable employee in Stahl's situation would interpret the statements therein as an express or implied threat. Accordingly, I find that Respondent violated Section 10(1)(a) of PERA by sending the email throughout the department. Accordingly, I hereby recommend that the Commission issue the following order:

RECOMMENDED ORDER

Based upon the above findings of fact and conclusions of law, Respondent Michigan State University, its officers, agents, and representatives are hereby ordered to:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their right to engage in lawful concerted activities for the purpose of collective bargaining or negotiations or other mutual aid or protection or to negotiate or bargain collectively with their public employer through representatives of their own free choice, as guaranteed in Section 9 of PERA.

2. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 7, 2012

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, MICHIGAN STATE UNIVERSITY, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their right to engage in lawful concerted activities for the purpose of collective bargaining or negotiations or other mutual aid or protection or to negotiate or bargain collectively with their public employer through representatives of their own free choice, as guaranteed in Section 9 of PERA.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

MICHIGAN STATE UNIVERSITY

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 or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510