STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

NEW BUFFALO BOARD OF EDUCATION,
Respondent-Public Employer,

Case No. C99 J-192

-and-

NEW BUFFALO EDUCATION ASSOCIATION,
MEA/NEA, AND CHARLES W. COVERT,
Charging Parties.
_____/

APPEARANCES:

Taglia, Fette, Dumke, Passaro & Kahne, P.C., by Thomas R. Fette, Esq., for Respondent

White, Przybylowicz, Schneider & Baird, P.C., by Jeffrey S. Donahue, Esq., for Charging Parties

DECISION AND ORDER

On October 24, 2000, Administrative Law Judge (hereafter "ALJ") Nora Lynch issued her Decision and Recommended Order in the above matter finding that Charging Parties Charles Covert and New Buffalo Education Association MEA/NEA failed to meet their burden of proof that Respondent New Buffalo Board of Education threatened Covert in retaliation for his protected concerted activity in violation of Section 10(1)(a) of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, MCL 423.210; MSA 17.455(10). The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On November 16, 2000, Charging Parties filed timely exceptions to the ALJ's Decision and Recommended Order. Respondent filed a timely brief in support of the ALJ's recommended order on November 28, 2000.

The facts of this case were set forth fully in the Decision and Recommended Order and need not be repeated in detail here. Briefly, Covert was a probationary instructor in the Employer's building trades program. At a June 14, 1999, disciplinary meeting, Covert was directed by Superintendent Michael Lindley to complete a house construction project, which he had earlier been assigned, by the end of month. Since Covert's contract had expired, MEA representative Mike Schroeder asked Lindley whether Covert would be paid for the extra time required to complete the project. Schroeder's question referred to a provision in the parties collective bargaining agreement which required compensation for extra work hours. In response, Lindley indicated to Covert that if he refused to complete the work without additional compensation, he "might as well turn in [his]

keys." Following the meeting, Lindley issued a written reprimand to Covert for failing to complete the house on time. In the reprimand, dated June 15, 1999, Lindley expressed his intent to "non-renew Covert's contract for the 2000-2001 school year prior to May 1, 2000, with reconsideration if [the next project] is completed by the end of the year." Several months later, on September 22, 1999, Covert and Schroeder met with Lindley and Tom Fette, the school district's attorney, in an attempt to resolve grievances resulting from the June 14 meeting and the reprimand which followed. During the course of this meeting, Schroeder indicated that there were going to be additional charges arising out of the incident. Lindley responded by stating that Covert would be terminated under the Tenure Act at the end of the school year.

Charging Parties contend that the statements made by Superintendent Lindley at the meetings on June 14 and September 22 constituted threats in violation of Section 10(1)(a) of PERA. With respect to the latter remark, we disagree. To determine whether an employer's statements constitute an implied or express threat, both the content and context of the remarks must be analyzed. *City of Greenville*, 2001 MERC Lab Op ___ (issued March 1, 2001); *New Haven Comm Schools*, 1990 MERC Lab Op 167, 179. The standard applied is whether a reasonable employee would interpret the statement as a threat. *Greenville, supra*; *Detroit Fire Dep't*, 1988 MERC Lab Op 561; *Detroit Water & Sewerage Dep't*, 1983 MERC Lab Op 157, 167. As noted by the ALJ in her Decision and Recommended Order, Lindley's statement concerning non-renewal under the Teacher Tenure Act was merely a reiteration of what was previously expressed to Covert in the written reprimand of June 15, 1999. For this reason, we fail to see how Covert or anyone else could have reasonably interpreted the remark as a response to Schroeder's suggestion that the Union might take additional action on his behalf. Thus, the ALJ was correct in determining that no PERA violation occurred as a result of the statement which Lindley made at the September 22 meeting.

We disagree, however, with the ALJ's conclusion regarding the June 14 statement. As noted, Lindley told Covert that he "might as well turn in [his] keys," if he refused to complete the work without additional compensation. The ALJ held that this statement was lawful because it was not motivated by the threat of a grievance, but instead was the result of Lindley's annoyance that the project had not been completed. A violation of Section 10(1)(a), however, does not depend upon the employer's motive, or on whether the employee was actually coerced. See e.g. *Greenville, supra*. Moreover, the ALJ's finding was based primarily on her determination that the word "grievance" was never mentioned by Schroeder at the June 14 meeting. Regardless of whether Schroeder ever explicitly used that word, it was evident from the context of the conversation that the Union would consider filing a grievance if Covert was forced to work extra hours without pay. Lindley himself even admitted as such. At the hearing, he testified that Schroeder told him that the Union "may have a problem" with the Employer's position regarding completion of the house, and that he interpreted this statement to mean that the Union would "look at the contract and if they thought it was necessary they would file grievances." Therefore, the fact that Schroeder may not have explicitly used the term "grievance" is immaterial. Based on the context in which the remark was made, we conclude that Covert could reasonably have interpreted the statement as a threat intended to dissuade him from attempting to enforce his contractual rights by filing a grievance.

It is true that, under certain circumstances, we will decline to issue a remedial order where the unlawful conduct is, as it appears to have been in this case, isolated in nature. See e.g. *Rochester Hills School Dist*, 2000 MERC Lab Op 38. The right to file a grievance, however, is a basic statutory right. *MERC v Reeths-Puffer School Dist*, 391 Mich 253, 261 (1974); *Ingham County*, 1999 MERC Lab Op 168, 173. We consider a threat of this nature far too serious to dismiss as merely a de minimis violation for which a cease-and-desist order is not warranted. See e.g. *Container Corp.*, 277 NLRB 1398; 121 LRRM 1103 (1985); *General Motors Corp, Packard Electric Div*, 232 NLRB 335; 97 LRRM 1162 (1977); *Interlake, Inc*, 218 NLRB 1043; 89 LRRM 1794 (1975), enf'd 529 F2d 1277; 91 LRRM 2655 (CA 8, 1976). But see *Titanium Metals Corp*, 274 NLRB 706; 119 LRRM 1021 (1985). Accordingly, we find that Lindley's statement at the June 14 meeting constituted a threat in violation of Section 10(1)(a) of PERA and hereby issue an appropriate remedial order for the violation found.

ORDER

Respondent New Buffalo Board of Education, its officers and agents shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 9 of PERA by threatening employees with discharge if they file grievances under the contract.

2. Insure that all employees are free to engage in lawful, concerted activity through representatives of their own free choice, for the purpose of collective bargaining or other mutual aid or protection, as provided in Section 9 of PERA.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Maris Stella Swift, Commission Chair

_____

Harry W. Bishop, Commission Member

_____

C. Barry Ott, Commission Member

Dated:_____

NOTICE TO ALL EMPLOYEES

PURSUANT TO AN ORDER OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, AFTER A PUBLIC HEARING AT WHICH IT WAS FOUND THAT THE NEW BUFFALO BOARD OF EDUCATION COMMITTED AN UNFAIR LABOR PRACTICE IN VIOATION OF SECTION 10 OF THE PULBIC EMPLOMENT RELATIONS ACT,

WE HEREBY NOTIFY OUR EMPLOYEES THAT

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 9 of PERA by threatening employees with discharge if they file grievances under the contract.

WE WILL insure that all of our employees are free to engage in lawful, concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid or protection, as provided in Section 9 of the Public Employment Relations Act.

NEW BUFFALO BOARD OF EDUCATION

By _____

Title _____

Dated: _____

This notice must remain posted for a period of thirty (30) consecutive days and must not be altered, defaced, or covered by other material. Questions concerning this notice should be directed to the Michigan Employment Relations Commission, 14th Floor, 1200 Sixth Street, Detroit, MI 48226. (313) 256-3540.

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

NEW BUFFALO BOARD OF EDUCATION,
Respondent-Public Employer

- and - Case No. C99 J-192

NEW BUFFALO EDUCATION ASSOCIATION,
MEA/NEA, AND CHARLES W. COVERT,
Charging Parties
_____/

APPEARANCES:

Thomas R. Fette, Esq, Taglia, Fette, Dumke, Passaro & Kahne, P.C., for the Employer

Jeffrey S. Donahue, Esq., White, Przybylowicz, Schneider & Baird, P.C., for the Charging Parties

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Lansing, Michigan, on February 3, 2000, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on October 15, 1999, by the New Buffalo Education Association, MEA/NEA, and Charles W. Covert, alleging that the New Buffalo Board of Education had violated Section 10 of PERA. Based upon the record, including briefs filed by the parties on or before April 12, 2000, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges that Respondent=s actions in threatening to fire teacher Charles W. Covert if he pursued a grievance, and then making a prospective non-renewal of Mr. Covert=s contract after the Association and Mr. Covert did pursue grievances, violated PERA.

Facts:

The New Buffalo 5-C Education Association, MEA/NEA, represents a bargaining unit of certificated employees of the New Buffalo Area Schools. The Superintendent of Schools is Michael Lindley. Charles Covert was hired in the fall of 1997 as an instructor in the building trades program. As a probationary teacher, Covert was employed on an annual basis during the four year probationary period. If a probationary teacher=s performance is unsatisfactory, they are subject to non-renewal on an annual basis; pursuant to the Teacher Tenure Act, notice of non-renewal must be given 60 days prior to the end of the school year.

Covert=s assignment at the beginning of the l997/98 school year was to teach students the basic skills of construction by building a house. This was a Aspec@ house, in other words built to be sold or rented, rather than a custom house built for a particular owner. Under Covert=s supervision, students perform tasks such as framing, roofing, drywalling, finish work and painting. A primary objective of the building trades program is that the house be completed by the end of the school year so that students can see the project through to its completion. Covert was informed of this expectation at his initial interview. Because for various reasons the project started late in 1997, the house was not completed during the school year. Covert requested, and was granted, a stipend to finish the project himself over the summer.

Covert was rehired for the 1998/99 school year. The construction on that year=s house did not start until the middle of September when the building permit was obtained. In December of 1998, the School District entered into a pre-sell agreement with a buyer for the house that was being built. The buyer wanted the house completed in May; Lindley told him that was impossible but it would be completed in June. Lindley and the high school principal visited the site regularly. When it appeared that construction on the house was falling behind, the high school principal sent a memo to Covert on January 18, 1999, indicating that the house must be completed by June 4, 1999. The principal requested a construction plan outlining the entire completion of the house. He stated that:

> You will not have two weeks after the school year ends and be paid to complete the project. You must complete the project with the people you have.

The principal also indicated that if the house was not completed by June 4 there could be serious consequences involving Covert=s employment. On May 10, 1999, the principal requested a final completion schedule for the house and reminded Covert that they were 18 days away from the June 4 completion day.

The house was not completed on schedule. Superintendent Lindley informed Covert that a disciplinary conference would be held and that he had the right to Union representation. A meeting was held on June 14, 1999, with Covert, Union representative Mike Schroeder, and Superintendent Lindley to discuss Covert=s failure to complete the assignment. Each individual had a different recollection of what was said at the meeting. According to Schroeder, the superintendent

indicated that discipline would be imposed and directed Covert to complete the house by the end of the month. There was a closing date on the house at the end of the month and Lindley indicated that there would be legal problems if the house was not completed at that time. Since Covert=s contract had expired, Schroeder asked if Covert would be paid for the additional time required to complete the house. Schroeder testified that he referred to the collective bargaining agreement which provided that any additional classroom teaching duty assignments beyond the school year would be paid at the rate of .001 percent of the BA base. According to Schroeder, in response the superintendent looked at Covert and angrily stated: AWell, if you=re going to take that position you might as well turn in your keys right now because you=re fired.@ According to Covert, when Schroeder raised the contractual requirement, the superintendent stated that he wasn=t going to pay. Covert testified that after Schroder said that he would recommend filing a grievance, the superintendent stated: AFile a grievance against me, might as well just turn your keys in, all done.@ Superintendent Lindley testified that in the course of the meeting he indicated the reasons that discipline would be imposed. When the question came up about compensation for additional work, Lindley stated that there were no additional duties, Covert had to complete the work he was employed to do and there would be no additional compensation. Lindley testified that he made the statement that Aif his position was that he was not going to complete the work, with the understanding that there would be no additional compensation, that he might as well turn in his keys.@ Lindley did not remember the exact context of his remarks but he denied making a threat in regard to the Union taking action of any sort.

Lindley issued a written reprimand to Covert on June 15, 1999 for failure to complete the house by June 4 as directed. Lindley also indicated that if the house was not completed by June 24, he would consider taking steps to terminate Covert=s employment immediately. Since the District had not given Covert a timely non-renewal notice, his appointment automatically renewed for the 1999-2000 school year. However, Lindley also stated the following in the memo of reprimand:

> It is my intent to take steps to non-renew your contract for the 2000-2001 school year prior to May 1, 2000, with reconsideration if it [the 1999-2000 house] is completed by the end of the year.

On June 15, 1999, the Union filed an Association grievance claiming that the building trades teacher was required to work beyond the contract year without pay. On June 17, 1999, Covert filed a grievance stating that he was disciplined without just cause and requesting that the discipline and all references thereto be removed from District records. Both grievances proceeded to arbitration.

On September 22, 1999, a few weeks prior to the arbitration hearing, a meeting was held to explore the possibility of settlement. In attendance were Covert, Schroeder, Lindley and the Employer=s attorney, Tom Fette. Schroeder testified that in the course of the discussion he indicated that there were going to be additional charges that could stem out of the whole situation, including an unfair labor practice charge and a wage and hour complaint. According to Schroeder, the response came in the form of AWell, we=ll terminate Mr. Covert under the Tenure Act at the end of this current school year.@ Lindley testified that the only discussion he recalled with respect to non-renewal was that Schroeder asked if it was still the Employer=s intention to non-renew prior to May 1, and Lindley

responded affirmatively because he had a legal deadline to meet. The Teacher Tenure Act provides that a probationary teacher=s annual appointment will automatically be renewed for an additional year unless the teacher is given notice of non-renewal at least 60 days before the close of the school year, which would be May l.

Discussion and Conclusions:

Charging Parties allege that Covert was threatened by Superintendent Lindley on June 14, when his Union representative indicated that a grievance would be filed, and also on September 22, when his representative stated the intent to file an unfair labor practice charge and a wage and hour complaint. Respondent denies any retaliatory conduct. Respondent asserts that at the time of the June 14th meeting no action of a protected nature had been taken or threatened by Covert; in addition, Lindley=s statement regarding a non-renewal made at the September 22 meeting was not in response to the Union=s stated intent to file additional claims but was merely a reminder that the Employer would not renew Covert=s contract if the 1999-2000 house was not timely completed.

The record reveals that Covert had been warned by the Employer on several occasions that there was a deadline for the completion of the house, that there would be serious consequences if it was not finished, and that no additional compensation would be made. At the June 14 disciplinary conference the Union brought up the subject of compensation. Lindley was obviously frustrated that the issue of compensation was being raised after the previously expressed conditions and warnings to Covert. I find that Lindley=s statement to the effect that if Covert was not going to complete the work without compensation he should turn in his keys, was the result of Lindley=s annoyance that the project was not completed as agreed, rather than the possibility of a grievance being filed. Of the three individuals present at the meeting, only Covert testified that a grievance was mentioned. Schroeder testified that he referred to the collective bargaining agreement when discussing compensation, but he did not specifically indicate that a grievance would be filed. Lindley denied making a threat based on any action of the Union. Given their testimony, and the absence of any other evidence of animus towards Covert or his use of the grievance procedure, I am unable to credit Covert=s testimony linking the filing of a grievance with Lindley=s statement that Covert could turn in his keys. I conclude that the superintendent=s statement was not motivated by the threat of a grievance and was not retaliatory in violation of Section 10(1)(a) of PERA. *West Bloomfield Board of Ed*, 1983 MERC Lab Op 18, 23.

As to the comments made by Lindley at the September 22, 1999 meeting, again I am unable to conclude that the motivation for his remarks regarding non-renewal was the possibility of further legal action by Covert. In a discussion regarding possible settlement of the grievances it is logical that the issue of non-renewal would have been raised. Clearly Lindley was concerned about meeting the non-renewal notice requirements of the Teacher Tenure Act for a probationary teacher prior to the May 1, 2000, deadline. Lindley=s statement regarding non-renewal was simply a reiteration of what was expressed in the written reprimand of June 15, that although he was taking steps to non-renew Covert=s contract for the 2000-2001 school year, he would reconsider if the 1999-2000 house was satisfactorily completed. Since Lindley had already stated his intentions in this regard, this action was clearly not in response to the Union raising the possibility of filing unfair labor

practice charges or wage and hour claims.

Based on the above discussion, I find that Charging Parties have failed to meet their burden of proof that Lindley threatened Covert in retaliation for his concerted activity in violation of Section 10(1)(a) of PERA. It is therefore recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch
Administrative Law Judge

DATED: