STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN STATE UNIVERSITY,
Public Employer-Respondent,

MERC Case No. C16 H-086

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1585,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, by Richard W. Fanning, Jr., for Respondent

Miller Cohen, P.L.C., by Robert D. Fetter, for Charging Party

DECISION AND ORDER

On May 31, 2018, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] 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 either 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 19, 2018

[1] MAHS Hearing Docket No. 16-024900

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MICHIGAN STATE UNIVERSITY,
Public Employer-Respondent,

Case No. C16 H-086
Docket No. 16-024900-MERC

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1585,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, by Richard W. Fanning, Jr., for the Respondent

Miller Cohen, P.L.C., by Robert D. Fetter, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On August 30, 2016, AFSCME Council 25 and its Affiliated Local 1585 (Collectively the Union or Charging Party) filed the above captioned unfair labor practice charge against the Michigan State University (University or Respondent). 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 Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission).

This matter was heard before the undersigned on November 21, 2016, January 10, and January 11, 2017. Based upon the entire record, including exhibits, transcripts of the hearings and post-hearing briefs, I make the following findings of fact, conclusions of law, and recommended order.

Charging Party claims the University's decision to investigate, and the method by which it did investigate, sexual harassment/misconduct and retaliation allegations made by two members of Local 1585 and the Local's administrative secretary against various union officials together, with other actions occurring during the above investigations, violated Sections 10(1)(a) and (b) of PERA.

The University claims that it was required under federal law, specifically Title IX of the Education Amendments of 1972, 20 USC §1680 *et seq.*, as well as its own policies to investigate the claims and, the preceding obligation notwithstanding, its decision to investigate and the manner by which it did, did not violate PERA.

Title IX:

Title IX provides at 20 USC §1681(a) that, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance." 20 USC §1682 provides authorization to the United States Department of Education to issue rules and regulations to effectuate the provisions of §1681.

Also contained in 20 USC § 1682 is the enforcement provision by which the Department of Education could seek to terminate federal financial assistance against any institution not in compliance with Title IX.[2]

In defining the scope of applicability of Title IX, 20 USC §1687, provides in the relevant part the following:

> For the purposes of this chapter the term 'program or activity' and 'program' means all the operations of
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> ***
>
> (2)(A) a college, university, or other postsecondary institutions, or a public system of higher education

The interpretive rules for Title IX, as administered by the Department of Education, are set forth in Title 34 of the Code of Federal Regulations, Part 106, 34 CFR 106. Section 106.1 of those regulations states in part, "The purpose of this part is to effectuate Title IX … which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part."

Similar to 20 USC §1687(2)(A), 34 CFR 106.2(h)(2)(i) defines "program or activity" and "program" to include "all the operations of" a "[a] college, university, or other postsecondary institution, or a public system of higher education." That regulations goes further, 106.2(h)(3) to also include in the above definition "[a]n entire corporation, partnership, other private organization, or an entire sole proprietorship" if that organization receives federal assistance from the Department of Education or if it "is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation."

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[2] That section states in the relevant portion pertaining to enforcement:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . .

Under 34 CFR 106.8(a), a covered institution is required:

> [T]o designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

Subsection (b) requires covered institutions to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." 34 CFR 106.8(b).

In addition to the above regulations, the Department of Education's Office of Civil Rights (OCR) also issues regulatory guidance in the form of "Dear Colleague" letters.

Findings of Fact:

1. Creation of the Office of Institutional Equity

In 2011, the OCR investigated the University's handling of sexual harassment complaints and compliance with Title IX. Ande Durojaiye, the University's Office of Institutional Equity (OIE) Director, testified that the University receives "hundreds of millions if not billions of dollars" in federal funding, and as such is required to comply with Title IX.

During the period relevant to the OCR's investigation, allegations of sexual harassment were handled by the University's Office of Inclusion and Intercultural Initiatives (I3). In effect alongside the I3 was the "University Policy on Sexual Harassment." Section II of that policy, entitled "Prohibition" states:

> Members of the University community shall not engage in sexual harassment. Persons who do so are subject to disciplinary action, up to and including discharge for employees and dismissal for students. The University also prohibits sexual harassment by third parties towards members of the University community.

Section III, defines "sexual harassment" as "unwelcome sexual advances, unwelcome requests for sexual favors or the unwelcomed behavior of a sexual nature…" The policy directs individuals who wish to file a complaint of sexual harassment to contact the University's Title IX Coordinator within the I3.

On August 28, 2015, following completion of the OCR's investigation, the University and the OCR entered into a Resolution Agreement to "ensure the University's compliance with Title IX" and "its implementing regulations." The Resolution Agreement noted that the University had already undertaken several actions including, but not limited to, creating the OIE, which would assume the role of the I3 in investigating "all claims of harassment and discrimination on campus." Additionally, the Resolution Agreement included thirty (30) separate requirements that the University's policies and procedures had to contain. Examples of those requirements included,

but were not limited to, the following:

> [N]otice that the procedures apply to complaints alleging all forms of sex discrimination (including sexual and gender-based harassment, assault and violence) against employees, students, and third parties;
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> ***
>
> 4. [P]rovisions for the prompt, adequate, reliable and impartial investigation of complaints, including the opportunity for the parties to present witnesses and other evidence and to have similar and timely access to information being considered in the grievance process;
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> ***
>
> 11. [A] statement clarifying that the University's policy and procedures for addressing complaints of sex discrimination, including sexual and gender-based harassment, assault and violence, apply to all University programs and activities; including those conducted off-campus and in the University's professional and graduate schools;
>
> 12. [A]n explicit statement that where relevant, if the off-campus misconduct did not occur in the context of a University program or activity, the University will consider the effects of off-campus conduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity;
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> ***
>
> 28. [S]tatement that retaliation and retaliatory harassment is prohibited against any individual who files a sex discrimination complaint with the University or participates in a complaint investigation in any way; and a clear explanation of how retaliation or retaliatory harassment can be reported to the University;

The Resolution Agreement required that the University submit to the OCR its proposed procedures to comply with the above requirements, along with other anti-discrimination policies for OCR review and confirmation that such conformed with Title IX and the Resolution Agreement.

The Resolution Agreement mandated certain continuing reporting requirements that, among other things, required the University to submit copies of complaints filed alleging "sexual or gender-based harassment, assault or violence" during the 2015-2016, 2016-2017, and 2017-2018, academic years. As part of its obligations, the University was required to:

> [P]rovide to OCR, for review and approval, documentation related to the investigation of each complaint; such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries,

> documentation regarding interim measures provided or offered, any final disposition letters, hearing records, disciplinary records, documentation regarding any appeals, and documentation regarding additional steps taken to stop harassment found to have occurred, prevent its recurrence and remedy its effects on complainants and others as appropriate.

Lastly, the Resolution Agreement also contained express agreement and acknowledgement by the University that the "OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement."

Durojaiye testified that the "University Policy on Relationship Violence & Sexual Misconduct" (RVSM) was issued as a result of the OCR investigation and Resolution Agreement. Section II of the RVSM, entitled "Applicability and Prohibition" provides:

> This policy applies to all members of the University community - faculty, staff, and students - regardless of gender, sexual orientation, or gender identity. **Members of the University community shall not engage in relationship violence or sexual misconduct against employees, students, or third parties.** Persons who do so are subject to disciplinary action, up to and including discharge for employees and dismissal for students. The University also prohibits sexual misconduct by third parties towards members of the University community. The University prohibits retaliation, including retaliatory harassment, against individuals who report relationship violence or sexual misconduct or who participate in the University's investigation and handling of such reports.
>
> This policy applies to all forms of relationship violence, stalking, and sexual misconduct committed by or against a member of the University community when:
>
> - The conduct occurs on campus;
> - The conduct occurs off-campus in the context of University employment, education, or research programs or activities, including but not limited to MSU-sponsored study abroad, internships, graduate/professional programs, intercollegiate athletics, or other affiliated programs; and/or
> - The conduct occurs off-campus outside the context of a University program or activity but has continuing adverse effects on campus or in any University program or activity.
>
> [Emphasis Added].

The term "third party" is defined by the RVSM in a footnote as "an individual who is not a member of the University community (faculty, staff, or student) such as a visitor or guest, contractor, alum, or student from another institution." Durojaiye testified that he believed the OIE was obligated to investigate complaints that occurred off-campus "if we think they're having a continuing adverse effect on campus."

Both the RVSM and the "MSU Anti-Discrimination Policy" contain anti-retaliation provisions. The RVSM states:

> Persons who report relationship violence or sexual misconduct, or who participate in the University's investigation and handling of such reports, shall not be subject to retaliation (including retaliatory harassment) for reporting or participating, even if the University finds that no relationship violence or sexual misconduct occurred. The University will take strong responsive action if retaliation occurs.
>
> Retaliation is defined as an adverse action or adverse treatment against an individual involved in an investigation by an individual who knew of the individual's participation in the investigation.
>
> If a claimant or witness believes that she or he is being subjected to retaliation (including retaliatory harassment), she or he should promptly contact the Office of Institutional Equity.

Regarding retaliation, the Anti-Discrimination Policy states:

> Persons who complain about sexual harassment, or who cooperate in the University's investigation and handling of sexual harassment reports or complaints, shall not be subject to retaliation for complaining or cooperating, whether or not the University finds that there was sexual harassment. If a complainant or witness believes that she or he is being subjected to retaliation, she or he should promptly contact the Director of Human Resources (staff), the Associate Provost/Associate Vice President for Academic Human Resources (faculty and academic staff), the Vice President for Student Affairs and Services (students), or the Director of the Office for Inclusion and Intercultural Initiatives (faculty, staff, or students).

The University's Director of the Office of Employee Relations, Jim Nash, testified that several meetings were held with the University's labor unions over the RVSM as it was being developed and that a copy of the policy was e-mailed to each of the unions upon its adoption. There is no indication on the record that Charging Party, or any labor union for that matter, challenged the RVSM or the University's authority to create and adopt it.

According to Durojaiye, the OIE is a complaint driven office, where it responds to complaints that come into the office via e-mail, the online website, or a phone call/walk-in. After a complaint is made, the OIE staff completes an initial intake form which is then submitted for Durojaiye's review and initial determination whether the OIE has jurisdiction over the complaint. Durojaiye testified that he relies on the RVSM to determine whether the OIE has jurisdiction over sexual harassment complaints.

After the intake and initial jurisdiction determination by Durojaiye, an OIE staff member conducts a one-on-one interview with the complainant. After the interview a final decision on jurisdiction is made.

The investigation into a complaint received by the OIE and within its jurisdiction is assigned to an Institutional Equity Investigator (Investigator). The process that an investigation follows, as described by Investigators Tracy Leahy and Elizabeth Abdnour, includes review of the initial intake form, interviewing the complainant regarding the allegations, interviewing the respondent, identifying witnesses, and interviewing witnesses identified by the parties. After that the Investigator prepares a draft report, reviews the draft report with the interested parties, and then issue a final report.

The Investigators must rely upon party and witness cooperation as the OIE has no authority to compel participation in an investigation. Investigators attempt to contact parties and witnesses by phone or email seeking participation. Leahy testified that if she got no response to her initial contact she would attempt to follow-up but that she did not have any authority to force anyone to come in and talk with her. Durojaiye testified that an Investigator will continue to gather information even if a respondent does not participate and would still issue a decision based on all available information.

2. Local 1585

Local 1585's bargaining unit is comprised of approximately 900 University employees in various non-supervisory, non-instructional positions. Every individual identified herein as a member of the Local's bargaining unit, unless specifically stated, is also an employee of the University. Pursuant to the collective bargaining agreement between the parties, the Local's President and Chief Steward enjoy full-time release from their respective University positions to engage in union business. The President is responsible for, among other things, running the functions of the Local's off-campus office, its day-to-day operations, as well as participating in step 3 grievance hearings, special conferences, negotiations, and arbitrations. The Chief Steward is responsible for step 2 grievance hearings, attending Local meetings, and participating in negotiations.

Local 1585's governing body is comprised of several officers, including the President, Vice President, Recording Secretary and Secretary Treasurer, and an Executive Board. The Executive Board is comprised of ten members. While the record is not clear on this point, it is presumed that the Local's Executive Board includes as part of its ten members the Local's officers identified above. The Local also has anywhere between twenty-five to forty-five stewards including the above mentioned Chief Steward. The Chief Steward is not automatically a member of the Executive Board.

The Local rents office space at an off-campus location where both its President and Chief Steward maintain offices. Also present at that off-campus site is the Local's one employee, a clerical secretary.

3. Initial Sexual Harassment Investigation

On May 24, 2016, Lisa Deavers, the Local's Chief Steward at that time, came into the OIE office and made a complaint alleging that Jim Rhodes, the Local's President for the last twelve years, had been sexually harassing her for several years. The OIE completed an initial contact form in which Deavers identified several instances of harassment that took place at union conferences,

Rhodes's home, and the Local's off-campus office. The intake form also claimed that Rhodes had exposed himself in text messages he had sent to her. Additionally, Deavers identified two other members of the Local by name, whom she claims were harassed by Rhodes as well.

Durojaiye, in testifying why he made the initial determination that the OIE had jurisdiction, stated:

> [B]oth Mr. Rhodes and Ms. Deavers were both employees of the University, both continuously coming back on campus and so as it was portrayed to me and as I found was that there was a continuing adverse effect based on his conduct and him coming back on campus. I think the simplest way is, but for his employment at MSU, he wouldn't have this particular role, and so that was the other thing we looked at as well.

The investigation was then assigned to Leahy.

Leahy testified that she contacted Deavers by email and arranged a time to meet and discuss the allegations. When they met, Deavers again provided names of other individuals within the Local's bargaining unit who might also have been harassed by Rhodes. Of the individuals identified, only Danielle Martin-Stoney, a former Local Chief Steward and current University employee, requested to be added as a complainant.

Leahy described Deavers's allegations as including sexual harassment and creating a hostile work environment. Furthermore, as testified to by Leahy, Deavers believed that Rhodes was trying to have her removed as Chief Steward because she "wasn't coming to his sexual advances."

On June 28, 2016, Leahy met with Martin-Stoney and learned that Martin-Stoney, who had held the position of Chief Steward from 2009 through 2014, had made a previous complaint of sexual harassment against Rhodes in 2014 with the I3. Martin-Stoney alleged at that time that Rhodes had made unwelcomed sexual advances toward her and initiated an effort to have her recalled as Chief Steward after she began a relationship with the President of another AFSCME Local at the University and refused Rhodes' sexual advances. Eventually Martin-Stoney resigned. In 2014, I3 had determined that it lacked jurisdiction to investigate those claims.[3] According to Leahy, it was not until sometime after she met with Martin-Stoney that the former Chief Steward asked to become a complainant.

Leahy testified that she spoke with Durojaiye, reviewed Martin-Stoney's earlier complaint to the I3 and the policy in effect at that time, the Harassment Policy, before concluding that the I3's decision was "erroneous." Durojaiye testified that the rationale for his finding initial jurisdiction to investigate Martin-Stoney's allegations was the same as for Deavers.

[3] Included within a packet of documents introduced and accepted as an exhibit in these proceedings was an October 31, 2014, letter from Kristin Moore with the I3 which stated in the relevant part: "We have considered your claim, consulted with legal counsel, and have determined that your claim is not something within our jurisdiction to investigate. The appropriate place for your complaint would be within your union since it pertains to a purely internal union matter.

On July 25, 2016, Leahy emailed Rhodes indicating that OIE was investigating allegations made against him and requesting to speak with him regarding the same. On July 29, 2016, Rhodes, along with an attorney, met with Leahy. Leahy testified that she advised Rhodes that her role was to "gather information, documents and any other relevant information to make a determination as to whether there has been a violation of the policy." Leahy further testified that she advised Rhodes of the RVSM's non-retaliation provision.

Leahy, in describing Rhodes's response to the allegations Deavers had made against him, testified:

> His defense was, one, that she -- any sexual contact that occurred between the two of them was consensual; two, that her allegation that she was going to be recalled because she had refused his sexual advances was not true, that it was based on the fact that she was in the middle of the recall process for political issues based on her performance as chief steward. And then he proceeded to provide me with specific information regarding the performance issues that he believed to be relevant to her recall process.

Leahy further testified that the performance issues identified by Rhodes included the failure to file a grievance on behalf of Local member Tim Kane, her voting in his absence at a Coalition of Labor Organizations (CLO) meeting, misuse of release time, and a failure to file certain tax forms for the Local when she was the secretary/treasurer.[4] Rhodes also identified some fiscal concerns with the way Deavers had handled invitations and passes to an internal Local picnic.

When discussing the allegations made by Martin-Stoney, Leahy testified that Rhodes claimed Martin-Stoney was abusing the release time and was spending time with the President of another union instead of responding to grievances.

Regarding efforts to remove either woman from the Chief Steward position, Rhodes, according to Leahy, told her that the Local's Executive Board was the driving force behind the moves. With respect to Martin-Stoney, Rhodes told Leahy that she chose to resign her position rather than face recall. Regarding Deavers, there had not been any formal complaint against her with the Local's Executive Board at the time she made the complaint.[5]

Rhodes, in describing his initial interviews with Leahy regarding Deavers and Martin-Stoney, did not contradict the Investigator's recount.[6] Rhodes testified that Leahy asked several questions which he characterized as "detailed in the inner functions of how I control Local 1585 book of business." Questions asked by Leahy, according to Rhodes, included his relationship with former chief stewards, union elections, conferences he had attended, how such conferences are paid for, internal Local discipline, CLO meetings, and operation of the AFL-CIO.

Leahy, following the initial meetings with Deavers, Martin-Stoney, and Rhodes, sent an

[4] The CLO is a coalition of on-campus unions that negotiates healthcare.
[5] Rhodes testified that a member of the Executive Board did eventually file a complaint against Deavers and that a "trial" was held with the Executive Board acting as the "trial board."
[6] It must be noted that while Rhodes did testify prior to Leahy, there was a sequestration order in effect and that Rhodes did not testify again on rebuttal to refute any of Leahy's testimony.

email on August 4, 2016, to eight potential witnesses identified by the parties. That email stated in the relevant part:

> My name is Tracy Leahy. I work in the Office of Institutional Equity (OIE) at MSU. Among other things, OIE investigates incidents that may be a violation of MSU's Relationship Violence & Sexual Misconduct Policy. Your name was provided as someone who might have information relevant to a matter I am currently reviewing.
>
> I would like to speak with you regarding my investigation. Would you please contact me upon receipt of this email so that we can set up a time to meet in person?

That same day, at least five of the eight potential witnesses, Executive Board Member and steward Mathew Fehrenbach, Executive Board Member and alternate steward Chris Wayne, Executive Board Member James Kane, along with Shay Rosales and Autumn Roush emailed Leahy back and, in some fashion or another, appeared willing to meet with the Investigator. The record is not clear whether Rosales and Roush were simply members of the bargaining unit at the time Leahy contacted them. Leahy claimed she contacted both woman because Deavers had made allegations that Rhodes was recruiting the two to run for office with the local because they were young woman.

Fehrenbach's email response to Leahy stated, "I would be happy to meet with [you] regarding this issue whatever it concerns." Both Kane and Wayne replied with their work schedules and telephone numbers where they could be reached. Leahy exchanged emails with both Roush and Rosales, as both expressed concern that they did not know what Leahy was investigating. Leahy thereby responded by stating that she would provide more details when they met and further offering assurances that there had been no concerns raised regarding their conduct. On August 11, 2016, Executive Board Member and steward Earl Chapman, responded with his work schedule and contact number. Leahy sent similar emails to additional potential witnesses on August 12 and August 22, 2016.

Leahy eventually ended up meeting with several members of Local 1585 including Kane, Chapman, Wayne, and Fehrenbach, the Local's Vice President Paul Harper, Executive Board Members Carol Buckler and Sharon Harlow, as well as Lena Pereida.[7] Leahy also interviewed Charging Party's own employee and secretary, Kelly Mireles. Mireles, an employee of Charging Party and not the University was initially identified as a potential witness by Rhodes. According to Leahy, she began each interview the same way, first introducing herself as a neutral fact-finder and then explaining to the witnesses that they were protected from retaliation for participation in the process. At no point did Leahy indicate that participation by the interviewees was mandatory or that she had the authority to compel their cooperation.

Leahy met with Kane on August 10, 2016. Topics of that interview included; questions about Martin-Stoney's job performance as Chief Steward and efforts by some Local members to initiate internal union discipline; time spent by Martin-Stoney while serving as the Local's Chief Steward; an internal union dispute over how the Local had handled a particular grievance that he

[7] The record is unclear whether Pereida was an Executive Board Member or simply a member of the Local's bargaining unit.

requested be filed and that Deavers failed to file on his behalf; union conferences; CLO meetings and voting; the Local's internal rules and policies on voting at CLO meetings; discussions at an Executive Board meeting regarding Deavers's actions at the CLO meeting; the Local's efforts to recall Deavers; the Local picnic and whether Deavers had worked on the picnic during her release-time; and, Rhodes's relationship with other union's leadership. Leahy also asked Kane to identify Executive Board members who were not happy with Deavers' job performance.

Harper and Leahy also met sometime in early August, possibly on or around August 10, 2016. That interview covered the same topics as addressed above with Kane. Additionally, Leahy asked Harper whether he or other Executive Board members believed Deavers was too pro management. Regarding Leahy's initial email to him, Harper testified that he believed he was "supposed to respond and set up a meeting as part of the investigation."

Leahy and Fehrenbach met also on or around August 10, 2016, where the parties discussed generally the same topics as identified above.

Leahy met with Wayne sometime in August. The interview discussed the same issues as identified above. Wayne did testify that he believed Leahy only spent around 30% of the interview asking him questions regarding sexual harassment while the other 70% of the interview pertained to union-related questions about the Local's disciplinary procedures or its constitution. Wayne admitted that while he was instructed by Leahy that he did not have to provide any information, he nonetheless felt the "need to defend myself and other innocent parties."

Chapman met with Leahy on or around August 17, 2016.[8] The topics discussed were generally the same as identified above. Chapman was also asked what was set to be discussed at the next day's Executive Board meeting.

Leahy's interviews with the other individuals, Harlow, Buckler, Pereida, and Rosales, as testified to by Leahy were similar as discussed above.

Leahy interviewed Mireles three separate times, the first two at the Investigator's request and the third upon request by Mireles. Leahy testified that the Local's secretary "talked" and "volunteered information" and that the Investigator asked very few questions during the first interview. Leahy did admit to asking Mireles questions about Martin-Stoney's job performance, including how long Martin-Stoney spent at lunch. Leahy also asked about the Local's internal discussions regarding Martin-Stoney's discipline as well as discussions on union issues between the President and Chief Steward. Additionally, Leahy's questions covered the same topics as identified above with the other individuals interviewed by her.

Leahy testified that following her second interview with Mireles, the secretary contacted her and requested to meet again. The pair met again on August 19, 2016, at which time Mireles made allegations that Rhodes had sexually harassed her. Leahy asked Mireles if she would like to become an additional complainant along with Deavers and Martin-Stoney; the secretary said she would like to.

[8] Chapman testified that he believed he met with Leahy the day before a Union meeting that had been scheduled on or about August 18, 2016.

Durojaiye, while recognizing that Mireles was not a University employee, nonetheless determined that the OIE had jurisdiction to investigate her allegations against Rhodes. Durojaiye, in explaining his rationale stated during his testimony:

> [W]e often have cases where other individuals come forward and allege discrimination on the part of MSU community members, and they may not be affiliated with the institution. And so, for example, we might have a faculty member who goes somewhere to a conference, and at that conference someone may allege that that faculty member did something that was a violation of our policy. The fact that that faculty member is a member of our University, a member of our campus and was there and we call MSU official business, then he would still be subject to that as well. So the fact that Ms. Mireles was not technically affiliated with the University does not mean she can't bring a claim against one of our community members.

Leahy, during her investigation, received a multitude of documents, some provided by the complainants, some by Rhodes, and the rest from other sources including the University's own files. This packet of documents, initially described above in Fn. 2, included, but was not limited to, personnel files, internal union emails, minutes of the Local's meetings, calendar entries reflecting Rhodes's time, tax documents, and a copy of the Local's rules and policies regarding CLO meetings. Two of the Local's meeting minutes, for July and August of 2016, contained the Local's Operating Report, which provided detailed information regarding the Local's finances. The Investigator testified that while some of the documents were provided without her first asking for them, she would ask for a document if someone mentioned one during an interview. Rhodes himself provided several of the internal emails collected by Leahy; Leahy testified that Mireles provided others. Rhodes also provided the tax documents. Additionally, the minutes of the Local's meetings were provided by Rhodes, Deavers, or Mireles. It is clear from Leahy's testimony that she would have accepted any document offered by someone related to her investigation.

During Leahy's testimony, the Investigator was asked repeatedly to explain how the questions she asked regarding the various machinations of the Local, or documents she collected as described above, related to her investigation into the allegations of sexual harassment against Rhodes. Examples of Leahy's explanations included, but are not limited to: questions regarding how Local members used release time were relevant because Rhodes claimed both Deavers and Martin-Stoney abused such; questions regarding the appointment of stewards were relevant because Deavers claimed Rhodes was keeping her out of the selection process and attempting to appoint people who would support the effort to recall the Chief Steward; questions regarding the Local's grievance handling were relevant because Rhodes identified the alleged failure by Deavers to file the Kane grievance as one of her performance issues; Rhodes's relationship to other union's leaders was relevant because Martin-Stoney's relationship with the President of another union was cited by both Rhodes and Martin-Stoney as relevant; questions regarding the CLO, voting and other related questions were relevant because Deavers's actions at a CLO meeting were cited as a performance issue by Rhodes in his defense. With respect to the documents collected, examples of Leahy's explanations, included, but were not limited to: the tax documents provided by Rhodes were in furtherance of his claims regarding Martin-Stoney's job performance and the alleged failure to file tax forms; calendar entries were relevant with respect to Rhodes because despite

claims by the President that both Deavers and Martin-Stoney were abusing release time, Mireles made claims that Rhodes himself was the bigger abuser. Regarding the Local's meeting minutes, Leahy explained that some were provided by Rhodes and were relevant in relation to his claim that Deavers had voted, without authority, at a CLO meeting. Leahy explained that the minutes containing the Local's detailed financial information were provided by Deavers and were relevant to show the amount that the Local had authorized to spend on the Local's picnic and how much was actually spent. The record does not establish that the questions or information elicited or received by Leahy covered bargaining positions or proposals.

4. Deavers Retaliation Complaint

On August 17, 2016, Deavers went to the office of the University's Director of the Office of Employee Relations, Jim Nash, and told him that Charging Party had scheduled a meeting for the next day at which she would be recalled from her position as Chief Steward. Nash claimed that she told him her recall was in retaliation for the filing of the OIE complaint against Rhodes. Nash then learned from a telephone conversation with Leahy that Deavers had made a claim of retaliation against Rhodes. Nash claims that he then made the decision to suspend Rhodes, initially without pay, pending an investigation; the suspension was changed to with pay two days later. Nash explained at the hearing that the University uses a suspension pending investigation in cases where there is a reason to expect that an employee is interfering with an investigation. Sometime that same day Rhodes was summoned to Nash's office and notified of the suspension.

Also, that same day August 17, 2016, Nash sent an email to the Local's Executive Board and stewards asking them not to take action regarding Deavers at the August 18, 2016 meeting. That email stated:

> This Office has been advised by the Office of Institutional Equity that a "special" meeting of the Local 1585 Executive Board and Stewards has been scheduled with the topic/subject to recall the current Chief Steward, Ms. Lisa Deavers. We have been further advised that the Office of Institutional Equity will be conducting an investigation into possible retaliation claims regarding a current investigation they are conducting. As such the University requests that the Union officials involved in this August 18, 2016, meeting take no action at this time.

Nash testified that he made the request to "avoid future litigation."[9]

Chapman, upon receipt of Nash's email both called and emailed Nash because he was concerned whether he would be disciplined for participating in the August 18, 2016, meeting.[10] Nash's email response to Chapman stated:

> This office does not have any interest in when union meetings are held and who attends. That is an internal union matter and we will not become involved. The University has, to my knowledge, never taken any action against an employee for

[9] Nash, while asked to expand on what "litigation" he meant, did not elaborate.

[10] Chapman's email to Nash indicates that Lisa, presumably Deavers, told Chapman that he would be fired if he attended the meeting.

his/her attendance at a union meeting, nor their involvement in such.

Kane testified that upon receiving Nash's email he felt that if he were to attend the meeting he "was going to have some type of discipline up to termination from the University."

On August 18, 2016, Leahy completed an initial intake form for the retaliation claim now alleged by Deavers. Once again Durojaiye determined that the OIE had jurisdiction over the allegations and in describing that decision at the hearing stated:

> Based on the fact that Ms. Deavers alleged that she participated in our process and she filed a complaint against Mr. Rhodes and, as a result of her filing that complaint, members of the organization and Mr. Rhodes took retaliatory action against them. So we looked at it as she participated in our process and therefore she should be free from retaliation.

The Investigator assigned to this new claim was Elizabeth Abdnour. Abdnour met with Deavers several times to discuss her allegations and identified four additional respondents, Buckler, Wayne, Harper, and Executive Board Member and steward Cheryl Whalen.

The allegations made against Rhodes, as recounted by Abdnour at the hearing, included, but were not limited to: circumventing her involvement as the Chief Steward in filing of open steward positions; making statements, retaliatory in nature, at Local meetings, making statements regarding poor job performance to other Local members; excluding Deavers from paperwork she would normally be involved in; encouraging Local members to file a complaint against her; interfering with the way in which Deavers had handled two particular Local matters; and making a request for Harper to schedule an emergency Executive Board meeting to discuss her recall.

Abdnour admitted under cross-examination that the scope of her investigation was "whether any of the respondents had retaliated against [Deavers] for filing the sexual harassment allegation with [OIE]." She further admitted that incidents that occurred prior to the retaliation complaint being filed with OIE would be outside that "scope." To that point Abdnour testified that Durojaiye instructed the OIE Investigators not to communicate with each other about their reports. Accordingly, Abdnour claims she did not know the date on which Deavers had filed her initial claim of harassment with the OIE.

Deavers's allegations against the other Executive Board members, as recounted by Abdnour included a claim that Wayne, Buckler, and Whalen made retaliatory statements against her and that Harper arranged meetings for the purpose of recalling Deavers as Chief Steward.

On August 24, 2016, Abdnour sent emails to the above identified respondents which stated in part:

> We are looking into an allegation that you may have violated MSU's Anti-Discrimination Policy ("ADP") by retaliating against a [complainant] in an ongoing investigation being conducted by OIE.
>
> I would like to meet with you to allow you to respond to the allegations and to

> answer any questions you may have. The meeting will be your formal opportunity to provide me any information, evidence, and names of potential witnesses you would like me to consider in my investigation. You are welcome to bring an advisor or support person to this meeting. … If I do not hear from you by **August 29, 2016**, it may be necessary for me to proceed with my investigation without your input or participation.
>
> [Emphasis in original]

Eventually Lena Pereida, the Local member who requested that the Executive Board recall Deavers, was added as an additional respondent after Deavers alleged Pereida's request was made in retaliation as well. On October 5, 2016, Abdnour sent Pereida a letter, similar in fashion to the above emails, informing the Local member of the allegations against her.

Each of the respondents met with Abdnour. Similar to Leahy, Abdnour claims she began each interview with statements that the Respondent's participation was voluntary. Abdnour described her interviewing style as "I present the allegations against them and allow them the opportunity to respond." The Investigator admitted that she might have "follow-up" questions depending on what she is told. Some of the respondents declined to discuss information they claimed was "union business." Following such refusals, Abdnour claimed she either moved on to the other allegations if there were any or asked the respondents "if there was anything additional that they wished to share, if they had any witnesses who they would like me to interview..." The interview would then conclude. Abdnour testified that Rhodes would often continue speaking with her and made additional comments despite claiming a topic was "union business."

Rhodes met with Abdnour on September 7, 2016. Testimony from Abdnour and Rhodes differed on whether Abdnour simply "offered" Rhodes the opportunity to provide information, as claimed by the Investigator, or whether Abdnour asked direct questions regarding the various topics identified below, as claimed by Rhodes. It is clear however, that the two discussed the CLO and AFL-CIO organizations and further how grievances were handled within the Local. With respect to the latter, Rhodes testified that:

> [Abdnour] wanted to know the functions of the beginning of a grievance, basically the chain of command, who has access to the keys to the files, who has access to my case file, who would have access to any of the other arbitration or grievance files that are located within our office.

Rhodes also claimed that Abdnour directly asked about the Local's process to fill steward positions and about the August 18, 2016, Executive Board meeting. Rhodes further testified that Abdnour asked how other Executive Board meetings were run, the process of electing individuals to the Board and other questions regarding the Board's actions. Additionally, Rhodes claimed Abdnour asked him about discussions he had with other leaders within the Local, including conversations pertaining to events that had taken place during Executive Board meetings and whether he met with certain Executive Board members in special meetings.

Abdnour met with Kane sometime in September, at which the Local member claims the Investigator asked him about a September 1, 2016, Local meeting as well as questions regarding

his grievance, presumably the one he claims Deavers should have filed but did not.

During Abdnour's interview with Harper, the Vice President claims the Investigator asked him who had called the August 18, 2016, meeting and whether a vote had taken place to recall Deavers.

Whalen testified that during her interview with Abdnour, she was asked only whether she had said something at an Executive Board meeting. According to Abdnour's Final Investigative Report, Whalen indicated during the meeting that she would not provide the OIE with any information or respond to the allegations made by Deavers because it was "union business."

On or about September 23, 2016, Abdnour conducted an interview with Fehrenbach by telephone. In describing the conversation and answering a question on whether Abdnour asked him "any questions about sexual harassment," Fehrenbach testified:

> I believe there was one, and actually I circled back around to it at the end of our conversation because I was confused as to why she was asking so much union business when this was a sexual harassment allegation.

5. Mireles Retaliation Claim

On September 6, 2016, the Local's secretary, Mireles, went to the OIE and made a complaint alleging that Rhodes was retaliating against her for her participation in the previous investigations. Leahy completed the initial intake form in which Mireles claimed that Rhodes was seeking to have the Local's Executive Board terminate her employment.

Durojaiye, again despite the fact that Mireles was not an employee of the University, found that the OIE had jurisdiction to investigate this complaint, and in describing that decision at the hearing, stated:

> Based on the fact that Ms. Mireles was a witness in the original complaint that was investigated by Ms. Leahy. As I previously stated, for participating in our process she should be free from retaliation. She alleged that, because she participated in the process, she was retaliated against by the respondent, so therefore we found that we had jurisdiction.

The investigation was assigned to OIE Investigator Lin-Chi Wang who met with, or talked with, Mireles on September 10, October 7, October 10, 2016.

Wang emailed Rhodes on September 20, 2016, informing him of the allegations made against him. That email stated in part that Wang would like to meet with Rhodes to "discuss the allegation, allow you to respond to that allegation, and answer any questions you may have." Rhodes never responded to Wang's request. On September 28, 2016, Wang sent another email to Rhodes which stated:

> Since I have not heard from you regarding scheduling a meeting time, I will be moving forward with the Investigation without your input or participation at this

time. If you have any questions or if you decide you would like to participate, please let me know.

Rhodes again did not respond.

During a telephone conversation on October 7, 2016, Mireles made additional allegations against Local members Wayne and Whalen, claiming that the two, along with Rhodes, were trying to get her fired.[11] It appears from the record that at this time, the Local's executive Board had just met the previous day and decided to suspend Mireles for thirty (30) days. On October 13, 2016, both Wayne and Whalen were contacted by email, similar to one sent to Rhodes, and made aware of the allegations against them. Both agreed to meet with Wang.

Along with Mireles, Wayne, and Whalen, Wang also interviewed several other Local members, including but not limited to, Kane, Deavers and another Executive Board Member, James Mireles, the husband of the complainant. Similar to the other Investigators, Wang contacted potential witnesses and indicated her desire to meet with them; at no point did Wang force or attempt to force anyone's participation.

James Mireles was interviewed on October 5, and November 4, 2016. The pair discussed the Executive Board meeting at which Mireles was suspended.

Kane was interviewed on October 7, 2016, during which Wang asked him questions regarding the Executive Board meetings and disciplinary action taken by the Board against Mireles and issues regarding the secretary's job performance.

Whalen, accompanied by Jim Rhodes Sr., presumably her and the Local President's father, was interviewed on October 20, 2016, where Wang asked several questions, including some regarding what was discussed at Union meetings. Whalen testified that she refused to answer the latter questions because "that was union business." There is no indication that Wang pressed the issue.

Wayne was interviewed on October 24, 2016, also accompanied by Jim Rhodes, Sr. Wang asked Wayne about the Local's decision to discipline Ms. Mireles as well as about an incident in which Mireles claimed Wayne had attempted to intimidate her while driving on a road in East Lansing. Wayne declined to answer questions regarding his participation in the Executive Board meeting and otherwise denied Mireles's other allegations.[12]

Discussion and Conclusions of Law:

Charging Party asserts that the Respondent's investigations into the allegations made against Rhodes by the two fellow Local members and by the Local's own secretary, and the manner in which they were conducted, violated Section 10(1)(a) and (b) of PERA. Charging Party claims

[11] During Wang's testimony, Counsel for Charging Party agreed to stipulate that Whalen and Rhodes were siblings.

[12] Although neither Wang nor Wayne explicitly testified to such, Wang's Draft Investigative Report, indicates that during the interview, Wayne told Wang that he did not have "anything against Kelly [Mireles]" and that "its all union business." Wayne further told Wang that he believed he was being "retaliated against for conducting union business."

that the University's reliance on its own policies as well as federal law in defense of its actions is misplaced given its claim that the actions complained of by Deavers, Martin-Stoney and Mireles occurred off-campus and did not have any impact on the University's operations.

Respondent's initial defenses to the charge rely on a premise that federal law, specifically Title IX preempts PERA and the Commission's jurisdiction. In the alternative, Respondent argues the Charging Party has failed to meet its burden in establishing that the University violated Section 10(1)(a) and/or (b). The preceding notwithstanding, the University also claims that the record and Commission precedent requires dismissal of the charge.

1. Preemption

Addressing the argument that the Commission's jurisdiction in this matter is somehow usurped or preempted by federal law, I note that Respondent's initial argument is that the Commission "lack[s] the ability to adjudicate the rights and obligations of the University under federal law." The principle of federal preemption originates from the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, and as explained by the Court of Appeals in *Packowski v. United Food & Commercial Workers Local 951*, 289 Mich App 132, (2010):

> Whether a federal statute preempts a state-law claim is a question of federal law. When such questions of federal law are involved, we are bound to follow the prevailing opinions of the United States Supreme Court. If a state-law proceeding is preempted by federal law, the state court lacks subject-matter jurisdiction to hear the state-law cause of action.
>
> Preemption occurs when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Preemption can also occur when a state or local regulation prevents a private entity from performing a function that Congress has tasked it with performing.
>
> There are three types of federal preemption: express preemption, conflict preemption, and field preemption. Express preemption occurs when a federal statute clearly states an intent to preempt state law or that intent is implied in a federal law's purpose and structure. Under conflict preemption, a federal law preempts state law to the extent that the state law directly conflicts with federal law or with the purposes and objectives of Congress. Field preemption acts to preempt state law when federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it.

The University provided a list of several Commission cases where the Commission has declined to exercise jurisdiction over claims that involved or were somehow related to federal law, including Title VII and the Americans with Disabilities Acts. However, each of the cases cited involved situations where charging parties brought unfair labor practice charges predicated, either entirely or in some part, on an alleged violation of federal law, as opposed to an alleged violation of PERA. In such situations the Commission dismisses those cases as failing to state a claim under PERA for which relief could be granted.

In the instant case, while the University claims a conflict exists, it has not articulated with any specificity as to what the conflict is or how its obligations under PERA would somehow preclude it from satisfying any obligation it may have under the federal laws set forth in its post-hearing brief. Accordingly, I find no basis upon which to conclude that PERA, and by extension the Commission's jurisdiction to consider whether the University's actions violated the Act, is preempted by federal law. I do concede however that it is neither within the jurisdiction of the Commission, or necessary to resolve the current dispute, for the undersigned to determine whether the University complied with Title IX or whether Rhodes or any of the other respondents named in the various complaints, were guilty of the serious allegations levied against them.

The University also argues that any attempt by the Commission to exercise jurisdiction in this matter would violate Article VIII, §5 of the Michigan State Constitution of 1963, based upon the possibility that the University could lose federal funding if it is precluded from complying with Title IX.[13] Respondent argues that under *Branum v Bd of Regents of Univ of Michigan,* 5 Mich App 134 (1996), it is clear that the preceding constitutional provision grants it the "supreme" authority on all issues involving "the confines of the operation and allocation of funds." *Id* at 138-139. However, *Branum*, while stating the above, was not a matter implicating or involving PERA but rather addressed the University of Michigan's attempt to assert the principle of governmental immunity in defense of a tort claim. Furthermore, our Supreme Court has consistently held that the state's various public universities are subject to PERA. *See Bd of Control of Eastern Michigan Univ*, 384 Mich 561 (1971); See also *Central Michigan University Factuality Association v. Central Michigan University,* 404 Mich 268 (1978). For this reason, I reject Respondent's argument that Article VIII §5, divests the Commission from jurisdiction in this matter.

2. OIE Investigations

Section 10(1)(a) of PERA makes it unlawful for a "public employer or an officer or agent of a public employer" to "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed" by PERA. It is well established that a determination of whether an employer's conduct violates Section 10(1)(a) is not based on either the employer's motive for the proscribed conduct or the employee' s subjective reactions thereto. *City of Greenville,* 2001 MERC Lab Op 55, 58. Rather the test is whether a reasonable employee would be coerced. *Id* at 56. Furthermore, it is the chilling effect of a threat and not its subjective intent which PERA was created to reach. *University of Michigan*, 1990 MERC Lab Op 272. In making this determination, the Commission looks at both the content of the employer' s statements or other conduct and the context in which the conduct occurred. *City of St Clair Shores*, 17 MPER 76 (2004).

Section 10(1)(b) of PERA makes it unlawful for a public employer to "initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization." Employer actions that violate Section 10(1)(b) of the Act do so because they are likely to abridge public employees' Section 9 rights to "bargain collectively with their public employers through representatives of their own free choice." *Michigan Quality Community Care*

[13] The relevant portion of Article VIII, §5 of the Michigan State Constitution of 1963 states, "the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University … [the] board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds."

Council, 26 MPER 49 (2013). Further describing the scope of a Section 10(1)(b) violation the Commission, in *Lansing School District*, 21 MPER 21 (2008), affirmed the Administrative Law Judge's (ALJ) Decision and Recommended Order and praised the accuracy of the ALJ's statement that the "evil" Section (10)(1)(b) was intended to prevent was "the subversion of the Union's independence."

In considering whether the University violated either Section 10(1)(a) and/or (b) of the Act, it is necessary to consider the University's actions not as a whole but rather as a two-part analysis, i.e., whether the decision by the OIE to investigate each of the allegations violated the Act and if not, whether the manner by which each investigation was carried out violated PERA.

a. Decision to Investigate

It is clear to the undersigned that Title IX, and the various related regulatory items, including the Resolution Agreement, required the Respondent to implement, maintain and enforce a policy to investigate and act on both allegations of sexual harassment and allegations of retaliation. The Resolution Agreement is very clear that the University's policies must protect "employees, students and third parties" as it relates to "all University programs and activities; including those conducted off-campus…" "Third parties" as identified by the RVSM is defined to include visitors, guests, contractors, alumni, or students from another institution. Further, that Agreement requires the University to investigate even if the "off-campus misconduct did not occur in the context of a University program or activity" if there remains a "hostile environment on campus" as a result of off-campus incident; the University's RVSM policy underscores that point and covers misconduct that occurs "off-campus outside the context of a University program or activity but has continuing adverse effects on campus or in any University program or activity."

As testified to by Durojaiye and the various Investigators, a complaint is initiated by a complainant and an initial intake form is completed. Durojaiye then determines whether the OIE has jurisdiction under the Title IX, the law's regulatory framework and the University's policies to investigate the matter further. Durojaiye testified as to the rationale regarding his determination as to why the OIE had initial jurisdiction to investigate the allegations levied by Deavers, Martin-Stoney and Mireles and each's respective initial intake.[14]

With respect to the harassment allegations levied by Deavers and Martin-Stoney, had the alleged harassment occurred on-campus and/or occurred between individuals who were not on full-time release, despite being members of the same bargaining unit, there would be no question as to either the University's obligations or its ability to conduct an investigation. Similarly, had the conduct complained of by Mireles occurred on the campus, OIE's jurisdiction would not be an issue under the premise that Mireles, as a visitor, would be covered under the RVSM's protection of a third-party.

As noted above it is neither necessary nor proper for this tribunal to determine whether

[14] The Union may argue that the OIE's decision to revisit the Martin-Stoney allegations given I3's earlier decision to decline jurisdiction is evidence of unlawful motive on behalf of the University. However, according to Leahy, Martin-Stoney asked to be made a claimant in the current investigation. Further, there is no indication that the Leahy, or anyone with the University, sought to solicit complainants.

Title IX actually required the University to investigate the allegations made by the complainants. Rather, my inquiry is limited to whether the University's decision to investigate said allegations could be interpreted by a reasonable employee as coercive with respect to the exercise of Section 9 rights as guaranteed under the Act.

It is the opinion of the undersigned that Durojaiye's determination that the OIE had jurisdiction to investigate the harassment allegations levied by Deavers and Martin-Stoney was based on a reasonable interpretation of the University's obligations under Title IX and the law's regulatory framework, including the Resolution Agreement.[15] In support of this determination, I first note that it was reasonable for Durojaiye to believe that the complained of misconduct had a continuing adverse on-campus impact since Rhodes and Deavers and Martin-Stoney would presumably come back and forth to the campus both as University employees but also in their roles as the Local's President and the Chief Steward(s). Furthermore, as recognized by Durojaiye, but for the fact that Deavers, Martin-Stoney and Rhodes were all University employees, they would not be in the same bargaining unit, and but for them being in the same bargaining unit, neither Deavers nor Martin-Stoney would be in a position, as Chief Steward with full release time, to suffer the alleged harassment by Rhodes. Further supporting the premise that the University's decision to investigate the above allegations was reasonable is the University's reporting requirements as set forth in the Resolution Agreement and the possibility that the OCR or the Department of Education could move to terminate federal funding under 20 USC § 1682 for non-compliance.

Furthermore, while Mireles was neither an employee of the University or a member of Charging Party's bargaining unit, I nonetheless find that Durojaiye's determination that the OIE had jurisdiction to investigate her harassment allegations was based on a reasonable interpretation of the University's obligations under Title IX and the law's regulatory framework, including the Resolution Agreement.

Based upon the context surrounding the University's decision to investigate the harassment claims made by Deavers, Martin-Stoney and Mireles, I find that a reasonable employee would be aware of the seriousness nature of sexual harassment allegations and the University's obligation to address such allegations and determine their validity especially given the danger of possibly losing federal funding for noncompliance.[16] For this reason, I find that a reasonable employee, either aware of the investigation or approached to participate in the investigation, would not view the University's decision to investigate the harassment claims made by the three women as coercive or otherwise in violation of Section 10(1)(a) of PERA.

Moving on to the retaliation claims filed by Deavers and Mireles, here too I conclude that the OIE's decisions to investigate those complaints was reasonable under Title IX and the law's regulatory framework, including the Resolution Agreement. The University's RVSM clearly protects individuals who have made a complaint or otherwise participated in an OIE investigation

[15] I note, that while not outcome determinative, there is no indication that, in the period of time leading up to when the decisions to investigate or during the actual investigations, the parties were engaged in any period of labor strife and/or bargaining over any conditions of employment worth noting. Considering the preceding in the context surrounding the events as described herein adds further support to the reasonableness of the University's decisions.

[16] It is important to note that Charging Party, along with the University's other unions, participated in meetings while the RSVM policy was being developed.

from retaliation. The RVSM's language is so broad that it even protects an individual from retaliation if the initial complaint is unfounded. Retaliation, as defined by the RVSM, includes an "adverse action" and/or "adverse treatment." With respect to Deavers, the Chief Steward alleged that it was because she had made a complaint against Rhodes that he and various other members of the Local's Executive Board were now moving towards a recall, an action that would cause her to lose her full-time release and return to her job on the University's campus. Mireles, on the other hand, made allegations that Rhodes was seeking to have her terminated because she had made allegations against him and had participated in the investigation regarding Deavers and Martin-Stoney. For these reasons, I find that the OIE reasonably concluded that it had the obligation, in order to remain in Title IX compliance, to investigate the claims of retaliation. Similar to the above finding with respect to the harassment allegations, here to, and for the same reasons as set forth above, I conclude that a reasonable employee, either aware of the investigation or approached to participate in the investigation, would not view the University's decision to investigate the retaliation claims made by Deavers and Mireles, as coercive or otherwise in violation of Section 10(1)(a) of PERA.

Additionally, I find that there is no reasonable basis by which to conclude that the University's decision to investigate the sexual harassment complaints either dominated or interfered with the Local's activity or ability to act as the bargaining unit's exclusive bargaining agent in violation of Section 10(1)(b) of the Act. Furthermore, while the Union does assert that, at least with respect to Mireles, the proper party to investigate the harassment claims was ASFCME Council 25, such an argument does not establish that Charging Party's status as the exclusive bargaining representative was somehow subverted; whether the University's actions interfered with the Local's employment of Mireles does not infringe on its status as the bargaining unit's exclusive bargaining representative.

b. Scope of the Investigations

Having determined above that the University's decisions to investigate the above allegations were reasonable under Title IX, the law's regulatory framework and the University's policies, the next question to consider is whether the method by which the Investigators undertook those investigations violated PERA.

Our Commission has long held that interrogation of employees about union activities is not *per se* impermissible and that circumstances under which the questioning takes place must be examined to determine if it is coercive or threatening. *St. Lawrence Hospital*, 1971 MERC Lab Op 1173; *City of Lansing (Police Dept)*, 1982 MERC Lab Op 893; *Painters, Inc*, 1989 MERC Lab Op 452; *Lenawee Medical Care Facility*, 1994 MERC Lab Op 171. Moreover, misconduct in the course of concerted activity is not immune from discipline. See *AFSCME, Michigan Council Local 574-A v City of Troy*, 185 Mich App 739, 744 (1990).

Charging Party cites to several cases in support of the premise that an employer is prohibited from questioning employees on what occurs at union meetings. See *Sixtieth District Court*, 1979 MERC Lab 558; *City of Lansing*, supra. In *Sixtieth District Court*, a court administrator was notified by a bargaining unit member that two union officials had made highly critical remarks towards management; the employer went on to question other union members regarding what occurred at the meetings and ultimately terminated one of the officials. The ALJ,

in finding a violation of 10(1)(a) and (c) of the Act, determined that the record clearly established that the union official had been terminated as a result of their comments at the meeting.[17] The ALJ relied on *Reeths-Puffer School Dist,* 391 Mich 253 (1974), for the proposition that that concerted activity "is protected even when the employer has a good faith mistaken belief of employee misbehavior." The ALJ also quoted the following from the Supreme Court's decision in *NLRB v Burnub and Sims Inc,* 397 US 21 (1964):

> [P]rotected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the Section 8(a) (1) rights that is controlling. We are not in the realm of managerial prerogatives.

In *City of Lansing,* the Commission reversed the ALJ's recommended dismissal of the portion of the charge that alleged the employer's solicitation of employees to report on union activities constituted unlawful coercion and interference in violation of Section 10(1)(a). There, the City's police department was concerned with a potentially unlawful work-stoppage and questioned certain union members about what had occurred at union meetings. The ALJ initially held that questioning employees for the purpose of obtaining information about unlawful activities did not violate Section 10(1)(a). In making that determination, the ALJ noted that the "direction" of the questioning done by the employer was to gain information about a possible strike. The Commission disagreed and based on the record determined that the employer's interrogator "did not limit his questioning of employees to the subject of unlawful strike activity" and that the employer's agent "made remarks which could have been construed as a demand for information in general about the Local's doings, protected and unprotected." In that same decision, the Commission affirmed the ALJ's dismissal of the allegation that the employer violated PERA by investigating threats made to other bargaining unit members in relation to the unlawful work-stoppage. The Commission, in agreeing with the ALJ that the employer had the right to question employees in that situation stated, "[t]hreats made in connection with even a lawful work stoppage [sic] are not protected activity" and that, "[i]n this case, the questioning was confined to the subject of the threats and did not constitute unlawful interrogation." The Commission also noted that the employees interviewed were told that the interviews were voluntary and were allowed union representation during the questioning if they wanted.

The present situation is different from the violation as found in *Sixtieth District Court.* While in *Sixtieth District Court,* the subject of the questioning was directly related to protected activity, i.e., comments made about the employer, protected activity was not the focus of the University's inquiries in the present matter, rather sexual harassment and retaliation was the focus. Here the three Investigators testified credibly and reasonably regarding the nexus and relevance between the questions they asked or the information they followed up on with each of the individuals interviewed. For example, Leahy testified that she sought information regarding the Local's appointment of stewards given Deavers's claim that Rhodes was attempting to appoint members of the Local to those positions who would support his effort to recall the Chief Steward.

[17] While the Commission did affirm the ALJ' s decision, that affirmation dealt with procedural and jurisdictional issues and did not address the substantive issues of the case, i.e., whether the employer had in fact violated Section 10(l)(a) and (c) of PERA.

Furthermore, Leahy's questions regarding the Local's grievance procedure were relevant given that it was identified as a performance issue by Rhodes.

Additionally, unlike the violation the Commission found in *City of Lansing,* where the questioning went beyond the scope of the work-stoppage and instead inquired about other broader topics, the testimony provided by the three OIE Investigators clearly establishes that, for the most part, the information sought by them was in direct response to either of the allegations as made by the three women against Rhodes, or was related to defenses as proffered by the President. Furthermore, it is my opinion that the dismissal of the charges in *City of Lansing,* related to the employer's investigation of threats is controlling a guiding in this matter. There and here the individuals interviewed were clearly told their participation was voluntary and moreover there is no indication that any attempt by someone to bring union representation would have been denied.

Furthermore, while Charging Party takes issue with the documents received by the Investigators, and particularly Leahy, the record shows that a great number of those documents were provided by the complainants or Rhodes himself, and similar to above, the Investigators testified as to the nexus and relevance of those documents received to the allegations being investigated.[18]

Accordingly, while it is true that the scope of the investigation ventured into sensitive areas, including but not limited to, grievances, voting at meetings, and other various operations of the Local, it is my finding that the scope of the investigation under the context and in the manner conducted was narrowly tailored and reasonable given the serious nature of sexual harassment allegations and the potential loss of federal funding. As such, I conclude that the scope of the investigation was permissible and appropriate under the facts as presented herein.

Lastly, similar to the University's decision to investigate the various claims, I find that there is no reasonable basis by which to conclude that the method and manner by which it did actually investigate the claims that said actions either dominated or interfered with the Union's activity or ability to act as the bargaining unit's exclusive bargaining agent in violation of Section 10(1)(b) of the Act.

3. Nash's Letter and Rhodes's Suspension

My above findings and conclusions notwithstanding, I do find that Nash's email asking the Local's Executive Board to refrain from acting on any effort to recall Deavers while the University conducted an investigation into her allegations did violate PERA's Section 10(1)(a). While there is no actual explicit threat in the letter, Nash nonetheless sought to influence the Local to refrain from engaging in an undoubtedly protected activity, i.e., voting to remove a Chief Steward. The University's action here goes well beyond the questioning of the Local's members as to what has happened in the past and other related topics to now request that the Local's Executive Board refrain from taking action. As such, and even when considering the context surrounding the

[18] Charging Party takes issue with several of the documents received by OIE. Seemingly most significant to the Union were the financial documents provided by Deavers. However, as explained by Leahy, those documents were relevant to the allegations that Deavers had committed financial malfeasance regarding the Union's picnic.

request, I find that Nash's email would cause a reasonable employee to view such as a threat or otherwise coercive in violation of Section 10(1)(a) of the Act.[19] Furthermore, while Nash did claim that he made the request to avoid litigation, at no point did the University attempt to establish a connection between his letter and the requirements of Title IX or its related regulatory framework. Lastly, while Nash's email undoubtedly sought to influence the Local to refrain from protected activity, there is no basis to conclude that said interference was an effort by the University to interfere with Union's ability to act as the bargaining unit's exclusive status in violation of Section 10(1)(b).

However, concerning Rhodes's suspension, I find that the University's decision thereto, in light of the circumstances surrounding the nature of the claims against him and the ensuing investigation, would not cause a reasonable employee to feel threatened or otherwise coerced in violation of Section 10(1)(a). Allowing such a finding would effectively preclude an employer from exercising its ability to investigate misconduct claims without the possibility of interference as suspensions of union officials could trigger Section 10(1)(a) violations. Additionally, there is no basis upon which to conclude that the University's decision to suspend Rhodes was an effort by the University to interfere with Union's ability to act as the bargaining unit's exclusive status in violation of Section 10(1)(b).

Conclusion:

I have considered all other arguments as set forth by the parties and conclude such do not warrant a change in the result. Accordingly, I recommend that the Commission issue the following order:

[19] That Nash, when advised of a specific worry of reprisal by an employee, Chapman, quickly attempted to dispel that worry, does not change the fact that he, Nash, attempted to curtail the Local's rights under the Act.

Recommended Order

Respondent Michigan State University, its officers, agents, and representatives, are hereby ordered to:

1. Cease and desist from restraining or coercing the Local 1585 Executive Board in the exercise of their rights as guaranteed by Section 9 of PERA by requesting that the Board refrain from voting to remove individual members from Local 1585 officer positions.

2. Post the attached notice to members in all places on the premises of the Michigan State University where notices to bargaining unit members are customarily posted for a period of (30) consecutive days or, in the alternative, mail copies of this notice to all unit members within 30 days of the date of this order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated May 31, 2018

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGES BY AFSCME COUNCIL 25 AND ITS AFFILIATE LOCAL 1585, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE MICHIGAN STATE UNIVERSITY 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 Cease and desist from restraining or coercing the Local 1585 Executive Board in the exercise of their rights as guaranteed by Section 9 of PERA by requesting that the Board refrain from voting to remove individual members from Local 1585 officer positions.

MICHIGAN STATE UNIVERSITY

By: _____

Title: _____

If this notice is not mailed to members, it must remain 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. C16 H-086/Docket No. 16-024900-MERC