STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WATERFORD SCHOOL DISTRICT,
Public Employer - Respondent,

Case No. C04 E-127

- and -

WATERFORD FEDERATION OF SUPPORT PERSONNEL,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by William G. Albertson, Esq., for the Public Employer

Mark Cousens, Esq., for the Labor Organization

DECISION AND ORDER

On July 25, 2005, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order finding that Respondent Waterford School District did not violate Section 10(1)(c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(c) by laying off members of the bargaining unit represented by Charging Party Waterford Federation of Support Personnel. The ALJ concluded that the evidence did not establish that Charging Party's members were laid off in retaliation for engaging in protected concerted activity. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On September 16, 2005, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order. Respondent filed a timely response to Charging Party's exceptions on October 28, 2005.

In its exceptions, Charging Party argues that the ALJ erred in holding that it failed to establish a *prima facie* case of discrimination under PERA. It asserts that the timing of the layoffs and subsequent reposting of vacancies, the conduct of Respondent's chief negotiator, the alleged disproportionate number of union activists and officers laid off, and the fact that Respondent had a budget surplus at the time of the layoffs constitute sufficient evidence of anti-union animus. Accordingly, Charging Party submits, Respondent should be required to provide a non-discriminatory rationale for the layoffs. We have carefully considered the record, including the briefs submitted by the parties, and find that the ALJ's Recommended Decision and Order should be affirmed.

Factual Summary:

The facts have been adequately set forth in the ALJ's Decision and Recommended Order and need only be summarized here. Charging Party is the exclusive representative of approximately 470 educational support personnel employed by Respondent. The parties negotiated a contract between the fall of 2002 and March of 2004, which Charging Party ratified on May 15, 2004. Charging Party's staff representative, Elizabeth Duhn, testified that the negotiations were very contentious, that she requested the assistance of a mediator, and that there were conditional acceptances and offers made throughout the negotiations. During that time, Charging Party's members engaged in "informational picketing" and attended board meetings en masse, all of which were observed by members of Respondent's bargaining team. Duhn further testified that Respondent's chief negotiator sarcastically retorted, "Well, you going to picket us again?"

In June of 2003, Respondent made an effort to reduce school costs by closing schools and by eliminating custodial, secretarial, teaching, and administrative positions. Two months later, Respondent asked twenty principals and three directors to suggest potential personnel cutbacks. The principals and directors specified thirty-six positions for Respondent to eliminate, including thirty-two positions in Charging Party's bargaining unit. Several months after Respondent learned that the State of Michigan would be reducing its aid for the 2003-2004 school year by $817,864, it decided to effectuate the layoffs suggested by the principals and directors.

On April 6, 2004, after the parties had reached a tentative agreement, but prior to the contract ratification, Respondent began sending out the layoff notices. Said notices went out to a total of twenty-nine of Charging Party's bargaining unit members, including three members of the negotiating team.[1] Respondent posted vacancy notices for these bargaining unit positions beginning in August of 2004, requiring those employees who were laid off to reapply and interview for the vacancies.

Discussion and Conclusions of Law:

Charging Party argues that the Employer violated PERA by laying off union leadership and activists in retaliation for their engaging in protected concerted activities. In order to establish a *prima facie* case of discrimination under Section 10(1)(c) of PERA, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551-552. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Schs*, 125 Mich App 71, 74 (1983); *Wright Line, a Division of Wright Line, Inc,* 662 F2d 899 (CA 1, 1981). Ultimately, however, the charging party bears the burden of proof. *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

[1] As previously noted, the principals and directors recommended that Respondent lay off thirty-two employees in Charging Party's bargaining unit. However, two members of Charging Party's bargaining unit were terminated and one quit before the lay off was imposed.

After a careful review of the record, we find insufficient evidence to establish that the layoffs were illegally motivated. Such a finding must be based on substantial evidence and not mere suspicion or innuendo. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). Charging Party has failed to demonstrate anti-union animus on the part of the Employer, or that a causal nexus existed between the employees' concerted activity and their layoffs. We therefore agree with the ALJ's recommended Order and adopt it as our own.

ORDER

The unfair labor practice charge is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

WATERFORD SCHOOL DISTRICT,
Respondent-Public Employer,

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-and-

WATERFORD FEDERATION OF SUPPORT PERSONNEL,
Charging Party-Labor Organization.
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APPEARANCES:

Thrun Law Firm, P.C., By William G. Albertson, Esq., for the Public Employer

Mark Cousens, Esq. for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on January 18, 2005, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC or Commission) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based on the record and post-hearing briefs filed by March 24, 2005, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge:

On May 19, 2004, Charging Party Waterford Federation of Support Personnel filed an unfair labor practice charge alleging that Respondent Waterford School District violated Section 10 1(a), (b) and (c) of PERA by engaging in the following conduct:

> After negotiating a Tentative Agreement with the Waterford School District and the Union, the District began to terminate or lay-off members of the Waterford Federation of Support Personnel and not members of other units; also the District specifically targeted the officers of the Waterford Federation of Support Personnel and terminated or laid off all but one officer.

Findings of Fact:

In April 2002, Charging Party was certified by the Commission as the exclusive bargaining representative of approximately four hundred seventy educational support personnel employed by

Respondent Waterford School District. Bargaining for an initial contract commenced in the fall of 2002. By the end of March 2004, the parties reached a tentative agreement. The agreement, which was ratified by Charging Party on May 15, 2004, was effective July 1, 2004.

Charging Party's bargaining team included, among others, Charging Party staff representative Elizabeth Duhn and Charging Party's president, secretary, treasurer and chief steward, Julie Prahler, Colleen Wolf, Suzanne Shano and Terri Barth, respectively. Respondent's chief spokesperson was Richard Higginbotham. During the course of bargaining, Higginbotham rejected Charging Party's request to meet more than two hours, two to three times a month; conditioned acceptance of a grievance procedure with binding arbitration upon Charging Party's acceptance of Respondent's management rights proposal; and labeled as unnecessary proposals to incorporate into the contract fair employment and civil rights clauses. Duhn, who has negotiated one other initial contract, described bargaining as difficult and contrary. According to Duhn, bargaining became incredibly more difficult after Higginbotham reviewed Charging Party's initial comprehensive proposal and told her that he was surprised that "we would think that we could gain all of the things that had taken the MEA thirty years to gain in one contact."

During the eighteen months of bargaining, the parties used the assistance of a mediator; Charging Party's members, including members of the bargaining team, engaged in informational picketing; attended board meetings en masse; made comments to the board; and left one board meeting en masse. Some of the picket signs displayed such statements as, "We want a contract now," "treat us fairly," and "we need benefits." Duhn testified that during the during the course of picketing, she observed Higginbotham drive by very slowly and look out the car window at the picketers and the people. According to Duhn, during bargaining, Higginbotham made several sarcastic comments, including, "Well, you going to picket us again?"

On April 6, 2004, shortly after the parties reached a tentative agreement, Respondent began sending out layoff notices. Between April 30 and June 11, 2004, thirty-two bargaining unit members, including Wolf, Barth and Prahler, Charging Party's secretary, chief steward and president were laid off, terminated or quit. A number of laid-off employees had participated in Charging Party's informational picketing and attended board meetings. Duhn testified that shortly after becoming aware of the layoff notices, she spoke with Peni Aldrich, Respondent's assistant superintendent for human resources, who told her that Respondent could do whatever it wanted because the collective bargaining agreement had not been signed.

Between August and December 2004, Respondent posted vacancy notices for bargaining unit positions. Employees who had been laid off were required to reapply and interview for posted vacancies. By January 2005, eight of the laid off employees had been rehired. Among the re-hired employees were Prahler and Barth, who prior to receiving assistance from Aldrich to improve her interviewing skills had interviewed unsuccessfully for six positions.

In the meantime, effective July 1, 2003, in an effort to reduce $3.7 million in costs, Respondent closed two schools and eliminated, through attrition, custodial, secretarial, teaching and administrative positions. Two months later, to further reduce costs for the 2003-2004 school year, Respondent undertook plans to reduce its budget by an additional $800,000 to $1 million. Twenty principals and three directors were directed to identify possible mid-year personnel reductions and

the central administration was directed to review non-personnel cost-saving measures. The principals and directors, without input from central administration, recommended the elimination of thirty-six positions, including thirty-two in Charging Party's bargaining unit.

In January 2004, a month after Governor Jennifer Granholm signed an executive order reducing Respondent's per pupil state aid payments by $817,864 for the 2003-2004 school year, Respondent approved a recommendation to reduce spending by $870,000. Thereafter, between April 30 and June 11, 2004, Respondent followed the recommendation of the principals and directors to lay off thirty-two positions in Charging Party's bargaining unit. The layoff represented $100,000 of the $870,000 expenditure reduction. Respondent's 2003-2004 audited financial report indicates that revenues exceed expenditures by $1,857,401 and at the end of the school year the general fund balance was over $8 million.

Conclusions of Law:

Charging Party argues that the Employer violated PERA by laying off union leadership and activists in retaliation for their engaging in protected concerted activities. Respondent claims that Charging Party failed to establish that Respondent possessed union animus or that a causal nexus existed between such supposed animus and the decision of layoff members of Charging Party's bargaining unit. I agree.

In order to establish a *prima facie* case of discrimination under Section 10(1)(c) of PERA, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. Nevertheless, the charging party bears the ultimate burden of proof. See *MESPA v Evart Pub Schs,* 125 Mich Ap 65 (1983); *Olivieri/Cencare Foster Care Homes,* 1992 MERC Lab Op 6; *Wright Line, Div of Wright Line, Inc,* 251 NLRB 1083(1980), *enf'd* 662 F2d 899 (CA 1, 1981), *cert den* 455 US 989 (1982).

The record demonstrates that some of the laid off employees engaged in union or other protected activity by serving as bargaining team members, participating in informational picketing, attending board meetings en masse, and making their views known about their need to be treated fairly and to secure a contract. However, there is nothing in the record that supports a finding that the principal and directors who recommended the layoffs, knew of the employees' protected concerted activity or that they were union officers.

The record also contains no evidence that would support a finding of union animus. Charging Party would have this tribunal believe that direct evidence of union animus is established by Duhn's testimony that Respondent's chief negotiator's made a "sarcastic" comment during bargaining about whether Respondent would be subjected to more picketing and her claim that while entering the parking lot, he slowly drove past the picketers and looked out the window at the picketers and the people. Moreover, according to Charging Party, further evidence of union animus is demonstrated by Respondent's refusal to bargain the impact of the layoff by telling Charging Party's staff

representative that Respondent could do whatever it wanted because the collective bargaining agreement had not been signed.

I agree with Respondent's assertion that to base a finding of union animus on these assertions would constitute nothing more than suspicion or surmise and that these claims do not support a reasonable inference of union animus. *MERC v Detroit Symphony Orch.*, 393 Mich 116 (1974). Even if the comment made by Respondent's chief negotiator was sarcastic, as Charging Party alleges, and even if he slowly drove by and looked at the picketers and the people, without additional threats or coercive action, union animus is not established. *Genesee Co Sheriff's Dept*, 18 MPER 4 (2005); *City of Southfield*, 1987 MERC Lab Op 126, 141; *City of Detroit, Lake Huron Water Treatment Plant*, 1999 MERC Lab Op 211 (no exceptions); *Edwardsburg Pub Schs*, 1994 MERC Lab Op 870 (no exceptions). Further, Charging Party offered no evidence that the chief negotiator had any role in determining which employees would be laid off.

I also disagree with Charging Party's argument that the timing of the layoffs was a motivating cause of the allegedly discriminatory action. Although the layoffs were announced shortly after the parties reached a tentative agreement, the recommendation to layoff employees was made by the principal and directors months before a tentative agreement was reached. Moreover, the timing of an employer's action in relation to the employee's union activity is just one factor to be considered in determining motivation, but close timing by itself does not establish discriminatory motive. *City of Detroit (Water and Sewerage Dep't)*, 1985 MERC Lab Op 777; *No Dearborn Heights Sch Dist*, 1983 MERC Lab Op 257.

Since Charging Party failed to establish a *prima facie* case that Respondent violated Section 10(1)(c), the burden does not shift to the Employer to demonstrate its rationale for its actions. I have carefully considered all other arguments advanced by Charging Party and conclude they do not warrant a change in the result. I find that Respondent did not violate Section 10(1)(c) of PERA and recommend that the Commission issue the order set forth below:[2]

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated:

[2]In its charge, Charging Party also alleged that Respondent violated Sections 10(1)(a) and (b). These alleged violations have not been considered since Charging Party did not address them during the hearing or in its post-hearing brief.