

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

INNOVATIVE TEACHING SOLUTIONS, INC,
Employer-Respondent,

Case Nos. C05 L-306 & C06 E-124

-and-

OLD REDFORD ACADEMY,
An Interested Party,

-and-

KELLI CHILDS, TAMMY WILLINGER-FREDERICK, MELANIE CAIN,
MARIE PRANITO, AND DOMENICK RISOLA,
Individual Charging Parties.

APPEARANCES:

Butzel Long P.C., by Robert A Boonin, Esq., for Respondent

Miller Cohen, P.L.C., by Robert D. Fetter, Esq., for the Individual Charging Parties

DECISION AND ORDER

On April 11, 2008, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216 and/or Sections 16 and 23 of the Labor Mediation Act (LMA), 1939 PA 176, as amended, MCL 423.16 and 423.23. On November 5, 2008, the Commission received a notice of withdrawal from Charging Parties requesting that the charges be withdrawn. Charging Parties' request is hereby approved. This Decision and Order, and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Dennis Cleary, Esq., and Collins and Blaha, PC, by Gary J. Collins, for Innovative Teaching Solutions, Inc.

Miller Cohen, PLC, by Eric I. Frankie, Esq., for the Individual Charging Parties

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, and/or Sections 13 and 23 of the Labor Mediation Act (LMA), 1939 PA 176, as amended, this case was heard at Detroit, Michigan on July 13, July 14, August 10, and November 6, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by Innovative Teaching Solutions, Inc. and the Charging Parties on or before February 28, 2007, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charges:

On December 13, 2005, Kelli E. Childs filed an unfair labor practice charge (Case No. C05 L-306) against Innovative Teaching Solutions, Inc. (ITS). ITS, a for-profit Michigan corporation, operates elementary, middle and high schools under a management agreement with Old Redford Academy (ORA or the Academy), a public school academy chartered by Central Michigan University under part 6A of the Revised School Code, MCL 380.501, et seq. Childs alleged that between October 19 and 28, 2005, ITS unlawfully discharged her and four other teachers at the Academy's high school because they engaged in concerted activities protected by Section 9 of PERA, including, but not limited to, discussing union representation. Three of the other teachers named in the charge – Tammy Willinger-Frederick (Frederick), Melanie Cain, and Marie Prainito – were later joined as Charging Parties.¹

On May 30, 2006, Domenick Risola filed a separate charge (Case No. C06 E-124) against ITS. Risola was hired by ITS to teach at the Academy's high school on January 20, 2006 and terminated by it on or about May 8, 2006. During the period of Risola's employment, the Michigan Education Association (MEA) was actively organizing ITS' employees. The MEA filed a petition for representation election on March 29, 2006. After an election held on May 16, it was certified as the bargaining representative of ITS' teachers on May 31, 2006. Risola alleged that ITS discharged him because he engaged in union and other concerted activities protected by the Act. Risola's charge was consolidated with the charge in Case No. C05 L-306.

II. Commission Jurisdiction:

At about the same time as Childs filed her charge with the Commission, Melanie Cain filed an unfair labor practice charge against ITS with the National Labor Relations Board (NLRB). The allegations in this charge were substantially the same as those in the charge filed with the Commission by Childs. Under the doctrine of federal preemption, the Commission has jurisdiction to resolve unfair labor practice disputes only when the NLRB lacks or refuses to exercise jurisdiction. See e.g. *AFSCME v Dep't of Mental Health*, 215 Mich App 1 (1996). The Commission charges were held in abeyance until the NLRB determined whether it would assert jurisdiction over ITS. The Regional Director for Region Seven of the NLRB submitted the case to the NLRB General Counsel's Advice Division on the question of whether ITS was an employer within the meaning of the National Labor Relations Act (NLRA) 29 USC 151 et seq, or an exempt "political subdivision" within the meaning of Section 2(1) of that statute. On February 16, 2006, the advice division issued a memo to the Regional Director advising him to dismiss the charge for lack of jurisdiction. It accepted as fact that ORA, as a public school academy/school district established under the Revised School Code, was a governmental agency. After reviewing the relationship between ORA and ITS as set out in their management agreement, it concluded:

ORA not only has substantial control over ITS' policies regarding employees, budget, and operations, it has substantial reporting requirements designed to effectuate that control. Accordingly, we conclude that ITS' actual operations and characteristics amply demonstrate that it is administered by individuals responsible to public officials at ORA. ITS is thus an exempt political

¹ The fourth teacher named in the charge, Angela Jordan, indicated that she did not want to be part of the proceeding.

subdivision, and the Region should dismiss the charge, absent withdrawal, for lack of jurisdiction.²

On February 18, 2006, the Regional Director dismissed Cain's charge. On March 19, 2006, after I received a copy of the letter dismissing the charge, I served a copy of the charges filed with the Commission on ORA and scheduled a hearing. On July 12, 2006, the president of ORA's board, Sam Williams, submitted a letter stating that it was ORA's position that ITS was the sole employer of teachers working at the Academy. According to ORA, ORA and ITS are entirely separate entities, and the relationship between them is purely contractual. ORA did not appear at the hearing in this case. ITS' position, as stated at the hearing and in its post-hearing brief, is that the NLRB's factual conclusion that ORA exercised substantial control over ITS' policies was incorrect. ITS agrees with ORA that ITS was Charging Parties' sole employer. ITS also maintains that, as a for-profit corporation, it is not a public employer subject to PERA. Since the NLRB had refused to assert jurisdiction over ITS, and ITS agreed that the Commission had jurisdiction over it under the LMA, I informed the parties on the first day of hearing that I would proceed with the hearing on the merits of the charge against ITS. I stated that I would not take evidence on whether ORA was also Charging Parties' employer, but would leave this issue to the compliance stage of the proceeding if necessary.

III. Findings of Fact:

Background

Melvin Smith is a retired Drug Enforcement Agency agent whose experiences in that agency convinced him that new approaches were needed to the education of African-American youth. Smith, ITS' sole officer, founded ITS in 1998. Thereafter, ITS, under Smith's direction, helped establish ORA. ORA then hired ITS to operate Old Redford Academy, which opened an elementary school in 1999 and later expanded to include a middle school. In August 2004, the Academy opened a high school. By the date of the hearing in 2006, the Academy had about 1700 students.

Smith made all final personnel decisions for ITS. Each Academy school was headed by a building administrator who had the authority to discipline and the authority to effectively recommend the hiring and termination of teachers. Under the building administrator was a dean of students. ITS also employed other administrators, including a director of instruction.

² On June 15, 2007, after the close of the hearing in this case, the Regional Director for Region Seven issued a decision dismissing a representation petition filed by the Michigan Education Association seeking to represent employees of Charter School Administration Services, Inc., another private, for-profit corporation operating a charter school pursuant to a contract with a public school academy, the Academy of Waterford. On facts similar to those set out in the ITS memo, the Regional Director concluded that Charter School Administration Services was a political subdivision exempt from NLRB jurisdiction. The Regional Director also concluded that asserting jurisdiction over the management company would potentially create a clash between Michigan laws, including the law prohibiting strikes by public school teachers, and federal preemption. The Regional Director's decision in that case is currently on review.

Rachel Grandison was the building administrator at the high school when Charging Parties were terminated. Other administrators who allegedly played a role in their terminations included directors of instruction Barbara Zeile and Cherida Gary, as well Andria Love, whose title was not given in the record. Smith, however, was the only witness to testify on ITS' behalf.

During the period covered by the charge, Smith personally interviewed all new teachers hired at the Academy. During these interviews, Smith explained his personal educational philosophy, including his belief that the school should set high academic goals for students and that strict rules of conduct should be set for students, staff and parents. This philosophy, frequently reiterated in materials distributed to staff and students, was variously expressed as "no excuses, on time, on task and on a mission," and "no concessions to mediocrity." The Academy had a detailed teacher handbook and a published student conduct code. Smith frequently told teachers, students and parents that ITS had "zero tolerance" for violations of the rules by either students or teachers.

All employees of ITS entered into employment contracts stating that their employment was at-will. Smith testified that he believes that employees who fail to do their jobs should be terminated. Between September 1999 and September 2005, ITS discharged a substantial number of employees, including administrators who were relatives or close friends of Smith. ITS' records indicate that it terminated between six and eight teachers during every school year between 2003 and 2006.

Protected Activities during the 2004-2005 School Year

Charging Party Melanie Cain was hired by ITS on July 7, 2003 and began teaching in the Academy's middle school at the beginning of the 2003-2004 school year. During the 2003-2004 and 2004-2005 school years, Cain taught language arts. At the beginning of the 2004-2005 school year, 2004, Cain and another middle school teacher, Tonya Cooper, were reprimanded by their building administrator/principal for calling ITS' human resources office to complain about receiving a one-week paycheck at the beginning of the school year. After this incident, Cain and Cooper agreed that a union might help teachers in resolving their problems with the school. Cain and Cooper asked other middle school teachers to write lists of their complaints about the school. Starting in about January 2005, a group of middle school teachers, including Cain, Cooper, and Angela Jordan, began meeting regularly after school in a restaurant to discuss their complaints. These included shortages of supplies and staff meetings held after the time when teachers were normally allowed to go home. They also discussed their dissatisfaction with the conduct of various ITS administrators, in particular the middle school building administrator. The group eventually came to include some high school teachers. Cain and Cooper urged the group to consider a union, and the advantages and disadvantages of unions were debated. Sometime during that school year, Cooper and another teacher contacted several unions for information. No one, however, distributed union authorization cards during that school year. Cooper's employment was terminated by ITS at the end of the school year after she failed to pass a state exam necessary for certification as a social studies teacher.

At the end of April or the beginning of May 2005, Cain was asked by other middle school teachers to talk to Barbara Zeile, ITS' director of instruction, about their complaints. Cain gave

Zeile several examples of conduct by middle school administrators that she said the teachers believed was inappropriate. She told Zeile that one teacher was considering filing a lawsuit against ITS over one of these incidents. Cain also mentioned to Zeile that the teachers were "talking a little bit about bringing in a union" because they felt that they weren't being heard. She suggested to Zeile that both the lawsuit and the discussions about a union might end if ITS' administration heard out the teachers' complaints. Soon thereafter, Zeile scheduled a meeting of middle school teachers where she encouraged them to express their concerns. There was no mention of unions at this meeting.

Charging Parties Kelli Childs and Tammy Willinger-Frederick were hired by ITS to teach at its high school when the school first opened its doors in August 2004. Childs, who had five years experience teaching in public schools in Indiana, taught freshman biology. Frederick taught sophomore English and speech and debate. In April 2005, Marie Prainito, a newly certified teacher, was hired to fill a vacant position teaching physics and biology in the high school.

Commerlyn Trout was the high school building administrator throughout the 2004-2005 school year. There was a shortage of textbooks at the new high school due to demand caused by Hurricane Katrina. Students could not take textbooks home to do homework, and teachers had to copy textbook pages to distribute in class. Throughout the year, teachers complained about the textbook shortages, the fact that only one copier was available for their use, and about shortages of copier paper, toner and other supplies. They also complained about the condition of the building, including leaks in parts of the roof and the lack of air conditioning. Teachers discussed their complaints freely with each other. At the request of other teachers, Childs often met with Trout to discuss some of the teachers' concerns. Child also pressed Trout to purchase a test-scoring machine (scantron) for the school, and, when Trout seemed reluctant, conducted a survey of teachers to demonstrate to Trout that other teachers believed this to be an important issue. The above issues were also discussed regularly at staff meetings with Trout throughout the school year.

Events at the High School in September 2005

During the summer of 2005, ITS received the results of a supplementary head count audit conducted by the Wayne County Regional Educational Service Agency (RESA) pursuant to Michigan Department of Education (MDE) regulations. As a result of this audit, ITS had to return some of the state aid it had received for the previous year. The audit also identified a number of ongoing problems with attendance record keeping at all three Academy schools, particularly with respect to the maintenance of the alpha (primary) student rosters at each school. Shortly after the issuance of the audit report, Zeile resigned as director of instruction. In meetings of administrative staff in September 2005, Smith stressed that attendance was to be made a priority. According to Smith, he told administrators that "nothing was to be done in any classroom until attendance was taken." On about September 12, 2005, ITS administrator Andria Love came to inspect the office at the high school. She reported to Smith that student files were missing or in disarray. She also told him she could not determine exactly who was enrolled and, therefore, did not know whether ITS could contact families of students on its waiting list to offer

them spots. After the student head count in the third week of September 2005, ITS received another audit report critical of its attendance record keeping.

Childs, Frederick and Prainito were all offered contracts to return to the high school for the 2005-2006 school year. Cain was given a contract to teach English at the high school. Many of the issues about which the high school teachers had complained during the previous year continued to be issues at the beginning of the 2005-2006 school year. These issues included access to a copier, shortages of copy paper and toner, and the lack of a scantron. In addition, Prainito complained about the fact that ITS had bought different editions of the same textbook for her students, and about the lack of a laboratory or any place to do physics demonstrations. The science teachers, including Childs and Prainito, complained that the chemistry laboratory was filled with improperly stored and potentially dangerous substances. Numerous teachers also complained about a change in detention policy that required them, after they issued a student detention, to call the student's parents during the day and notify them that the student had to serve the detention after school. As they had done the previous year, teachers discussed these complaints among themselves and also raised these issues with Trout during staff meetings. As she had done the previous year, Childs also met with Trout individually to speak about some of these issues at the request of other teachers.

In mid-September, Cain, Prainito, and Lynnette DePrez, another high school teacher, began talking to other teachers in the high school about how a union might be able to help solve some of their problems. These discussions took place in the teacher lunchroom and in hallways between classes. Childs was among the teachers who were in favor of a union. She brought a copy of the union contract under which she had worked in Indiana to school and pointed out provisions to other teachers that she thought might benefit teachers at the Academy. Frederick did not participate in the discussions about unions.

In September 2005, the high school experienced several student fights, including a fight that took place during an all-school assembly. Student discipline at ITS is a primary responsibility of the dean of students. On September 26, 2005, ITS appointed Rachel Grandison, hired to teach third grade the previous July, to replace the dean of students at the high school. On Grandison's first day as dean of students, she sent a student back to Childs' classroom after Childs had sent him there for chewing gum in class. The student returned to the classroom and reported that Grandison had told him that this time it was just a warning. After school, Childs went to Grandison's office and asked her why she had revoked the detention. Grandison said that it was a first offense. When Childs pointed out that gum chewing was a violation of the student code of conduct, Grandison asked if Childs had put this rule in her own classroom rules of conduct and whether she understood that after five detentions students are to be considered for expulsion. Childs replied that she had and that she did, but that she did not think it was too much to ask a student not to chew gum. Grandison did not reply, and Childs left. Childs then told Trout what had happened. Trout told her to reissue the detention and that she would speak to Grandison. The following day, Childs asked Grandison if she had talked to Trout and if she could send the student to the office again. Grandison said yes. Later that day, Childs sent the student to the office again. The student returned shortly with a note stating that he had been excused for this offense.

During Grandison's week as dean of students, Grandison also refused to honor detentions issued by other teachers. The teachers discussed this issue among themselves, and Cain and DePrez went to Trout to complain that Grandison was spending her time correcting teachers' conduct instead of dealing with students.

During the week in which Grandison was dean of students, several more teachers told Cain that they were interested in the idea of a union. Cain telephoned the Detroit Federation of Teachers and asked for information about organizing. She was told that someone would call her back. In the lunchroom one day, Prainito, DePrez and another teacher were making a list of teachers they thought might support a union when Grandison walked in. Grandison looked at them and said, "Don't stop talking on my behalf," and then left the room.

On Friday, September 30, Smith held a meeting with the high school teachers at the school. He asked them about their concerns and, according to Smith, they told him about their supply problems. He promised to order a scantron machine and new copier immediately. He also told them that money for supplies was not a problem, and that they should be planning in advance and submitting requisitions for the supplies they needed.

Appointment of Grandison as Building Administrator

On October 3, Trout resigned and ITS appointed Grandison building administrator at the high school. Smith told Grandison that he expected her to restore order and discipline to the school and address record keeping, attendance, and supply problems. Todd Doughty, formerly a teacher in the middle school, was appointed dean of students.

During her first week as building administrator, Grandison issued counseling memos to several teachers. Under ITS' disciplinary policy, a counseling memo precedes a written reprimand. Trout had not issued many counseling memos, and there was much discussion among the teachers that week about these memos. One teacher complained to Cain that he had received a counseling memo for merely saying hello to a student sitting in the office, even though he did not know that the student was there for disciplinary reasons.

Trout, at the teachers' request, had held staff meetings before school on the same day each week. In her first week as building administrator, Grandison scheduled at least two staff meetings by sending emails to teachers at 3:00 pm telling them to come to staff meetings at 3:30 pm the same day. Since teachers normally were allowed to leave at 3:30, teachers complained to each other about having to attend these meetings.

During staff meetings held that first week, Grandison announced to teachers that she was planning to do hall sweeps. She also said that all teachers were to be in the doorways of their classrooms supervising students in the hall at the beginning of the school day and between all classes. Several teachers commented that, although they agreed that it was reasonable to have teachers standing in the hall during transition periods, they did not think that the whole staff needed to be there at all times. Grandison also announced that from that time forward, teachers were to send a student down to the office with attendance information fifteen minutes after the tardy bell at the beginning of each class period. More than one teacher raised objections to this

procedure. Someone asked Grandison if they were supposed to send students to the office in the middle of taking a test. Grandison reminded the teachers that it was essential for the school to keep complete and accurate attendance records. It was not clear from the record whether Cain, Childs, Prainito or Frederick were among the teachers who spoke at these meetings.

On Monday, October 10, Cain approached Grandison and suggested that she place a small box outside the doorway of each classroom so that the office assistant could pick up attendance information from each classroom at the beginning of each class. Cain said that this way the class would not be interrupted, and there would be only one student in the hall instead of thirty. Grandison told Cain, "All the teachers do is complain." Cain replied that the teachers were raising concerns, not complaining. She told Grandison that the teachers felt like they were not being heard. She said that the teachers were looking for another, or other, "avenues." Cain was referring to union representation, but she did not use the word "union" in this conversation.

Grandison had announced a staff meeting on Friday, October 6, but was called away at the last minute. When teachers showed up for the meeting, dean of students Doughty decided to proceed with his part of the agenda instead of canceling the meeting. Grandison issued Doughty a counseling memo for holding the meeting in her absence. Grandison also directed Doughty to prepare a written report of everything said at the staff meeting.

On Monday, October 10, DePrez approached Doughty privately and told him that the teachers were concerned about changing policies and about being written up for infractions such as not being in the hallway. She said that they thought Grandison was treating them like children. She asked Doughty to speak to Grandison about these issues, and Doughty reluctantly agreed. DePrez asked him not to mention her name, and he also agreed to this. When Doughty relayed these complaints to Grandison the following day, she asked who had spoken to him. Doughty refused to tell her. Grandison was angry, and told Doughty, "I am going to do my job." She also told Doughty that if procedures and policies weren't followed there were going to be "verbal or written consequences." Doughty replied that he felt that teachers would not work to their potential if they were constantly in fear for their jobs. He also said that, in his experience, children did not do well when teachers left in the middle of the school year. Grandison replied, "That's what subs are for." The morning after this conversation, Doughty saw a draft of a reprimand accusing him of insubordination for having meetings with the teachers without her permission sitting on Grandison's desk. Doughty then asked and was given permission to return to his teaching position at the middle school. Danielle Jackson replaced him as a dean of students.

Sometime around this time, Cain was informed by the Detroit Federation of Teachers that its parent, the American Federation of Teachers, did not represent teachers in charter schools. Cain contacted another union, but was terminated before she could meet with its representative.

Teachers at the high school had not been given attendance books at the beginning of the 2004-2005 school year. On about October 13, Grandison distributed attendance books and told the teachers to copy all the information from their attendance sheets dating back to the beginning of the year into the book. She instructed them to do this in ink, and not to erase or use white-out. Several teachers, including Prainito, made copying mistakes in their books. Prainito emailed

Grandison asking for a new book, but the school did not have another book to give her at that time.

Staff Meetings on October 13 and 14

On Thursday, October 13, Grandison held another meeting with the teachers. Prainito, Childs and Cain variously described Grandison's manner throughout this meeting as "cold," "terse" and "stern." Grandison began by telling teachers that it was urgent that they get their attendance sheets to the office exactly fifteen minutes after the tardy bell had rung. She said that the teachers' salaries depended on it because there was a fine by the State of Michigan every time there was a mistake. Grandison said that she would be reviewing every teacher's attendance book every Friday at 3:30 pm, and that books with information dating back to the beginning of the school year would have to be turned in on October 21. Prainito asked if she could put off sending a student to the office with attendance information if she was giving a test that day, since it took a student a long time to get to the office and back from her classroom. Grandison said no, that the attendance had to be in exactly fifteen minutes after the tardy bell. Someone else mentioned that students often came into first hour class more than fifteen minutes late, which meant that the student was marked absent instead of tardy. Grandison replied that the attendance clerk could correct this later. Grandison said that attendance information was to be in the office exactly fifteen minutes after the tardy bell, repeating the sentence several times and putting an emphasis on the word "exactly." Grandison then reminded teachers that they were to be in the hallways before school and between every class period. A teacher asked Grandison what they should do if a student came up with a question after class, and Grandison told him or her to tell the student to come back after school or to talk to the student in the hallway. Another teacher commented that teachers did not have an opportunity to use the restroom. Someone complained that standing in the hallways before and after lunch cut the teachers' lunch period to twenty minutes. After listening to these comments without response, Grandison told the teachers that they would be disciplined if they did not follow her directives. She said that if teachers were "rebels," they would be written up on a regular basis, and that "refusal represents resistance [sic]." Grandison also said that teachers undermined her authority when they discussed her directives among themselves. She told the teachers that they were not to "gossip" and that when they had a concern with an individual they should make a conscious effort to discuss that concern directly with that individual instead of talking among themselves. Grandison then said that teachers should not talk to each other, and particularly should not stand talking in groups, during the school day. She warned that if the teachers did not stay away from each other, there would be repercussions. Grandison told the teachers that she was going to create a safe, warm environment for students but that she had a zero tolerance policy for teachers. Concluding the meeting, Grandison said "resistance will be met with disciplinary action," and that "teachers should be in support or resign."

The following day, October 14, Grandison called another staff meeting to announce that that the attendance books would be collected on the following Monday, October 17, instead of October 21. Prainito asked Grandison how teachers were supposed to complete their attendance books by Monday if they were not supposed to take them home. Grandison said, "Do whatever it takes."

Childs, Fredericks, Prainito and Cain were all terminated by ITS between October 21 and October 28, 2005. The events leading to their individual terminations are discussed below.

Cain's Termination

When ITS hired her in 2003, Cain had been teaching at another charter school and had a Michigan provisional teacher's certificate valid through June 2005. Her provisional certificate had already been renewed once. When ITS hired Cain, she had completed ten of the eighteen post-degree credits required to obtain a Michigan professional teacher's certificate. Cain's contract with ITS for the 2003-2004 school year required that she be accepted into an approved university certification program and/or continue to take a minimum of six credit hours per calendar year towards certification. However, although Cain did not complete any additional credits towards her certification after 2003, her employment contracts for the 2004-2005 and 2005-2006 school years did not contain any reference to her certification.

As Smith acknowledged, Cain was a capable teacher whose students regularly had test scores above the school's average. In April or May 2005, Cain discussed the expiration of her provisional certificate with director of instruction Barbara Zeile. Cain admitted to Zeile that she had not enrolled in a program to complete the credits that she needed to receive a professional certificate. Cain and Zeile agreed that Cain would enroll in an approved university program, and that ITS would apply to the MDE for a second renewal of Cain's provisional certificate.³ On June 2, 2005, Cain gave Zeile a letter from Madonna University stating that she had enrolled in its certification program and could be recommended for certification by May 2006. Cain also wrote Zeile a note, which was placed in her personnel file, stating that she had enrolled in summer classes and would actually complete the necessary credits by December 2005.

Zeile did not testify, and therefore Cain's testimony that Zeile promised to apply for a renewal of her provisional certification was uncontradicted. However, MDE records do not indicate that any application was made for a second renewal of Cain's provisional certificate. These records appear to indicate that at some unspecified time someone applied for a one year special teaching permit (as opposed to a provisional certificate) for Cain, although the permit does not appear to have been issued.⁴

In August 2005, Cain moved to the high school to teach English. Before her reassignment, Cain tried to contact Zeile to explain that she had not been able to take classes in the summer and would not qualify for her professional certificate by December 2005, but learned that Zeile had resigned. Cain then told middle school administrator Renee Perkins that she still

³ Under MDE rules, R 390.1129a, a provisional certificate can be renewed for a second time only if the teacher has completed eighteen post-degree education credits, which Cain had not done. However, a teacher whose provisional certificate has expired can be granted a two-year extension at the request of her employing school district, although the teacher then forfeits the opportunity for additional renewals. MCL 380.1531e. This was the type of extension which Cain believed Zeile had promised to obtain.

⁴ A full-year special permit can be issued, upon the request of a school district, when a properly certificated teacher is unavailable for a regular teaching assignment. The school district, not the teacher or educational institution, must submit the application and the district holds the permit for the teacher. The district must demonstrate that it has made certain efforts to find a certified teacher for the position.

planned to complete the classes by May 2006. Perkins told Cain that not to worry about it, "that her paperwork was in." Cain testified that when she received a contract from ITS to teach for the 2005-2006 school year she assumed that ITS had received an extension of her certification.

Cain's personnel file included a copy of the June 2, 2005 letter from Madonna University regarding Cain's completion of her certification requirements. Sometime after Grandison became building administrator, Cain was called to a meeting with Sherida Gary, who had replaced Zeile as director of instruction, in Grandison's office. Gary asked Cain about the status of her certification, and Cain told her about Zeile's promise. Gary said that she would look into it. According to notations made in Cain's personnel file, on October 12, Andria Love telephoned Madonna University and was told that Cain had not completed any classes since she enrolled in its certification program and was not currently registered for any classes. Love wrote a memo to Gary and Smith stating that Cain had not met the requirements for renewal of her certification. When Cain and Gary met again, Gary told her that ITS had not obtained an extension of her certification and had no intention of doing so. Gary also told Cain that she "had not lived up to her end of the deal." On October 26, Cain received a letter signed by Smith stating that her employment was terminated because she had been "unsuccessful in completing the necessary educational requirements to achieve your Michigan Teachers Certification."

Cain testified that at the time she was terminated, there were many other teachers at the high school who were not certified, including teachers who did not even have a degree. However, she admitted that she not know whether ITS had obtained permits or vocational authorizations allowing them to teach, and was not aware of any other individual teaching English who was not a certified teacher.

Terminations of Childs and Frederick

On June 6, 2005, Trout gave Frederick a written reprimand after she reportedly told her students during a class, "This is not the matinee show where you African Americans sit and yell at the movie, so if you want to keep talking I'll turn it off." The reprimand also referenced two previous incidents, one where a student had reported that Frederick used profanity in class and another where Frederick had sent a student to the office for calling her a racist. Trout stated in the reprimand that she had concerns about Frederick's ability to relate to the African American population that she was there to serve. The reprimand was still in Frederick's personnel file in October 2005.

On the morning of October 11, 2005, Grandison saw Childs in the hallway before first hour classes and ordered her to return to her doorway. Childs tried to explain that she was looking for a maintenance man to adjust the heat in her classroom, but Grandison merely repeated the order. Childs returned to her doorway. On October 12, Grandison wrote Childs a counseling memo stating that she was expected to be in her doorway between classes.

As class advisor for the high school's first senior class, Frederick had been working closely with Grandison on senior issues. She had a meeting scheduled with Grandison on Monday, October 17, to discuss homecoming. After the October 13 staff meeting, Lynnette DePrez urged Frederick to talk to Grandison about the way she had spoken to teachers, and

Frederick agreed. At their October 17 meeting, Frederick asked Grandison if she could speak freely. She then told Grandison that the teachers did not like being spoken to as if they were kindergarteners. She told Grandison that Trout might not always have agreed with the teachers, but that she was able to explain things in a way that the teachers did not see as threatening. Grandison did not respond.

The week of October 17 through 21 was spirit week at the high school. As part of spirit week, students were given the opportunity to contribute money for senior class activities by paying for the privilege of wearing clothing not within the normal dress code. A list of acceptable clothing for each day of spirit week was posted during the previous week. However, both students and teachers had questions about whether particular clothing items were acceptable.

After an all-school assembly on Monday morning, October 17, Childs approached Grandison and explained that three students in her classroom were wearing neither their uniform nor the acceptable clothing for that day. With Frederick standing nearby, Grandison told her to write them a detention and send them to the office.

Later on October 17, Grandison sent the following e-mail to all the high school teachers:

Subject: Detention procedures

I cannot stress enough the importance of students being in their assigned classrooms. Students earning a detention should be issued a detention by the classroom teacher, the white copy goes to the students, all others are to be placed in the teacher's lounge. **DO NOT SEND STUDENTS TO THE OFFICE UNLESS THERE IS AN URGENCY.** [Emphasis in original]

Childs sent a reply later that same day:

Ms. Grandison –

I sent you three students not in dress code (or college dress) today during third hour because that is what I thought you wanted when I spoke with you after the assembly. And, with dress code infractions, I was told to send students to the office as of last week. Has this changed?

After school, Childs went to talk to Grandison's office to talk about the issue. Grandison told her to talk to dean of students Jackson, who was not available at that time. Later that evening, Grandison sent Childs the following email reply:

For the fourth time, students earning a detention should be issued a detention by the classroom teacher, not sent to the office. For future reference refer to the teacher handbook or previously forwarded email messages from me pertaining to the detention process. **IT WILL NOT CHANGE!!!!** [Emphasis in original]

On October 18, Grandison sent the teachers an email apologizing for the dress code confusion. She told them to tell students that there would be "no exceptions and no refunds "and that they were not to come to the office to discuss the dress code. Later that day, Frederick sent Grandison an email stating that students had asked her how they could be expected to wear track suits without gym shoes. Grandison responded that the dress code "was what it was" and was not up for discussion.

Sometime on October 18, Childs gave a student a detention and sent her to the office after she refused twice to stop talking and refused to do a written assignment. Jackson sent the student back to the classroom. Later that day, Grandison called Childs to her office and told her that students given detentions were not to be sent to the office unless they were talking back or being disruptive in the classroom. She said that in those cases teachers should also send her an e-mail explaining the circumstances. Childs explained the circumstances of the detention she had issued earlier in the day and asked Grandison how she should have handled it. Grandison told Childs that she was right to send the student to the office because the student's insubordination was an urgent matter.

Parent-teacher conferences were scheduled for Monday, October 24 at the high school. Previous parent-teacher conferences had included students, but Grandison had mentioned to teachers that she was considering changing this because of the number of classes that were then being taught by substitutes. Grandison told the teachers that she would let them know how the conferences would be conducted by October 19. On October 20, Frederick sent Grandison an email that said, " Please, please, please. Send the email to all the teachers about the conferences and everything. Students are getting very concerned today." Grandison replied that she "was on top of it" and Frederick should "stop being the student teacher advocate and concentrate on the MEAP (test)."

Spirit week was also the end of the high school marking period. Teachers turned their grades in to the office on October 17. On October 20, Grandison called Childs into her office and told her that she had given too many students failing grades. Childs said that her grades accurately reflected her students' performance. She argued that it was the Academy's philosophy to hold its students to high standards. Grandison told Childs that too many failing grades were a reflection on the teacher, not the students. She also told Childs that she should have contacted the parents of the failing students. Childs asked Grandison what she wanted her to do now, and Grandison directed Childs to adjust her grading rubric to reduce the number of failing students. Childs said that she would do so, but only if Grandison signed off on the change. The next day, Childs gave Grandison a new set of grades. Childs did not "curve" the grades, but instead added seven points to every student's grade. There were still many failing students. At the bottom of her grading sheet, Childs wrote, "Per Ms. Grandison's mandate, though I believe it to be unethical, I will comply with her request and adjust the grades." When Grandison saw the sheet, she became angry. Grandison began asking Childs questions about her grading policy, such as whether she gave students opportunities for extra credit.

On October 24, Childs received two disciplinary memos. One, a counseling memo, was written by Jackson and dated October 21. It stated that Childs had violated detention policies by

sending students to the office for uniform violations on October 17 and by issuing a detention for October 19 after fourth hour on that day.

The second memo was from Grandison:

It is the expectation of students and staff of ORAAPHS that parent communication be maintained.

In our meeting on Thursday, October 20, 2005 regarding report card grades you stated that you attempted to make contact with "a couple of parents" in response to being asked to substantiate the relevance of the number of failing grades issued in your Biology classes. The level of concern rests with the statement this makes about the classroom teacher as opposed to the students receiving the grades.

As a result of having not made attempts to make parent contact prior to issuing so many failing grades, you were ask [sic] to review your final grades and utilize a rubric that reflects fair and equitable decision making on behalf of the student. You stated however that you were asked to "inflate your grades." This statement is contrary to the purpose of the directive given you.

Mrs. Childs on several occasions you have been reprimanded for the same reasons.⁵ As a result of your continued decision to resist directives issued by the administration, I am recommending termination.

On October 25, Frederick learned that Childs had received a reprimand for not following detention policies and that Grandison was recommending that Childs be terminated. Frederick sent Grandison the following email:

I would like to receive in writing specific instructions what is expected of us when a student is not in dress code. Last year, and we were informed this came directly from Mr. Smith, any student out of dress code was sent home without question. They were sent to the office and not allowed in class unless parents brought proper clothing or they went home.

From a company asking for no excuses, I want to make sure that I am following the correct policy.

Grandison replied:

Please see your teacher and student handbook. Please also be advised that we will further discuss this matter in our upcoming meeting to eliminate further questions that may arise.

Later that day, Frederick received a disciplinary warning from Grandison that stated:

⁵ Childs testified that prior to October 2005 she had never received a reprimand, and there were no such reprimands in her personnel file.

Part 26 of the Student code of conduct clearly states, "In all matters regarding conduct, dress and overall appearance, the school reserves the right to counsel reprimand and even dismiss a student if the student does not cooperate or comply with the school standards. The school is the final arbitrator of appropriate dress." The code of conduct continues on pg 20, code #113 Dress code violations – wearing anything other than the mandated clothing and accessories listed in the dress code or the specified clothing for a special activity. This includes, but is not limited to, not wearing a tie or belt or neglecting to tuck in shirttails.

In your most recent email correspondence, you stated you were unclear of the above listed information. It is my expectation that teachers read and adhere to the student code of conduct in an effort to properly enforce the codes listed. Your decision to question such directives is insubordinate.

Later that day, Frederick returned the warning with these comments:

I feel I must respond because I was asking for clarification as a concerned employee. In the student handbook and the new teacher handbook the only line pertaining to the discipline actions for the student is on page 28, "Detentions may be given to students out of dress code."

On page 26 of the student handbook there is a passage that states, "Any student out of uniform in any way or dressed in a manner deemed inappropriate will not be admitted to class. The parent will be called for immediate pick up and the student will be marked absent for the day. My question is – which of these directives are we to follow?"

Sometime around this time, Grandison met with Smith and Gary. During a meeting that lasted about two hours, Grandison described the behavior of Childs, Frederick and Prainito. Smith testified that he and Gary agreed with Grandison that the three teachers had been "combative and argumentative." They also discussed the June 2005 reprimand in Frederick's file. Smith and Gary agreed that these teachers needed to be terminated so that Grandison could restore order to the high school.

Childs called Smith's office to schedule a meeting with him on October 25. Instead of Smith, Childs met with Gary and Andria Love. They gave Childs a letter signed by Smith that stating that she had not adapted to ITS' educational program and was terminated.

On October 28, Love and Gary came to Frederick's classroom and gave her a termination letter signed by Smith. Like the letters given to Childs and Prainito, Frederick's letter also stated that she had failed to adapt to ITS' educational program.

Prainito's Termination

On October 14, Prainito received a counseling memo from Grandison for remaining in her classroom, instead of being in the hall, during a class transition on October 13. Prainito told Grandison that she could not remember not being in the hall, and asked who had witnessed this. Grandison told her that she had seen it. Prainito then asked Grandison if she knew which class transition it was, and Grandison said she did not.

On October 17, Prainito received a written reprimand from Grandison dated October 15. It stated:

On Thursday, October 13, 2005 in our staff meeting Ms. Butts reiterated the importance of keeping accurate attendance and the procedure to be used to effectively submit hourly attendance sheets. I explained that attendance would be submitted by a designated student fifteen minutes after the tardy bell each hour. With this in mind, the directive was issued to have attendance books prepared for collection on Friday, October 21, 2006.

On Friday, October 14, 2005, the directive was retracted to reflect the submission of attendance books on Monday October 17, 2005, as report card grades are due Tuesday October 18, 2005. With each directive issued you have openly expressed your inability to carry out the directives given inclusive of explanations as to how this process would not be effective for you. You proceeded to openly attempt to debate your position each time.... The decision to continually be resistant to the timely execution of assignments issued by administration clearly represents insubordination. As a teacher, accurate attendance must be kept and prepared for submission to the building administrator whether issued on little or no notice.

As noted above, Prainito had informed Grandison that she had spoiled her attendance book, and she had not been given another one. On October 17, Prainito turned in the binder in which she had been keeping her attendance sheets to Jennifer Wilkins, who was then in charge of attendance records, and explained that she did not have a book. Wilkins told Prainito to transfer all the information into her new attendance book when she received it.

On the afternoon of October 21, the teachers, except three who were entering grades into the computer, were in the gym with their classes attending an all-school pep rally. The teacher handbook states that teachers are responsible for bringing their classes into the gym and remaining with them during assemblies. One of the three teachers entering grades came into the gym and told Prainito that he had a question about her grades. She left the gym with him. The two teachers walked past Jackson on their way out, but Jackson did not speak to them. On October 25, Prainito received a disciplinary reprimand for insubordination for leaving the pep rally on October 21 without notifying an administrator. Prainito asked for an appointment to talk to Grandison about this warning, but Grandison did not show up for the meeting.

On October 26, Prainito received a memo from Grandison which read as follows:

You have been asked on several occasions to completely and correctly meet attendance requirements. On October 15, 2005, you were issued a written reprimand expressing this concern. In review of your attendance records your attendance is to be recorded in your school issued attendance book, instead it has been tracked and placed in a binder. In addition, the tracking method used is consistently incorrect and attendance not delivered in a timely manner. I am therefore recommending termination.

On October 28, Prainito received a letter signed by Smith stating that she was terminated effective that day because she had failed to adapt to the school's educational program.

Risola's Hiring and Termination

Domenick Risola was hired by ITS on January 20, 2006 to teach physics and general science in the high school. Risola had been teaching elsewhere as a substitute for several years and was enrolled in a master's degree program in teaching with the University of Phoenix on-line (Phoenix). Risola was told by the MDE that the fastest way for him to become certified to teach in Michigan was to obtain his Arizona certification; the MDE would then issue him a temporary employment authorization for one year while he took his Michigan teacher exams. Risola believed that by the end of December 2005 he had completed all the requirements necessary to be certified in Arizona, and told ITS this during his job interview. ITS told him that he would be paid at the daily rate of a substitute until he obtained a "90-day letter" from the Arizona Department of Education (ADE) stating that he had completed all the requirements for professional certification in Arizona and that his application was pending. Risola was given a contract which stated that he had to submit this letter by March 1, 2006. The contract stated that after Risola submitted this letter he would be paid a yearly salary and that he would receive a salary increase when he received a "90 day letter" from the MDE.

After he entered into this contract, Risola contacted Phoenix and asked how to get the 90 day letter from the ADE. Phoenix explained that it would first have to certify him as having graduated. After a few weeks, Phoenix told Risola that it had made a mistake, and that Risola needed one more class to graduate. Risola enrolled in the class. When March 1 arrived, Risola told Gary and Jackson that he was still working on getting his 90-day letter from the ADE. Risola continued to teach his assigned classes while being paid as a daily substitute.

Grandison was terminated as high school building administrator about two weeks after Risola was hired. Danielle Jackson, the former dean of students, became the building administrator. Risola testified that when he began teaching at the Academy, teachers were constantly discussing problems at the school. These included problems with the condition of the building and supply shortages. Teachers were also very concerned about job security, and the discharges of the Cain, Prainito, Frederick, Childs and Jordan in October were a frequent topic of discussion among them. These discussions took place primarily in the lunchroom, but they also occurred in the hallways during class transition periods.

Around the time Risola was hired, the MEA began actively organizing ITS employees. Risola was eventually accepted into the group of teachers who were involved with the organizing

drive. These teachers sat together at lunch and also met after school. These teachers were in touch with Cain, Prainito and Childs, who by this time had filed the instant charge. The MEA filed a petition for representation election on March 29, 2006. However, ITS became aware of the organizing efforts before the petition was filed. Around the end of January, it hired a consultant who began mailing letters and other materials to teachers' homes urging them to reject the union.

In early March 2006, Risola asked R. Galbraith, dean of students at the high school, how ITS administrators could have gone on a retreat to Aruba when he (Risola) could not get a simple thing like colored chalk. Risola told Galbraith that "this would not be happening if there was a union." Galbraith told Risola that he would "discuss this with the appropriate people and get back to you." Shortly thereafter, on March 17, Gary issued a lengthy memo to all teaching staff entitled "Myths and Rumors." The memo explained that Smith had paid for the retreat to Aruba out of his personal funds. The memo also addressed the issue of supplies and asserted that ITS did not terminate employees without cause. A few days later, on about March 20, Risola was talking to another teacher about the need for a union when he was interrupted by Galbraith, who told him that he "had better not speak about those things or he would be fired."

Risola completed his final class and received his diploma from Phoenix on March 20. A Phoenix representative told Risola that that she would submit his application for an Arizona teaching certificate to the ADE. On March 22, Risola was called to Love's office. Love gave him an application for a one-year teaching permit for the 2005-2006 school year and told him to sign it. She told Risola that if this permit was not granted, he would be fired. Risola also received a letter from Smith stating that if he was "denied a full-year permit and/or have not received your Arizona certification" he would be terminated immediately.

Risola repeatedly emailed Phoenix trying to get written proof that he was eligible for certification in Arizona. Phoenix sent Risola a letter confirming that he had completed an Arizona-approved teacher-preparation program and a second letter stating that he had completed all the requirements for Arizona certification. Gary and Jackson told him that these letters were not sufficient. In the meantime, Phoenix told Risola that it had not applied for his Arizona certificate, and that he had to submit his own application. Risola did so immediately.

On Sunday, April 23, 2006, while his Arizona application was pending, Risola received a call from Jennifer Wilkins, the individual in charge of calling substitute teachers at ITS. Wilkins said that Love had told her to call him and tell him that he was no longer to be in a regular classroom. She asked him if he wanted to take a long-term substitute position at the middle school or take substitute positions on a daily basis as an on-call sub. Risola was upset. He said that he would call her back. The next day, Risola asked for a meeting with Love and Gary to discuss his employment situation. He also called Wilkins back and told her he would substitute. Risola agreed to work as a substitute on April 24, but turned down an assignment on April 27 because his meeting with Love and Gary was scheduled for that day.

Between April 23 and April 27, Risola obtained a copy of his newly-issued Arizona teaching certificate from the ADE. Risola gave Love and Gary a copy of his Arizona certificate at their April 27 meeting. He told them that as he was now certified to teach in Arizona, he

should be placed back in his regular classroom and should begin receiving a salary. Love and Gary told Risola that they would have an answer for him within forty-eight hours. On Monday, May 1, Wilkins called Risola and offered him another daily substitute assignment. He told her that he wanted to wait and see if he was going back to his original classroom. Wilkins did not call Risola again after May 1.

Between April 27 and May 8, Risola had conversations with both Smith and his wife, who was then in charge of human resources for ITS. Risola told both of them that since he had received his Arizona certificate, he should be placed back in his regular classroom and paid a salary. On May 8, Smith called him back and told him that ITS wanted a Michigan certificate. Smith testified that when he told Risola this, Risola threatened to sue him. Later that day, Smith sent Risola a letter stating that he was terminated because he had not complied with the conditions of his contract and because he had refused to accept on-call substitute assignments.

IV. Discussions and Conclusions of Law:

Melanie Cain

In order to establish a prima facie case that an employer's adverse action constituted unlawful discrimination under Section 10(1) (a) or (c) of PERA or Section 16(3) of the LMA, a charging party must show: (1) that the employee engaged in union activity protected by the Act; (2) that the employer had knowledge of that activity; (3) anti-union animus or hostility toward the employees' protected activities; and (4) other evidence, including but not limited to suspicious timing, that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006); *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).

Cain was one of two teachers who first suggested a union as a possible solution to the teachers' complaints at the middle school during the 2004-2005 school year. She participated in discussions with other teachers about unions during the winter and spring of 2005. When she transferred to the high school in the fall of 2005, she initiated discussion of unions among teachers there. Cain contacted two unions to try to get the organization process started, but was terminated before she could do so.

Smith denied having any knowledge of union activity at the Academy before he received a copy of the first unfair labor practice charge in December 2005, and ITS asserts that Charging Parties have not established that ITS knew of Charging Parties' union activities. In April or May of 2005, Cain told Barbara Zeile, then director of instruction, that teachers were talking about bringing in a union. Zeile, therefore, knew that in May 2005 that some type of union activity was taking place in the middle school and that Cain had participated in it. Unless there is affirmative evidence that a supervisor who learns of union activity has not passed this information to others,

the supervisor's knowledge is attributed to the employer. *Van Dyke Crotty Co*, 297 NLRB 899, fn. 4 (1990); *Dr. Phillip Megdal, DDS, Inc*, 267 NLRB 82 (1983).

The extent of the employer's knowledge of the union activity, however, is a factor to be weighed in determining whether the union activity was a motivating factor in the adverse employment action. Although union activity was clearly taking place in the high school in the fall of 2005, there is no affirmative evidence that ITS knew this. Grandison walked in on Prainito and Lynnette DePrez while they were making a list of union supporters in late September 2005. However, neither Prainito nor DePrez testified that Grandison actually heard their conversation. On October 10, Cain warned Grandison that teachers were seeking another "avenue" for their complaints. However, unless Grandison already knew that the employees were discussing unions, she could not reasonably have understood this as a reference to union organization.

In order to establish a prima facie case of unlawful discrimination because of their union activities, Charging Parties must also show that ITS had anti-union animus and that this animus was at least a motivating cause of their terminations. Anti-union animus can be established by circumstantial, as well as direct, evidence, including the timing of the adverse action in relation to the union activity and/or the pretextual nature of the employer's explanation for these actions. See *Tubular Corp*, 337 NLRB 99 (2001); *Fluor Daniel, Inc*, 304 NLRB 970 (1991). However, in this case the timing of Cain's termination in relation to her union activity is irrelevant unless ITS knew that she was involved in this activity in the fall of 2005. I conclude that Charging Parties did not establish that Cain's union activity, or that of Childs or Prainito, was a motivating factor in their discharges because they did not establish that ITS knew of the union activity at the high school in the fall of 2005.. The record indicates that Frederick did not engage in union activity prior to her termination.

Section 9 of PERA and Section 8 of the LMA, however, like Section 7 of the National Labor Relation Act (NLRA), 29 USC 151 et seq, protect not only union activities but also other "lawful concerted activities for the purpose of . . . mutual aid or protection," including complaints made to an employer about working conditions. Complaints made solely by one employee on his or her own behalf are not concerted, and thus not protected. However, "concerted" complaints include those made: (1) with, or on the authority of, other employees; or (2) individually, but with the object of inducing group action or bringing a "truly group complaint" to the attention of management. *Meyers Industries, Inc*, 281 NLRB 882, 85-887 (1986). An individual need not be formally designated by other employees as their spokesperson in order to speak on their authority. Questions and comments concerning matters of mutual concern raised by a single employee at a group meeting with the employer, even without the prior approval of other employees, come within the definition of concerted activity. *Unionville-Sebewaing Cmty Schs*, 1981 MERC Lab Op 932, 934; *In re Anheuser-Busch, Inc*. 337 NLRB 3, 15 (2001); *Whittaker Corp*, 289 NLRB 933,934 (1988). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. *Meyers*, at 886-887; *Ewing v NLRB*, 861 F2d 353 (CA 2, 1988).

Throughout the 2004-2005 school year, and again in September 2005, teachers at the Academy's high school complained about working conditions both in discussions among

themselves and in staff meetings with Trout. These included complaints about shortages of supplies, particularly copier supplies, equipment, and the condition of the school building. Between October 3 and October 13, Grandison held several staff meetings in which teachers again voiced complaints about working conditions, this time about her directive that all teachers stand in the hallway between all classes, and her new procedure for sending attendance information to the office. On Friday, October 14, Prainito complained in another staff meeting about Grandison's directive that they complete the copying of their attendance records into their new attendance books by the following Monday. Throughout this period, teachers were also discussing these same issues in conversation among themselves, as well as other issues of mutual concern such as Grandison's issuance of allegedly unjust counseling memos and her refusal to honor teacher detentions. I find that both the complaints expressed by individual teachers at staff meetings over what were clearly group complaints, and the conversations among teachers over these and other issues of mutual concern, constituted concerted protected activity within the meaning of Section 9 of PERA and Section 8 of the LMA.

The record indicates that Grandison knew about and was angered by these complaints. When she was appointed building administrator, Smith told her that the high school teachers had complaints about supplies and that she was to fix the problem. More than one teacher complained about Grandison's hallway directive and her new attendance procedure in staff meetings, and I find that she was fully aware that these were group concerns. Grandison also knew that teachers were discussing her actions outside of staff meetings. On October 10, Doughty told Grandison that teachers were complaining about her. In the October 13, staff meeting, she angrily admonished teachers not to discuss her directives among themselves and told them that they were not even to talk to each other. Grandison clearly communicated at this same staff meeting that she considered these discussions to be a threat to her authority. I find that Grandison's statement at the end of the October 13 staff meeting – "teachers should be in support or resign" – was a threat to retaliate against those who continued to complain about her actions.

Although Cain participated in discussions with other teachers, the record does not indicate that Cain was among the teachers who spoke out in staff meetings between October 3 and October 14. However, Cain identified herself as one of the "complainers" when she defended the others teachers' actions in her conversation with Grandison on October 10. At about the same time – and more than a month after the start of the school year - ITS discovered that Cain had no teacher certification or permit. In the absence of any other explanation by ITS, I believe that the facts warrant the inference that Cain and Grandison's October 10 conversation led ITS to examine Cain's personnel file, and thus to the chain of events that resulted in her termination. I find, therefore, that the teachers' lawful concerted activities were a motivating factor in ITS' decision to terminate Cain.

However, even if a charging party establishes that protected activity is a motivating factor in the employer's action, the employer may escape liability by showing that it had also had a legitimate motive and that the adverse action would have been taken even in the absence of the protected activity. In this case, ITS discovered in October 2005 that it had allowed Cain to fill a regular teaching position without a current certification or permit, a clear violation of state law and federal regulations. This situation did not necessarily require ITS to terminate her. As Gary

admitted to Cain in their conversation shortly before her termination, ITS could have submitted its application for renewal of Cain's provisional certificate in October after discovering its oversight, although she could not have taught in a regular classroom until the certificate was renewed. However, ITS also discovered that Cain not taken any more of the courses necessary for her professional certification since her hire in 2003, despite her promise in May 2005 to complete this coursework by December 2005. I conclude that ITS would have discharged Cain whenever it discovered this fact, even in the absence of protected activity on her part. I find, therefore, that Cain was not terminated by ITS in violation of Section 10 of PERA or Section 16 of the LMA.

Kelli Childs and Tammy Willinger-Frederick

The record does not indicate that either Childs or Frederick were among the teachers who spoke out at staff meetings after Grandison became building administrator. However, like Cain, they were among the teachers who participated in the discussions taking place outside of staff meetings which angered Grandison. Moreover, both Childs and Frederick engaged in conduct during Grandison's first month at the high school which, I conclude, led Grandison to identify them as part of a group of teachers responsible for these discussions. Childs complained to Trout about Grandison's refusal to honor her detention on Grandison's first day as dean of students. After Grandison became building administrator, Childs persistently questioned her about the circumstances under which students were to be sent to the office. Frederick also asked Grandison questions, including questions about the dress code and whether students were to be sent to the office for violating it. On October 17, Frederick told Grandison that she was treating the teachers "like kindergarteners" and compared her unfavorably to Trout.

Not all of Childs' and Frederick's complaints constituted concerted activity. Childs did not identify herself as speaking for other teachers when she questioned Grandison about rules for sending students to the office, and there was no evidence that this was a group concern. Frederick made the "kindergarteners" remark to Grandison at DePrez's urging, but she did not indicate to Grandison that this was anything other than her personal opinion. However, as indicated by her remarks at the October 13 staff meeting, and in the disciplinary memos issued to Childs and Frederick shortly before their terminations, Grandison equated all questioning of her directives or conduct with insubordination. In her October 21 memo recommending that Childs be terminated, Grandison accused her of "continuing to resist directives issued by administration." In the disciplinary reprimand she issued to Frederick on October 25, Grandison told Frederick that her "decision to question [detention policy] directives" was insubordinate. I conclude that Charging Parties met their burden of showing that protected concerted activity, in this case complaints made by Childs, Frederick and other high school teachers about Grandison's actions in October 2005, was a motivating cause of both Childs' and Frederick's terminations.

In her October 21 memo recommending Childs' termination, Grandison cited Childs' failure to make contact with the parents of students receiving failing grades in her classes as a cause of her termination. However, there is no evidence that this was an ITS policy, or that Childs had any notice that this was expected of her. ITS argues that Childs was insubordinate because she refused to follow Grandison's directive to curve her grades. However, according to the record, Grandison told Childs only to use a different grading rubric, not specifically to curve

her grades. Although Childs admitted that she was philosophically opposed to altering students' grades, there is no evidence that she deliberately refused to follow Grandison's instructions. ITS also argues that the reprimand issued to Frederick in June 2005, and her failure to adhere to school directives regarding the enforcement of the school dress code, constituted a legitimate reason for her termination. However, Frederick was rehired for the 2005-2006 school year despite her June 2005 reprimand, and there is no evidence in the record that she refused or failed to follow school dress code policies. I find that ITS did not show that Childs or Frederick would have been terminated in the absence of their protected conduct. Based on the evidence as a whole, therefore, I conclude Childs and Fredericks were unlawfully terminated for engaging in concerted activity protected by PERA and the LMA.

Marie Prainito

As discussed above, an employee engages in activity protected by PERA or the LMA when he or she asks questions or makes comments on issues of mutual concern during group meetings with the employer. I find that Prainito engaged in concerted protected activity when, at the October 13 staff meeting, she asked Grandison if she could avoid sending a student to the office with attendance information if she was giving a test, and when, in the October 14 meeting she complained about Grandison's order to turn attendance books in the following day. I find that Prainito also engaged in concerted protected activity when she participated in discussions of these and other issues of group concern with other teachers outside of staff meetings.

On October 17, Prainito received a written reprimand from Grandison which stated, "With each directive issued you have openly expressed your inability to carry out the directives given inclusive of explanations as to how this process would not be effective for you. You proceeded to openly debate your position each time.... The decision to continually be resistant to the timely execution of assignments issued by administration clearly represents insubordination." While Prainito had complained in the staff meetings about Grandison's directives, nothing in this record indicates that Prainito refused or threatened to refuse to follow her orders. I find that this reprimand was issued to Prainito because of her protected concerted activities at the October 13 and 14 staff meetings.

Grandison disciplined Prainito three other times between October 14 and her termination on October 28. On October 14, Prainito received a counseling memo for supposedly being in her classroom, instead of the hallway, between classes. Prainito denied doing this. On October 24, Prainito was reprimanded for leaving her class alone during an assembly without notifying an administrator, even though dean of students Jackson saw but did not question her departure from the room and Prainito was not given the opportunity to explain why she left. On October 26, Prainito was reprimanded for not turning in her attendance book, although Grandison knew that she had spoiled her first book and did not have another one. The reprimand also cited her for not tracking attendance correctly, and stated that her attendance "was not delivered in a timely manner." Prainito admitted turning in her attendance records in a binder, but there was no evidence that her records were incorrect or late. I find the reasons given by Grandison for these disciplinary actions to be pretextual. I conclude that Grandison's true intent was to punish Prainito for her comments at the October 13 and 14 staff meetings and for being among the

teachers who complained about Grandison outside of staff meetings. I conclude, therefore, that Prainito was terminated for engaging in concerted activity protected by PERA and the LMA.

Domenick Risola

By the time Risola was hired in January 2006, the MEA had begun actively organizing teachers at the Academy. Risola was among the high school teachers who supported the organization drive. By the end of January 2006, ITS admittedly was aware that a union was attempting to organize its teachers. In early March, Risola identified himself as a union supporter when he told dean of students Galbraith that things like problems getting supplies and administrator trips to Aruba would not be happening if the school had a union. Risola testified, without contradiction, that in March 2006 Galbraith threatened to terminate him if he continued talking about the union. Thus, Charging Parties met their burden of establishing that Risola engaged in union activity and that ITS knew about the union activity and was hostile toward it.

ITS hired Risola with a substitute permit, with a contract stating that Risola was to provide proof by March 1 that he had satisfied the requirements for certification in Arizona and his Arizona application was pending. Risola did not comply with the terms of his contract. However, ITS did not remove Risola from his classroom until April 23, after it had learned of his union sentiments and after the MEA had filed its election petition. Risola was terminated several weeks later, about a week before the union election. I find that the evidence supports a finding that Risola's union activity was a motivating factor in his termination.

As noted above, Risola did not comply with the requirement of his contract that he prove that he was eligible to be certified as a teacher in Arizona by March 1, 2006. ITS has a responsibility to ensure that its teachers are certified in Michigan to teach the subjects to which they are assigned or hold appropriate teaching permits issued by the MDE. On March 1, Risola was filling a regular teaching position at ITS even though he had not yet even formally received his teaching degree and had only a substitute permit. ITS had a legitimate reason to terminate Risola, or remove him from his regular classroom, at that time. However, it allowed Risola to remain in his classroom until April 23. On April 27, ITS refused to return Risola to the class he had been teaching all semester, despite the fact that Risola now had his Arizona certification and the fact that ITS had already applied for a one year permit for him. I conclude that ITS did not demonstrate that it would have terminated Risola in the absence of his union activity. Based on the evidence as a whole, therefore, I conclude Risola was unlawfully terminated because of his union activity in violation of Section 10(1) (a) and (c) of PERA or Sections 16(1) and (3) of the LMA.

Summary of Conclusions of Law:

I conclude that Respondent ITS violated Section 10(1) (a) of PERA or Section 16(1) of the LMA by discharging Kelli Childs on October 25, 2005, and Tammy Willinger-Frederick and Marie Prainito on October 28, 2005, because they engaged in concerted activities protected by Section 9 of PERA or Section 8 of the LMA. I also conclude that ITS violated Sections 10(1) (a) and (c) of PERA or Sections 16(1) and (3) of the LMA by discharging Domenick Risola on May 8, 2006 because of his union activities. I find that Charging Parties did not establish that Cain

was discharged because of her union or other activities protected by PERA or the LMA. In accord with these conclusions of law, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Innovative Teaching Solutions, Inc., its agents, co-employers and successors, are hereby ordered to:

1. Cease and desist from discharging employees because of their union or other concerted activities protected by Section 9 of PERA and Section 8 of the LMA or in any other manner interfering with, restraining, coercing employees in the exercise of the rights guaranteed them by those statutes.

2. Take the following affirmative actions to effectuate the purposes of the Act:
 - a. Within fourteen days of the date of this order, offer Kelli Childs, Tammy Willinger-Frederick, Marie Prainito and Domenick Risola unconditional reinstatement to teaching positions they would have held in the absence of the unlawful discrimination against them, including all rights and privileges they would have enjoyed had they not been unlawfully terminated.

 - b. Make Kelli Childs, Tammy Willinger-Frederick, Marie Prainito and Domenick Risola whole for any loss of pay they may have suffered as a result of their unlawful terminations by paying them the amounts they would have earned in wages and benefits from the date of their discharges to the date of their reinstatements or rejections of Respondent's unconditional offers of reinstatement, minus any interim earnings, plus interest on the amount owed at the statutory rate of six percent (6%) computed annually.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____