STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CLARENCEVILLE SCHOOLS,
Public Employer - Respondent,

Case No. C08 J-219

- and -

CLARENCEVILLE PARAPROFESSIONAL ASSOCIATION,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Secrest Wardle, by Dennis R. Pollard, for the Respondent

Lee & Correll, by Michael K. Lee, for the Charging Party

DECISION AND ORDER

On February 3, 2011, Administrative Law Judge David M. Peltz issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CLARENCEVILLE SCHOOL DISTRICT,
Respondent-Public Employer,

Case No. C08 J-219

-and-

CLARENCEVILLE PARAPROFESSIONAL ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Thurn Law Firm, P.C., by Dennis R. Pollard, for the Public Employer

Law Offices of Lee & Correll, by Michael K. Lee, for the Labor Organization

DECISION AND RECOMMENDED ORDER ON ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on April 17, 2009, before David M. Peltz, Administrative Law Judge of the State Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties on or before June 8, 2009, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On October 15, 2008, the Clarenceville Paraprofessional Association filed an unfair labor practice charge against the Clarenceville School District. The charge, as amended on April 8, 2009, alleges that the Employer violated Sections 10(1)(a) and (c) of PERA by laying off seven members of the bargaining unit shortly after Charging Party became the certified representatives of the school district's paraprofessional employees.1 The charge further asserts that after the layoffs, the school district hired new paraprofessionals instead of recalling the bargaining unit members whose

1 The Union is only seeking relief as to five of the seven bargaining unit positions eliminated by the school district.

positions had been eliminated. According to the charge, Respondent justified its decision to employ candidates outside the district by asserting that the new paraprofessional employees were "highly qualified" under Title I, whereas the individuals who had been laid off lacked that certification. The charge alleges that the district's explanation for its actions was pretextual because the new paraprofessionals were not actually "highly qualified" at the time of hire, but rather they were given the opportunity by the district to attain that status while holding the positions, an opportunity not afforded to Charging Party's members who had previously been laid off.

Findings of Fact:

Following an election conducted by the Michigan Employment Relations Commission, Charging Party was certified on April 29, 2008 as the exclusive bargaining representative of all full and regular part-time paraprofessionals employed by Respondent. Shortly thereafter, in June of 2008, Pamela Swert, the district's superintendent, proposed to the school board that it eliminate a number of positions throughout various bargaining units due to declining student enrollment and for other reasons relating to Respondent's finances. Specifically, Swert recommended that the district eliminate one administrator position, one custodian, seven paraprofessionals and one combined teacher/paraprofessional position within the teacher bargaining unit. The school board accepted all of Swert's recommendations and passed a resolution effectuating the layoffs. 2

In August of 2008, Respondent promoted one of the paraprofessionals in Charging Party's unit, Brian DeCaire, to a teaching position. DeCaire's primary duty as a paraprofessional had been to work with a special needs child who had a history of erratic behavior. The child, a ten-year-old boy, was originally cared for by various female paraprofessionals. However, the child grew increasingly violent and difficult to handle. At the recommendation of the classroom teacher, responsibility for the boy was transferred to DeCaire. When DeCaire was promoted, Swert sought to fill the position with another male paraprofessional. Because all of the paraprofessionals on layoff were female, the superintendent hired an outside candidate, John McAskin, a certified teacher and paraprofessional with experience dealing with special needs children. When McAskin is absent from work or busy with other tasks, the child is cared for by lunch aides, all of whom are female.

Around the same time that McAskin was hired, Swert learned that additional funds had become available under Title I, a federal program which provides supplemental funding to qualifying schools. Paraprofessionals working in Title I positions provide one-on-one tutoring if such tutoring is scheduled at a time when the student would not otherwise receive instruction from a teacher, assist with classroom management, conduct parental involvement activities, provide instructional assistance in a computer laboratory, provide support in a library or media center, act as translators or provide instructional support services under the direct supervision of a teacher.

The No Child Left Behind Act (NCLBA) of 2001 mandates that all teachers and paraprofessionals employed in schools supported by Title I funds be "highly qualified" to perform such work. Pursuant to the NCLBA, paraprofessionals hired prior to January 2002 had until June 2006 to attain highly qualified status. Paraprofessionals hired after January 2002 must be highly

2 The layoff of the custodian became unnecessary when the individual holding that position suffered an accident which prevented him from continuing to work.

qualified at the time of hire. In order for a paraprofessional to be highly qualified, he or she must have completed sixty credit hours of college course work, have an associates degree or higher or demonstrate knowledge of, and the ability to assist in, instructing reading, writing and mathematics. The latter can be demonstrated by the passage of the WorkKeys test.

Upon learning of the additional federal funding, Respondent identified the need for two Title I paraprofessional positions. Initially, the district looked to fill the positions by recalling the paraprofessionals who had been laid off several months earlier. According to Swert, only two of the seven paraprofessionals who were on layoff status, Jody Griffin and Kathy Fife, met the highly qualified standard and, thus, were eligible under the NCLBA to perform Title I work.3 Swert first offered the positions to Griffin and Fife, but neither agreed to return to work. Fife turned the job offer down flat, while personal issues prevented Griffin from accepting the offer. Because none of the remaining laid off paraprofessionals were highly qualified or had experience performing Title I work, Respondent filled the two new positions with candidates from outside the district who had highly qualified status.

Sometime during the fall of 2008, Respondent became aware that two of its remaining paraprofessionals, Sharon Harding and Penny White, had been working for Respondent in Title I positions despite the fact that neither had attained highly qualified status. Harding and White were both longstanding employees of the school district and members of the bargaining unit represented by Charging Party. Rather than terminate their employment, the district asked them to immediately take the WorkKeys test in order to attain highly qualified status. However, the Union expressed to Swert its concern that the paraprofessionals were being asked to take the test without being provided study materials and time to prepare for the exam. In response, the district delayed administration of the test so that Harding and White could have an opportunity to study. In order to avoid violating the NCLBA, the district did not pay Harding and White with Title I funds during the period in which they were preparing for the test. Both Harding and White passed the test on or before January 2009 and thereafter continued to work for Respondent as Title I paraprofessionals.

In November of 2008, the parties were in the process of negotiating an initial contract covering the paraprofessional bargaining unit. During one bargaining session, Gail Nelson, a paraprofessional with the school district and current president of the Union, asked assistant superintendent David Bergeron why the layoffs of paraprofessionals had occurred. According to Nelson, Bergeron responded by stating that he could "clean house" and that the district had the right to layoff whoever it wanted. Nelson testified that Bergeron further asserted that the layoffs had been implemented in random order and that some paraprofessionals were better than others. Robert Schindler, an attorney for the school district who began attending bargaining sessions in November of 2008, denied that Bergeron made any reference to "cleaning house."

Arguments of the Parties:

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3 MEA executive director Laurie Moore testified that there were other paraprofessionals on layoff who were highly qualified, but were not recalled. However, Moore did not identify those individuals by name, nor did Charging Party offer any other evidence to contradict Swert's specific and credible testimony regarding the qualifications of the paraprofessionals who had been laid off.

Charging Party asserts that the school district engaged in unlawful discrimination in violation of PERA by laying off seven members of the bargaining unit in June of 2008. According to Charging Party, anti-union animus is established by the fact that the layoffs occurred just weeks after the Union became the certified bargaining representative of the district's paraprofessionals. Charging Party contends that this cannot be "mere coincidence" because if layoffs were truly a possibility, the district would have indicated this prior to the end of the 2008 school year. The Union further asserts that Respondent's actions following the layoffs "cast a serious doubt on the legitimacy of its decision." In support of this contention, the Union refers to the statement allegedly made by assistant superintendent Bergeron at the bargaining table which, according to Charging Party, establishes Respondent's "hostility" toward the Union. In addition, Charging Party asserts that the school district's stated explanation for the layoffs, financial difficulties, is unpersuasive given that Respondent hired new paraprofessionals not long after implementing the layoffs, rather than recalling the bargaining unit members whose positions had been eliminated.

Respondent asserts that the charge should be dismissed because the Union failed to meet its burden of establishing anti-union animus on the part of the school district or showing any causal connection between Charging Party's protected union activities and the disputed employment actions. Respondent denies that Bergeron ever made a statement asserting that the school district could "clean house". The district also disputes Charging Party's contention that the alleged statement constitutes proof of anti-union animus. With respect to the new positions which came into existence after the layoffs, Respondent asserts that its hiring and recall decisions were based solely on legitimate business practices and were intended to ensure that the positions were filled with individuals qualified to perform the work in question.

Discussion and Conclusions of Law:

The elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Univ of Michigan,* 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra,* 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707. Once the prima facie case is met, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419. See also *MESPA v. Evart Public Schools,* 125 Mich App 71 (1983).

In the instant case, protected activity and knowledge are established by the recent election and certification of Charging Party as bargaining representative of the paraprofessionals employed by the school district. Charging Party has, however, failed to sustain its burden of proving that the elimination of seven bargaining unit positions in June of 2008 was in any way motivated by concerted activity protected under PERA. Although Swert recommended the elimination of the seven paraprofessional positions approximately one month after Charging Party was certified as the

exclusive bargaining representative of the unit, it is well established that suspicious timing, in and of itself, does not warrant an inference of anti-union animus. As the Commission stated in *Southfield Public Schools*, 22 MPER 26 (2009), "[a] temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation." See also *University of Michigan*, 1990 MERC Lab Op 242, 249; *Plainwell Sch*, 1989 MERC Lab Op 464; *Traverse City Bd of Ed*, 1989 MERC Lab Op 556; *West v Gen Motors Corp*, 469 Mich 177, 186 (2003).

In the instant case, there is no evidence linking the June 2008 layoffs to the Union organizing drive, the election or any other activity protected under PERA. In fact, Charging Party's members were not the only employees of the school district impacted by Respondent's cost-cutting measures. In addition to the paraprofessionals, Swert recommended, and the school board approved, the layoff of one administrator position, a custodian and one position within the teacher bargaining unit. There is also nothing in the record to suggest that the election which preceded the layoffs was particularly acrimonious, nor did Charging Party offer any evidence which would indicate that members of the administration harbored ill will toward its employees for voting in favor of the Union. Furthermore, there is no suggestion in the record that those paraprofessionals who were laid off in June 2008 were Union activists or that they played a more significant role in the organizing drive than the paraprofessionals who were retained by the district. Charging Party's assertion that the statement allegedly made by the district's assistant superintendent during contract negotiations establishes union animus or hostility on the part of Respondent is baseless. Even assuming arguendo that Bergeron made such a remark, the statement does not in any way refer to the Union election or certification, both of which occurred several months earlier, nor does the statement contain any threat, real or implied, to retaliate against employees for engaging in protected activity. To the contrary, the statement merely constitutes an accurate recitation of the authority granted to public employers to unilaterally reduce the work force. To infer anti-union animus on these facts would be to engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, *supra*, and I decline to do so here.

The Union contends that Respondent's actions following implementation of the layoffs establish that its stated justification for the elimination of bargaining unit positions was pretextual. Because Charging Party failed to meet its initial burden of establishing that the layoffs themselves were motivated by protected concerted activity, the burden does not shift to the Employer to demonstrate that its rationale was lawful. See e.g. *City of St Clair Shores*, 17 MPER 27 (2004). Even if the Union had established a prima facie case, however, I would find no PERA violation, as Respondent produced credible evidence of a legal motive for its actions.

Swert testified convincingly and without contradiction that the school district had financial concerns in June 2008 which necessitated the elimination of several positions, including some jobs outside of Charging Party's bargaining unit. Although Respondent later hired new paraprofessionals, it did so only after additional federal funding became available and for the specific purpose of filling a vacancy which resulted when the district hired one of the paraprofessionals who had not been laid off as a teacher. Swert explained that Respondent hired outside candidates for the Title I positions because there were only two highly qualified paraprofessionals on layoff status at the time and both of those individuals turned down the district's offer to rehire them. With respect to the special education paraprofessional vacancy, Swert testified

credibly that Respondent hired McAskin based upon its conclusion that the district needed a male paraprofessional to be the individual primarily responsible for working with a difficult and sometimes violent child. While it may be argued that the decision to exclude female candidates was suspect, there is no basis in the record whatsoever to conclude that Respondent's actions were motivated by the exercise of activity protected under PERA. The Employer's conduct in accommodating bargaining unit members Harding and White by allowing them to remain on staff and giving them time to study for the WorkKeys examination further belies Charging Party's contention that the school district harbored anti-union animus to the paraprofessionals as a group based upon their decision to vote in favor of the Union.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: February 3, 2011