STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SCHOOLCRAFT COLLEGE,
Public Employer-Respondent,

Case No. C10 F-147

-and-

RUTH ELLEN SINGER,
An Individual-Charging Party.
_____/

APPEARANCES:

The Danielson Group, P.C., by Kenneth M. Gonko, for Respondent

Law Offices of Margaret Barton, P.C., by Margaret Barton, for Charging Party

DECISION AND ORDER

On November 4, 2011, Administrative Law Judge David M. Peltz issued his 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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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

SCHOOLCRAFT COMMUNITY COLLEGE,
Respondent-Public Employer,

Case No. C10 F-147

-and-

RUTH ELLEN SINGER,
An Individual Charging Party.
_____/

APPEARANCES:

The Danielson Group, P.C., by Kenneth Gonko, for Respondent

Law Offices of Margaret Barton, P.C., by Margaret Barton, for Charging Party

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 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting 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 September 23, 2010, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

Ruth Ellen Singer was employed by Schoolcraft Community College as an Office Assistant. Singer was terminated on April 14, 2010, shortly before she was due to complete her six-month probationary period. The charge, which was filed on June 14, 2010, alleges that Respondent terminated Singer after she was observed by her supervisors having lunch with current and former representatives of the labor organization which represents the College's clerical employees.

Findings of Fact:

Singer began working for the College as a full-time Office Assistant in the Records Office on October 19, 2009. At her orientation, Singer was provided with a copy of the collective bargaining agreement between the College and her bargaining representative, the

Schoolcraft College Association of Office Personnel (SCAOP). Pursuant to the contract, new employees are subject to a six-month probationary period during which they may be dismissed without recourse to the contract subject to the approval of the Executive Director of Human Resources. The College is required under Article VI, Section A of the agreement to evaluate each probationary employee at the end of three months of employment and again upon completion of the probationary period. The reviews are to be completed by the employee's immediate supervisor and signed by the employee.

Charging Party received her three-month performance evaluation on January 13, 2010. The evaluation was conducted by Respondent's Director of Enrollment Services, Nicole Wilson-Fennell. In evaluating Charging Party's work performance, Wilson-Fennell relied on feedback from Singer's immediate supervisor, Assistant Registrar Tracy Miller. The evaluation form used to review Singer's performance contains ten "performance factors" and rates employees on a scale of 5 (excellent) to 1 (unacceptable). Singer's scores ranged from a high of 4 for creativity and interpersonal relations to a low of 3 for perseverance. Her combined average score for all ten categories was 3.44. At the hearing in this matter, Miller characterized the evaluation as a "good review" and testified that Singer had satisfied the "minimum requirements" for the position as of January of 2010. Similarly, Wilson-Fennell testified that there were no red flags concerning Charging Party at the time of her three-month evaluation.

Proposed Schedule Change

The job posting for the Office Assistant position explicitly states that the position requires "flexible scheduling" and that "evenings & weekends may be required." This requirement was emphasized to Charging Party when she interviewed for the position and again during her initial orientation in October of 2009. During her interview, Charging Party assured Miller that because she was divorced and had no children living at home, she was "willing to be very, very flexible."

When Singer started working for the College, the Records Office was open late on Mondays and Thursdays. On those days, Singer worked until 7:30 p.m. On Tuesdays, Wednesdays and Fridays, Singer worked until 4:30 p.m. In November of 2009, the College announced that it would be changing the hours of operation for the Records Office. Miller informed Charging Party of the proposed change on January 13, 2010, just before Singer was scheduled to meet with Wilson-Fennell to discuss her three-month evaluation. Miller advised Charging Party that the schedule change was due to go into effect in June of 2010 and that it might result in Singer having to work until 6:00 p.m. Monday through Thursday. Singer responded that she had an exercise class two nights per week, but that she would "clear her schedule" if necessary to accommodate the change. Miller told Charging Party that if she was concerned about the new schedule, she should raise the issue with Wilson-Fennell.

Charging Party testified that approximately one week after she first discussed the new hours with Miller, an issue suddenly arose which created a conflict with the proposed schedule change. Singer characterized the issue as a personal matter involving her daughter. Singer asked Miller if she could schedule another employee to take her place so that she could leave work at 5:15 p.m. one day per week. Miller told Charging Party that they would discuss the issue at a

later time. Shortly thereafter, Wilson-Fennell called Singer into a meeting and questioned her about the change in circumstances. Charging Party testified that she assured Wilson-Fennell that she would not let the situation with her daughter "throw a wrench in things" and that she would be at work to perform her job if no accommodation could be arranged. According to Charging Party, this was the last discussion she had with her supervisors pertaining to the schedule issue. Charging Party testified that "the issue never came up again" prior to her termination.

In contrast, Miller testified that Charging Party made numerous and, at times, conflicting statements throughout January, February and March which cast doubt on her willingness to be flexible once the new schedule became effective in June of 2010. Miller testified that during a meeting in February, Charging Party indicated that she would be willing to stay at the office until 6:00 p.m. four nights a week, but that she would have to be paid overtime for working the evening hours. According to Miller, Singer explained that she was working another job which she would be willing to quit if the College would provide her with additional compensation. After Miller told Charging Party that the College could not pay her overtime for working until 6:00 p.m., Singer relented and told Miller that she would adjust the hours of her other job to accommodate the new schedule at the College.

Miller testified that Charging Party raised the scheduling issue once again in late February or March. With Miller's permission, Charging Party had asked another employee, Diane Mertern, to work the new evening shift in her place once a week. When Mertern refused, Singer approached Miller and, for the first time, indicated that she had a personal issue with her daughter that she wanted to discuss. Miller told Singer that the Director of Enrollment Services should be involved in the discussion and together they walked to Wilson-Fennell's office. Once there, Singer explained that she attends a weekly appointment with her daughter that must be scheduled on Tuseday or Wednesday evenings. According to Miller, Singer was visibly upset during the conversation and she admitted that she had not been forthright from the beginning about her reasons for needing an accommodation. Singer remarked that she would move her daughter's appointment to Saturdays if an accommodation could not be worked out, but that "it will just mean that I won't have any weekends to go on vacation or anything." Wilson-Fennell concluded the meeting by reminding Singer that the schedule change would not go into effect for several months and advising her to give the situation with her daughter time to resolve itself.

At hearing, Miller testified that she was very concerned about Charging Party's perceived inability to be flexible with her schedule because Singer was the only employee within the Records Office who could be assigned to work during the evening hours. Miller described Charging Party's shifting reaction to the proposed schedule change as a "red flag" and noted that Singer's response was contrary to the assurances she had made about her flexibility when she was first hired. Miller testified, "[The Office Assistant] position demands the late hours and it just was a huge concern of mine considering that one moment, she says I'm good, I'll work the hours, if those are my hours, those are my hours, and then again another issue is raised, and then, okay, those are my hours, and then another issue is raised." Wilson-Fennell also expressed apprehension concerning Charging Party's reaction to the schedule change. While conceding that it is reasonable for an employee to share concerns with her supervisors about new work hours, Wilson-Fennell testified, "I think it became problematic for us . . . when things continued to change, the need for the exception continued to change."

Charging Party corresponded with Miller by email several times regarding the schedule issue, and these written communications were produced by Respondent and admitted into the record at hearing. According to the documents, Charging Party wrote to Miller on January 14, 2010 and recounted the substance of her meeting the prior day with Wilson-Fennell, at which the matter of Singer's work hours was apparently discussed. According to the email, Singer told Wilson-Fennell that while "nothing is impossible", it would be "difficult" for her to work every night until 6:00 p.m. and that she would like "one night during the week to be able to make plans for classes, etc." Later that same day, Singer sent another email to Miller, this time inquiring about the "on call" staff employed by the College. Miller interpreted the message to mean that Singer wanted the College to utilize other employees to work the evening shifts in her place. Miller responded to Charging Party with a message describing how other employees within the Records Office will be affected by the change. Miller also promised to discuss the issue at the next staff meeting.

Singer next wrote to Miller concerning the schedule change approximately two weeks later. In an email message dated January 29, 2010, Singer indicated that she had asked Diane Mertern to work the evening shift for her once a week, but that Merten was unable work those hours. Singer concluded the email by writing, "[S]o I'm kind of throwing it out to you to see if you have any suggestions as to what can be done. I need to leave at the 4:30 time on either Tuesday or Wednesday. Any thoughts? Not trying to be difficult, it's just a dilemma." Miller responded by telling Singer that she would discuss the matter with Wilson-Fennell and get back to her.

On February 1, 2010, Charging Party sent a follow-up email to Miller regarding the impeding schedule change. Charging Party wrote, "I feel I need to tell you the reason I said 4:30 on [the prior] email is because I was thinking in terms of just working the 'standard' 8:00 to 4:30 shift that one day . . . but as I stated this morning, I could leave as late as 5:15. I just didn't want any confusion as to why I said 4:30 on [the prior] e-mail and 5:15 today." Singer also acknowledged to Miller that "running the business comes first" and indicated that, if necessary, she could tell "Jennifer" to reschedule her weekly appointment for Saturdays so as to avoid a conflict with the new schedule.[1] Miller responded that same day by inviting Singer to stop by her office to talk.

Termination

Charging Party's six-month probationary period was scheduled to end on or about April 19, 2010. Sometime in early April, Wilson-Fennell solicited Miller's opinion concerning Charging Party in preparation for the evaluation. Wilson-Fennell testified that she and Miller discussed Singer's work performance on Friday, April 9, 2010 and that the conversation continued on Monday, April 12, 2010. Miller testified that she told Wilson-Fennell that Charging Party arrived for work on time, performed the basic functions of the job in an accurate manner, interacted with her peers and communicated with others in a professional manner. However, Miller also expressed to Wilson-Fennell apprehension concerning Singer's willingness

[1] Neither party elicited testimony identifying "Jennifer" for the record. However, from the context of the message, this was presumably a reference to Singer's daughter.

to work the hours which would be required of her when the schedule change went into effect in June. Although Miller also made reference to several other, seemingly minor, incidents involving Charging Party's work performance, she emphasized at hearing that it was the scheduling issue which was her primary concern.

Around this same time, Miller sent an email to Charging Party confirming that the College would be "moving forward with training [Singer] on how to do sub-waivers", a task for which Singer had not yet received instruction. Singer also received an invitation to assist with the commencement ceremony which was scheduled to occur on May 1, 2010. At hearing, Miller stated that it was to up to Wilson-Fennell to decide whether to retain Singer and that she went ahead and notified Charging Party about the upcoming training because she did not know at the time what Wilson-Fennell would decide concerning Singer's future employment with the College. With respect to the invitation to the commencement ceremony, Miller testified that the document was sent to Singer and all other employees of the Records Office by another department of the College.

At some point in early April, Wilson-Fennell prepared a draft version of Singer's six-month performance review. On Monday, April 12, 2010, Wilson-Fennell had a meeting with her supervisor, Dean Cheryl Hagen, regarding Singer. According to Hagen, the discussion concerned Charging Party's lack of flexibility with respect to scheduling and the fact that her reasons for seeking an accommodation had changed. Hagen testified that she advised Wilson-Fennell to terminate Singer's employment. "I think you know what you need to do," Hagen recalled telling her subordinate. Later that day, Wilson-Fennell had a telephone discussion with Rochelle Schaffrath, Respondent's Coordinator for Labor and Employee Relations. Schaffrath testified that Wilson-Fennell described the various explanations given by Singer in support of her request for an accommodation and expressed concern regarding Singer's apparent resistance to working evenings. Schaffrath testified that she and Wilson-Fennell then discussed whether the College should extend Singer's probationary period or terminate her employment immediately. Wilson-Fennell indicated to Schaffrath that she intended to discuss the matter further with Hagen.

Early the next morning, Tuesday, April 13, 2010, Wilson-Fennell called Schaffrath and stated that after talking things over with Hagen, she had decided to terminate Charging Party. Schaffrath then contacted her supervisor, Cindy Koenigsknecht, Respondent's Executive Director of Human Services, and informed her of the situation. Koenigsknecht testified that she approved of Wilson-Fennell's decision because, as a matter of policy, the College does not retain employees if concerns arise during the six-month probationary period. Koeninsknecht testified that she stressed to Schaffrath the significance of the probationary period in evaluating employees:

> I always kind of liken it to a honeymoon period, and I said this is the best we're going to see with someone. If there is any problem at all during the probationary period, we do not retain someone.
>
> If there [are] concerns, and it sounded like there were a number of concerns, we are not going to retain that person. Quite frankly, the reason for that

> is we have zero turnover at Schoolcraft College. So once the probationary period is over, we have employees that are up to in their eighties still working for us. So we make long-term hiring decisions.

The following day, Wednesday, April 14, 2010, Wilson-Fennell and Schaffrath met with Charging Party and informed her that she was being terminated. When Singer asked for an explanation as to why she was not being retained, she was told by Schaffrath that she was no longer "a fit" for the College. At hearing, Schaffrath testified that she refused to elaborate at the time because Singer was an at-will employee and, therefore, no further explanation was required.

It is undisputed that Charging Party never received a six-month performance evaluation. Wilson-Fennell testified that she did not administer the evaluation or complete the written performance review because the issue had become moot once she made the decision to terminate Singer's employment. According to Wilson-Fennell, this was consistent with Respondent's protocol when an employee is terminated prior to the completion of the probationary period. Wilson-Fennell testified that in such situations, draft evaluation forms and notes made in preparation for the evaluation are not preserved. Her testimony in this regard was corroborated by both Koenigsknecht and Schaffrath. Koenigsknecht testified that in order for a performance evaluation to become part of the College's personnel files, a copy must be given to the employee and signed by his or her supervisors. According to Koenigsknecht, "That doesn't occur if somebody is let go during the probationary period." Similarly, Schaffrath testified that although the contract requires the College to perform two evaluations during the probationary period, there is "no point" to administering a second evaluation if the employee is terminated within the first six months of his or her employment.

Interaction with Union

On or about April 1, 2011, Charging Party attended a meeting of the SCAOP during which there was some discussion concerning the new schedule. When other Union members indicated that the late hours were being divided amongst various employees of the departments to which they were assigned, Charging Party questioned why the same thing was not being done in the Records Office. After the meeting, Singer spoke with a Union representative, Aaron Sheposh, who promised that he would look into the situation.[2]

On Tuesday, April 13, 2011, the day before Charging Party was terminated, Singer had lunch in the College cafeteria with Brenda Levinson and Belinda Ellison. Levinson is the president of the SCAOP, while Ellison is the former Union president. The cafeteria is open to students, staff and the general public. Miller and Wilson-Fennell observed Singer eating lunch with Levinson and Ellison, both of whom were also members of the Union. At hearing, Miller

[2] Charging Party testified that she later learned from a fellow employee, Deborah Gum, that Wilson-Fennell's secretary, Robert Rodriguez, informed Wilson-Fennell that she had spoken at the Union meeting regarding the new schedule. However, neither Gum nor Rodriquez were called to testify at the hearing and there was no other evidence introduced suggesting that Wilson-Fennell was aware of what had occurred at the Union meeting. I afford no weight to Charging Party's testimony concerning this incident, as it constitutes inadmissible double-hearsay.

testified that the incident was not significant in any respect. "It is not taboo or anything," Miller said. "The union President eats lunch with all of the employees. It's no big deal."

Credibility Determination

Charging Party asserts that the testimony of Respondent's employees should be disregarded because there were inconsistencies which, according to Singer, establish a "total lack of credibility" on the part of the management representatives. Although there were some discrepancies in the testimony of Respondent's witnesses, they were minor and, as a whole, not atypical of witness testimony concerning events which took place several months prior to the hearing.[3] The record suggests that Charging Party attempted to minimize the scope of her reaction to the schedule change, while Miller may have exaggerated to some extent how long Singer continued to raise objections to the new hours. Regardless, it is clear that Singer made repeated, often conflicting, statements which called into question her ability or willingness to work the modified schedule. Notably, both Miller and Wilson-Fennell testified consistently regarding Singer's reaction to the proposed schedule change, and Respondent introduced written documentation which substantially corroborated their testimony. Moreover, Wilson-Fennell, Hagen, Schaffrath and Koenigsknecht all testified uniformly and credibly that the final decision to terminate Charging Party's employment was made before Singer was observed having lunch with Union representatives. Based on the substance of their testimony, as well as their demeanor on the witness stand, I found Respondent's witnesses to be reliable and credit their testimony in this matter.

Discussion and Conclusions of Law:

The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility towards the employee's exercise of his or her protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Southfield Pub Schs*, 22 MPER 26 (2009); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. See also *Waterford Sch Dist*, 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems*,1997 MERC Lab Op 530, 551-552. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). See also *City of St. Clair Shores*, 17 MPER 27 (2004); *North Central Cmty Mental Health Services*, 1998 MERC Lab Op 427, 436.

Although the record establishes that Charging Party engaged in Union activity when she spoke on the issue of the new work schedule at a Union meeting on April 1, 2010, there is no

[3] For example, Miller initially disputed Charging Party's assertion that she met with Wilson-Fennell on Monday, April 12, 2010, to discuss Singer's upcoming performance evaluation. Instead, Miller asserted that her meeting with Wilson-Fennell occurred one or two weeks before that date. Later, Miller indicated that she did indeed discuss Singer's work performance with Wilson-Fennell on April 12th, but she clarified that the interaction took place in the hallway and that it wasn't a formal meeting.

reliable evidence proving that Singer's immediate supervisors or any other administrators at the College were aware of her presence at, or conduct during, that meeting. Protected activity and knowledge are arguably established, however, by virtue of the fact that Charging Party was observed by her supervisors having lunch with the current and former presidents of the SCAOP. Nevertheless, I find that Singer has failed to sustain her burden of proving the remaining elements necessary to establish a prima facie case of unlawful discrimination under PERA.

Although anti-union animus may be proven by direct or circumstantial evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of unlawful discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *Charter Twp of Plymouth*, 18 MPER 46 (2005); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. Here, the record contains no direct evidence of anti-union animus on the part of the College, nor is there any evidence in the record from which hostility to Singer's protected rights can reasonably be inferred. To the contrary, the credible evidence on the record establishes that Singer was terminated because of the perception amongst her supervisors that she was not flexible with respect to her work schedule. Whether that perception was accurate, or even reasonable is, of course, not a relevant factor in determining whether Respondent's decision to terminate Singer violated PERA. An employee alleging unlawful discrimination under PERA must establish initially that the adverse employment action taken against her was caused, at least in part, by her union or other protected activities and not simply that the employer's decision was unreasonable, unfair or made without just cause. In the instant case, Charging Party has not met her burden of proving anti-union animus on the part of the College.

In support of her contention that her termination was unlawful, Charging Party relies upon the fact that she was notified of the discharge the day after her lunch with Levinson and Ellison. It is well established that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result 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 Schools*, 1989 MERC Lab Op 464; *Traverse City Bd of Ed*, 1989 MERC Lab Op 556; *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). Had there been credible evidence suggesting the existence of hostility between the College and the Schoolcraft College Association of Office Personnel at the time of the events giving rise to this dispute, perhaps the lunch would carry greater significance. However, the record contains no indication that the relationship between Respondent and the Union was in any way strained in April of 2010 or at any time prior to Singer's termination. To infer that Singer's termination was the result of anti-union animus from the mere fact that Charging Party was observed talking to Union representatives just prior to her discharge would be to engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, *supra*, and I decline to do so here.

Charging Party has also not established that the stated reason for her discharge was pretextual. Respondent's witnesses testified credibly that Wilson-Fennell raised the issue of terminating Singer's employment on Monday, April 12, 2010 during two separate discussions

with Hagen and Schaffrath, and that Wilson-Fennell made the final decision to discharge Charging Party the following day. Wilson-Fennell testified that she notified Schaffrath of that decision during a telephone call early on the morning of April 13, 2010, the day before Charging Party was terminated, and her testimony regarding the timing of the decision was corroborated by both Schaffrath and Koenigsknecht. Given that Respondent had already decided to discharge Singer by the time she was observed having lunch with the current and former Union presidents, there can be no finding that the lunch was in any way a contributing factor in the College's decision. Accordingly, I conclude that Singer has failed to prove that Respondent's actions constituted unlawful retaliation or discrimination in violation of Section 10(1)(a) and (c) of PERA.

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 filed by Ruth Ellen Singer against Schoolcraft Community College in Case No. C10 F-147 is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 4, 2011