STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE STATE UNIVERSITY,
Public Employer-Respondent,

Case No. C10 L-317

-and-

BARBARA A. RICHARDSON,
An Individual-Charging Party.
____/

APPEARANCES:

Linda M. Galante, Assistant General Counsel, for Respondent

Ann Hildebrandt, for Charging Party

DECISION AND ORDER

On June 28, 2013, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondent Wayne State University did not commit an unfair labor practice when it refused to accept Charging Party's individual grievance, and did not discriminate or retaliate for Charging Party's union activities when it issued her a "Less than Satisfactory" performance evaluation. The ALJ found that Respondent did not violate § 10(1)(a) and (c) and § 11 of the Public Employee Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) and (c), and MCL 423.211, as alleged in the first amended charge. The ALJ recommended that the charge be dismissed in its entirety. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Charging Party filed her exceptions and brief in support on August 21, 2013. Respondent's request for an extension of time to file its brief in support of the ALJ's Decision and Recommended Order was granted and Respondent filed its brief on September 10, 2013.

[1] A corrected version was subsequently issued to reflect the accurate case number shown on the initial version of the ALJ's Decision and Recommended Order.

In Charging Party's exceptions, she contends that the ALJ erred in finding that her allegedly negative performance evaluation was not the product of discrimination or in retaliation for her concerted union activity. She also alleges that the ALJ erred in ruling that the performance evaluation would not objectively restrain, interfere with, or coerce a reasonable employee in the exercise of her § 9 rights under PERA. Charging Party did not file any exceptions relating to the filing of grievances.

Respondent argues that Charging Party did not establish a violation of PERA, and that specifically, she did not prove anti-union animus or adverse employment action when she received a "Less than Satisfactory" performance evaluation.

We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the facts found by the ALJ and will only summarize them here.

Charging Party alleges that Respondent violated § 10(1)(a) and (c) of PERA when she received a negative performance evaluation several months after Dr. Mumtaz Usmen, Associate Dean for Research in Respondent's College of Engineering, threatened her in a meeting that took place on October 29, 2009. Also present at the meeting was Michael Anderson, her supervisor, along with others. Charging Party had requested the meeting to explain and defend her use of contractual union release time while she served as local union president, an issue of concern to Anderson. The issue remained unresolved at the conclusion of the meeting, allegedly prompting Dr. Usmen to state that "well, we'll handle this at another meeting." When Charging Party and her union representative queried as to what meeting he was referring, Dr. Usmen said her performance evaluation, which was scheduled for June 2010.

After mutually agreeing on a release time schedule with Anderson, Charging Party continued her union activities unhindered. She went on sick leave from December 2009 to May 2010. Approximately eight months later after she returned from sick leave, when her evaluation came due, Anderson issued Charging Party a performance rating of "Less than Satisfactory." Charging Party took offense to the appraisal and submitted a response, asserting that "This Performance Evaluation is being used as retaliation for my filing grievances against the College of Engineering (COE) practices which violated WSU's Collective Bargaining Agreement with P & A UAW Local 1979 (including a grievance against Mr. Anderson's position as bargaining union erosion, while serving as President of P & A Local 1979.)"

Anderson testified at the hearing that Usmen did not threaten Charging Party at the October meeting, nor did he make any comments suggesting that she would be penalized for her union activities. In addition, Anderson testified that he alone evaluated Charging Party and that Usmen did not influence him in preparing the appraisal.

Discussion and Conclusions of Law:

Unlawful Interference-Section 10(1)(a)

Charging Party alleges that Respondent restrained, interfered with or coerced her in the exercise of her union rights in violation of PERA, MCL 423.210(1)(a). The test of whether § 10(1)(a) of PERA has been violated does not turn on the employer's motive for the proscribed conduct or the employee' s subjective reactions to it, but rather whether the employer's actions tend to interfere with the free exercise of protected employee rights. Section 10(1)(a) does not require proof of anti-union animus. See *Midland Co Rd Comm,* 21 MPER 42 (2008); *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *City of Greenville*, 2001 MERC Lab Op 55; *City of Detroit (Water & Sewerage Dep't)*, 1988 MERC Lab Op 1039; *City of Detroit (Fire Dep't)*, 1982 MERC Lab Op 1220. In determining whether a public employer's statement constitutes a threat in violation of § 10(1)(a), both the content of the employer's statement and the surrounding circumstances must be examined. *Michigan State Univ (Police Dep't),* 26 MPER 36 (2012).

There is no evidence that Usmen's comment and the circumstances which led to the evaluation were events that would interfere with or coerce a reasonable employee in the exercise of her rights under PERA. Usmen did not threaten Charging Party and she was not dissuaded from continuing her union activities for the duration of her position as local union president.

Unlawful Discrimination/Retaliation-Section (10)(1)(c)

Charging Party also asserts that Respondent discriminated and retaliated against her for her union activities in violation of MCL 423.210(1)(c), when Anderson issued what she considered to be a negative evaluation several months after her union activities had been discussed.

The elements of a *prima facie* case of unlawful discrimination under PERA are: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist,* 19 MPER 60 (2006). Union animus may be proven by indirect evidence; however, mere suspicion or surmise will not suffice. Rather, the party making the claim must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703. Additionally, 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 *Southfield Pub Sch*, 22 MPER 26 (2009), aff'd 23 MPER 56 (2010); *West v Gen Motors Corp*., 469 Mich 177; 665 NW2d 468 (2003).

Once the *prima facie* case is met, the burden of going forward then shifts to the employer to demonstrate that the alleged discriminatory action would have occurred even in the absence of

protected activity. However, the full burden of proving that the protected activity was a "but for" cause remains with the charging party. See *City of Saginaw*, 1997 MERC Lab Op 414, 419.

The ALJ properly determined that Usmen's purported comment about continuing the release time discussion at her performance evaluation did not suffice to establish a *prima facie* case of anti-union discrimination. Specifically, the ALJ held that management harbored legitimate concerns about Charging Party's use of the five hours a week that was allotted in the collective bargaining agreement to conduct union business. Respondent expressed its concern that Charging Party was frequently unavailable to assist her peers in the College of Engineering, and that her union business schedule was irregular and not "pre-determined." The ALJ correctly held that because union business conducted during working hours was a contractual privilege, it was entirely reasonable for Respondent to demand that Charging Party obtain her supervisor's approval prior to taking union release time. Respondent's disagreement with Charging Party's position regarding her use of contractual union release time does not, in and of itself, establish opposition to protected concerted activity. To hold otherwise would mean that an employer would be prohibited from protesting any action taken by a union official. PERA was not meant to insulate union officers in this manner. *City of Grand Rapids (Fire Department),* 1998 MERC Lab Op 703.

In addition, the ALJ correctly found that Charging Party's June 2010 "Less than Satisfactory" performance evaluation "does not, by itself, amount to the kind of adverse employment action that constitutes discrimination or retaliation under [PERA]." Despite her disappointment with the overall rating, Charging Party was not demoted, disciplined, reduced in pay or benefits, nor had her job duties been materially changed. Further, Charging Party's allegation that the evaluation would compromise her salary or promotional opportunities was mere speculation and presumption, insufficient to prove discrimination or retaliation. *City of Kentwood*, 26 MPER 40 (2013); *Detroit Symphony Orchestra*, 393 Mich 116 (1974). There is no evidence to support her claim that she "suffered negative consequences affecting her work" or that the evaluation ". . . had repercussions under the collective bargaining agreement for promotional opportunities and for wage (step) increases." For example, she offered no evidence that after receiving the evaluation, she applied for and was denied a promotion, or that she was eligible for but denied a wage increase.

In her exceptions, Charging Party also did not establish how Anderson's alleged failure to follow the correct procedure in evaluating her was discriminatory or retaliatory. Charging Party admitted that there was no contractual requirement that Anderson take certain training in order to evaluate her. Therefore, his alleged lack of training does not violate PERA. Moreover, it is undisputed that Charging Party delayed participation in her evaluation while challenging Anderson's authority and competence to conduct the appraisal. Only after the fact did she provide documentation in an effort to refute the completed evaluation, albeit the documentation made no mention of Usmen's comment some eight months earlier. Further, Charging Party has offered no evidence that Respondent took affirmative action to deny her union time or pay. Anderson, in particular, did nothing more than require a standard schedule for her union release time. The ALJ also properly rejected Charging Party's contention that the evaluation was

negative, finding that she received "fully satisfactory" ratings in most of the categories and did not receive the bottom rung rating of "unsatisfactory" in any area of performance.

Finally, any alleged temporal relationship or proximity between the 2009 meeting and the 2010 evaluation was effectively interrupted when Charging Party went on sick leave for approximately five months, making any causal connection even more tenuous.

Accepting the facts as alleged by Charging Party to be true, Usmen's comment is, at best, ambiguous. Dr. Usmen said that her union business would be discussed further at the next meeting, which would be her performance evaluation. He did not say that the union time issue was going to be considered part of that evaluation. Usmen never said he disliked her, her activities as local president, or even that he disfavored the Union as a whole. His comment was vague and innocuous. Compare *City of St. Clair Shores,* 17 MPER 27 (2004) (anti-union comment by superintendent that he did not like union steward and did not like union blunt and ill-advised but not discriminatory). In the absence of any persuasive evidence otherwise, the Commission concludes that Usmen was basically rescheduling the meeting.

In the same vein, Michael Anderson emphatically denied that he had a problem with Charging Party's status or activities as local union president, and clarified that it was only her schedule that caused concern within the College of Engineering. Moreover, as Anderson testified, Charging Party's evaluation was not jaded by or reflective of Usmen's comment. See *City of Grand Rapids* (*Fire Dep't*) (no suggestion that the evaluation process was tainted by the chief). In fact, Anderson made no reference whatsoever to Charging Party's union activities in her evaluation but instead focused on her position and duties as Budget Analyst II. *Univ of Michigan*, 3 MPER 21066 (1990) (evaluations concerned work product, not union activity).

Charging Party's allegations of interference, discrimination, and retaliation are all baseless, given the benign nature and context of Dr. Usmen's alleged comment in October 2009, several months prior to her evaluation which the Commission concludes was in all respects objective and legitimate.

We have carefully considered all other asserted factual and legal issues raised by Charging Party in her exceptions and find that they would not change the result.

Therefore, we affirm the ALJ's recommended dismissal of Charging Party's unfair labor practice charge and issue the following Order:

ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 15, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE STATE UNIVERSITY,
Respondent-Public Employer,

Case No. C10 L-237

-and-

BARBARA A. RICHARDSON,
An Individual Charging Party.
____/

APPEARANCES:

Linda M. Galante, Assistant General Counsel, for Respondent

Ann Hildebrandt, 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 transcripts of hearing and oral argument, exhibits and post-hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

This case arises from an unfair labor practice charge filed on December 29, 2010, by Barbara Richardson against her employer, Wayne State University ("Respondent" or "the University"). Richardson works for the University as a budget analyst II and is a member of the Professional and Administrative Union, United Auto Workers Local 1979 ("P&A" or "the Union"), which consists of approximately 450 full-time and fractional-time (working 50% of the time or more) employees of the University in professional and administrative classifications.

The unfair labor practice charge alleges that Respondent violated PERA by refusing to accept a grievance which Richardson attempted to file on July 9, 2010 and again on August 5, 2010. The charge further asserts that on October 29, 2009, the University threatened to give Richardson a negative performance evaluation in retaliation for her protected concerted activity,

and that Respondent carried out that threat by negatively evaluating her work performance in a written review dated June 24, 2010.

A hearing was held on January 20, 2012, during which I took oral argument on whether Charging Party's allegation concerning the University's purported refusal to accept Richardson's grievance stated a claim upon which relief could be granted under PERA. With respect to that issue, Charging Party presented the following offer of proof. On or about July 9, 2010, Richardson drafted a grievance asserting that her supervisor was not properly qualified to evaluate her work performance. Although Richardson was a past president of the P&A unit, she was not a Union officer at the time the grievance was drafted. Richardson attempted to submit the grievance on a Wayne State University grievance form, but Respondent's labor relations department refused to accept it. According to Charging Party, management asserted that it would not accept any grievance filed by an individual P&A member. Richardson made another unsuccessful attempt to submit the grievance to the Employer on or about August 5, 2010.

Charging Party contends that the Employer was obligated to accept her grievance pursuant to Article 2(B) of the collective bargaining agreement between the University and the P&A. That section, which is entitled "Union Rights", provides:

> The Employer will not aid, promote or finance any labor group or organization which purports to engage in collective bargaining involving the Employees covered by this Agreement, for the duration of the Agreement, or any extensions thereof. Nothing contained herein shall be construed to prevent any individual Employee from presenting a grievance and having the grievance adjusted without intervention of the Union, if the adjustment is not inconsistent with the terms of this Agreement, provided that the Union has been given opportunity to be preset at such adjustment. The Union may initiate its own grievances for protection and maintenance of this contract.

After considering Charging Party's offer of proof and the arguments set forth by counsel for both parties concerning Respondent's purported refusal to accept Richardson's grievance, I concluded that there were no legitimate issues of material fact and that a decision dismissing that allegation on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit Public Schools,* 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). My findings concerning the grievance issue are set forth in the Discussion and Conclusions of Law section below.

Findings of Fact:

I. Background

Charging Party began working for Wayne State University in February of 1998 as an accountant assistant in the College of Engineering (COE). She was promoted to budget analyst II in 2000. In that position, Richardson's primary function is to ensure that Respondent is in

compliance with requirements governing research grant projects. Richardson approves expenditures, reimbursement requests and purchase requisitions and interacts closely with faculty members.

Richardson was elected president of the P&A bargaining unit in May of 2007. At that time, her immediate supervisor was Gary Zaddach. When Zaddach left the University's employment, Richardson began reporting to Mumtaz Usmen, who was then Respondent's dean of research. When Usmen became the interim dean of the College of Engineering in August of 2009, he transferred responsibility for supervising Charging Party and the other budget analysts to Michael Anderson. Anderson had been employed by the University as a grant contract officer III and was a member of the P&A unit for approximately 10 years until his promotion in 2009 to the position of research support officer.

On October 23, 2009, Richardson sent a letter to Respondent's director of labor relations, Albert Rainey, Jr., asserting that Anderson was continuing to perform bargaining unit work, despite the change in title from grant contract officer III to research support officer. Richardson also discussed the issue personally with Anderson. On November 10, 2009, Richardson filed a written grievance asserting that the University had removed work from the bargaining unit in violation of the collective bargaining agreement. As a remedy, Richardson requested that the University restore the position of grant contract officer III to the P&A bargaining unit.

Richardson testified that her relationship with Anderson went from "friendly" to "adversarial" once she filed the grievance. According to Richardson, Anderson "became very curt, mostly antagonistic. We could not even talk about work hardly or anything." She further described Anderson's attitude toward her as "more combative." Anderson disputed Richardson's testimony, claiming that his relationship with Charging Party was difficult even before she filed the grievance. Anderson asserted, "I've always had an issue with talking with Barbara or [a] problem with talking with her. That did not change. I still had the same problem."

II. Dispute Over Union Release Time

The collective bargaining agreement which was in effect at the time Richardson took office as president covered the period August 1, 2008 to July 31, 2012. Article 2, Section D of the agreement covers release time for union officials and provides, in pertinent part:

> The Employer recognizes the responsibilities imposed on the Union and will grant permission and a reasonable amount of time to the authorized representative of the Union to meet with representatives of the University for the purpose of bargaining, or to investigate and present grievances as provided in the Grievance Procedure. The Union Representative shall give his/her Administrative Unit Head as much advance notice as possible of date, time and purpose of such needed released time. The privilege of authorized Union personnel leaving their work during working hours without loss of time or pay is subject to the understanding that the time will be devoted to the handling of such business.

> In addition to the time off to meet with representatives of the University as specified above, the Union President will be given a total of five (5) hours off per week with pay to transact affairs of the Union . . . . Any alleged abuse by either party with respect to the amount of time or the number of authorized representatives of the Union involved will be a subject for a Special Conference of representatives of the Employer and the Union.

Before Anderson became her supervisor, Charging Party reported her use of Union release time on a calendar hung on an office wall. In October of 2009, Anderson removed the calendar from the office wall and instructed Richardson to enter her time off on a spreadsheet. In addition, Anderson informed Richardson that she would no longer be permitted to utilize "flex time." Richardson had previously been allowed to stay after hours or work weekends in order to make up for the time spent on union activities. Richardson testified that Anderson complained that she was spending too much time away from work conducting union business and that the situation "was going to have to change." According to Richardson, Anderson indicated that she would need supervisor approval before she could take time off to represent P&A members on grievance issues. Richardson testified that Anderson insisted that she use only the five hours allotted for in the contract and that she pick a specified block of time each week in which to schedule such meetings.

Around this same time, Anderson exchanged emails with Richardson regarding several issues, including her use of flextime and Union release time. In one email message, Anderson outlined what he characterized as the University's "official response" concerning these issues. That message provides, in pertinent part:

> As it relates to Item 1: As we verbally discussed after my first email; there was never an issue with regards to flextime. Your start time of 11:00am (or thereabouts) does not benefit the COE. Your previous time schedule, 9:30am to 6pm was (and still is) acceptable. Your availability to meet with faculty and other staff is part of your role, and duties & responsibilities as a WSU Budget Analyst and every effort should be taken to ensure that you are available. Yes, COE does acknowledge flextime and provides that option to it's [sic] personnel, when possible. However, according to Article 6 Management Rights, management has the right " . . the supervision of all operations, the methods, processes, means, time, place and personnel by which any and all work will be performed . . ." Respectfully, management has the right to set employee start times.
>
> Resolution: We have consulted, and you are being notified that you are to report for work at 9:30am each scheduled workday. Your schedule will be 9:30-6pm (Mon-Fri) with a 1 hour lunch, beginning Monday, November 2, 2009. Under these circumstances, this is the most we can flex away from the standard 8:30am start time. Please plan accordingly.

> As it relates to Item 2: yes, the union contract does provide for the five hours for the handling of bargaining and grievance matters. The contention has been that the time you have been taking for union business may have been excessive.
>
> Resolution: That the following will be implemented: 1) you will establish a pre-determined 5 hours block of time, weekly, in which to conduct union business from your union office, based on the 5 hours as documented in the union contract (i.e. Wednesdays from 1:00pm – 6:00pm). This not only offers all parties a "standardized schedule", but also allows COE, P&A, and your union members to plan, knowing that your availability is based on that pre-determined schedule. Which day of the week and the time span (morning or afternoon) can be mutually agreed upon, but the new (5 hour block) schedule will begin on the week of Monday, November 2, 2009. 2) COE intends to grant you permission and a reasonable amount of release time with pay (in addition to the 5 hours off (with pay) that the contract gives the Union President). As noted in the contract, Article 2, paragraph (D); Requests for additional time off call for " . . . as much advance notice as possible of date, time, and purpose of such needed released time." These requests still need to be in writing (in advance whenever possible) and are subject to COE approval, based on current workload(s), deadlines and operational needs. Every effort will be made to accommodate your requests. The format of your requests for release time can be mutually agreed upon. 3) Even though it is an internal issue, it may be wise for you to explore the possibility of delegating some of your current responsibilities to other P&A officials, to help with your workload.
>
> As it relates to Item 3: as discussed in the previous email, COE has rescinded the verbal agreement you had with the previous business manager. That verbal agreement may have worked well for your previous manager, but it is no longer beneficial to COE. The issue here really does come down to availability and workload. COE is not trying to hamper or impend [sic] your responsibilities as Union President; however there must be resolution to this matter to ensure that the needs of both COE (and P&A) are being addressed.
>
> Resolution: See response above to Item 1 . . . COE is willing to work with you on accommodating your schedule, just not to the level you are currently engaged. Working consistently to make up time (to get the work done), after regular business hours, taking vacation leave to cover release time during work hours, or coming in on weekends (as stated by you) are not acceptable practices that COE condones or wishes to continue.

Richardson did not agree with what she perceived as an attempt by Anderson to limit her Union release time to five hours. Accordingly, she requested a meeting with management to discuss the matter further. The meeting was held on October 29, 2010. In attendance on behalf of the Union were Richardson, UAW International representative John Cunningham and P&A

vice president Charles Plater. The University was represented at the meeting by Anderson, Usmen and Simon Ng, the University's interim dean of research.

According to both Richardson and Cunningham, management's position during the meeting was that Richardson would be limited to five hours, one day a week for Union activity, with no possibility of there being any additional time allotted to meet with members on grievance matters. Cunningham testified that Usman repeatedly stated that the COE "comes first" and that management wants her "there at work." According to Cunningham, the Employer representatives emphasized that management was entitled to know where Richardson was during work hours and that she should be required to keep a schedule.

At the hearing, Anderson denied that management expressed any intent to limit Richardson's use of Union release time to only five hours per week. Anderson testified, "The problem with Ms. Richardson had to do with we never know when she was coming in and whether or not she would be working the full day." Anderson testified that Respondent merely wanted to know in advance when she would be off work on Union release time. With respect to unplanned appointments, Anderson testified that he wanted Richardson to notify him before leaving her desk for P&A business.

The parties were unable to come to an agreement on a plan to resolve the dispute over Union release time. Richardson testified that the sticking point was Respondent's insistence that management must preapprove her use of release time. After discussing the matter for more than thirty minutes, Usman stood up and told the Union representatives in attendance that the issue would be addressed further "at another meeting." Since there was no other meeting scheduled at that time, Richardson asked Usman to clarify his comment. Usman indicated that he was referring to Richardson's performance evaluation. Richardson and Cunningham immediately expressed concern that a performance evaluation was not the appropriate forum at which to discuss such matters. Usman did not respond to the Union's protestations. Rather, the parties exchanged greetings and the meeting concluded. Following the meeting, Richardson and Anderson came to a partial agreement on the scheduling of Union release time. The parties resolved that Richardson would use the five hours specified in the collective bargaining agreement in increments of one hour per day.

Michelle Burns was the president of P&A Local 1979 from 2004 to 2007 and also previously served as chair of the union's grievance committee. Burns was reelected P&A president in May of 2010 and she remained in that position at that time of the hearing in this matter. Burns testified with respect to how the union has historically interpreted the contact's release time provisions. Burns asserted that the P&A has always attempted to constrain union business to the five hours per week allotted for in the collective bargaining agreement and that, consistent with the language of the contract, any additional release time is subject to management's prior "approval and understanding." According to Burns, the union representative must provide his or her supervisor with "very specific information" concerning the need for additional time off. Burns testified further that she routinely consults with her supervisor before utilizing even the time specifically set forth in the contract. Burns asserted,

"Even when I need the five hours, there's a conversation that I have with my immediate supervisor as to when is the best time to use the five hours, do I need to space it out, and always as a part of that conversation [is whether] my responsibilities at work are settled and able to be done."

III. Performance Evaluation and Aftermath

Prior to the events giving rise to the charge, the annual performance evaluation process typically began with Richardson, at the request of her supervisor, drafting a summary of her major duties and responsibilities. The supervisor would then utilize that summary in completing his written review of Richardson's job performance. Richardson was always given an opportunity to discuss the evaluation with her supervisor before the performance review was finalized.

On June 2, 2010, Anderson notified Richardson and other employees under his supervision by email that performance evaluations were due later that month. Anderson instructed his staff to fill out the required portion of the evaluation form and return the documents to him by June 7, 2010. Anderson indicated in the email that he would "then prepare the other pages and review with each of you for comments, input, etc." Richardson testified that she did not immediately complete her portion of the review because she was concerned that Anderson had not been properly trained to conduct evaluations. She raised those concerns with Ng, who promised to look into whether the evaluations could be delayed until after Anderson had undergone the necessary training. Richardson did not hear back from Ng. On or about June 7, 2010, Anderson sent an email to his staff reminding them that he needed the completed review forms back by that evening. Richardson again contacted Ng, who informed her that the evaluation process would go forward and that Usmen wanted 100 percent employee participation in the process. Richardson testified that she immediately went to Anderson's office to request a meeting to discuss her review, but was told by Anderson that it was too late and that he had already submitted the evaluation. According to Richardson, Anderson asserted that University policy required him to submit the evaluation without employee consultation because she had failed to complete her portion of the review form. Richardson further testified that Anderson refused to provide her with a copy of the completed evaluation.

At the hearing in this matter, Anderson initially insisted that Richardson had indeed completed the first part of the performance review listing her major duties and responsibilities herself and that he and Cheri Nowak, the associate director of Respondent's human resources department, met with Richardson to review the completed evaluation form before he signed the document on June 24, 2010. Anderson later admitted that the meeting with Richardson and Nowak occurred later that summer and that he, in fact, never met with Richardson before submitting the performance evaluation to the University. Anderson testified that he completed the "duties and responsibilities" portion of the review form himself without any input from Richardson because she failed to return the employee portion of the evaluation to him by the June 7, 2010 deadline. Anderson testified that he evaluated Richardson utilizing the duties and responsibilities set forth by the other budget analysts on their evaluation forms.

The evaluation form utilized by Respondent sets forth various job performance categories such as "quality of work", "productivity/accomplishment" and "dependability", along with an overall performance rating. Employees are ranked for each category on a five-step scale ranging from "unsatisfactory" to "outstanding." From the time she started working for Respondent, Richardson had always received performance ratings ranging from "fully satisfactory" to "outstanding." Richardson's 2010 evaluation was signed by Anderson and dated June 24, 2010. Anderson gave Richardson a "fully satisfactory" rating in five of the nine individual categories listed on the form. Richardson's job performance was deemed "less than satisfactory" in the other four categories. Richardson received an overall performance rating of "less than satisfactory" with the following comments from Anderson:

> Ms. Richardson is knowledgeable and very much aware of her responsibilities, however she has not displayed a willingness to be a "team player." This has lead to confrontations and alienation among her "customers" (faculty and other administrators) as well as her counterparts and peers. While her knowledge base could be a tremendous asset to COE, her interaction with others are [sic] often adversarial and not conducive to the business matters that arise in COE.
>
> Note: Ms. Richardson has opted not to participate in the performance review process. She was notified (by email), 5 days prior to the COE deadline date and did not respond verbally or in writing to the supervisor of record.

After receiving a copy of the evaluation from Respondent's human resources department, Richardson asked Nowak to set up a meeting with Anderson. The meeting was held in early July of 2010 and attended by Richardson, Anderson and Nowak. In response to questions from Richardson concerning the substance of the review, Anderson asserted that he had received complaints about Richardson's job performance from University faculty and staff. Richardson testified that this was the first time that Anderson had ever mentioned such complaints.[2] For his part, Anderson testified that he met with Richardson and the other budget analysts several times during the fall of 2009 to discuss various complaints about their work. According to Anderson, the complaints concerning Richardson mostly related to her accessibility to University staff and her ability to complete her work in a timely manner. Anderson described his discussions with Richardson and the other budget analysts as "challenging" and "problematic," primarily because the analysts were resistant to changes implemented by Anderson when he took over as supervisor.

In August of 2010, Richardson submitted a written statement listing her objections to the evaluation, along with a description of her major duties and responsibilities and documentation purportedly refuting Anderson's evaluation of her job performance. Ng then conducted a second

[2] A supplemental letter of agreement between Respondent and the Union concerning performance management provides that "performance appraisals should not contain surprises."

review of Richardson's evaluation. Anderson did not participate in this later review, which resulted in Ng signing off on the earlier evaluation on August 2, 2010.

Discussion and Conclusions of Law:

I. Refusal to Accept Grievance

Charging Party contends that the University violated Section 11 of PERA by failing to accept the grievance which she attempted to file in July and August of 2010. Section 11, MCL 423.211, provides:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

It is well-settled that Section 11 of PERA is permissive rather than mandatory in nature. Under the Section 11 proviso, an employer may agree to process an individual grievance if it chooses to do so, provided that the bargaining agent is permitted to be present, but it does not obligate an employer to process such a grievance. *Detroit Fire Department*, 1995 MERC Lab Op 604 (no exceptions); *Muskegon County Wastewater Management System*, 1995 MERC Lab Op 377; *Detroit Wastewater Plant*, 1994 MERC Lab Op 884, 885, 887, 889; and 1993 MERC Lab Op 793, 794, 797; *Detroit Licensed Investigators Ass'n (City Of Detroit)*, 1993 MERC Lab Op 328; *Ferris State College*, 1976 MERC Lab Op 811, 814-816; *Traverse City Public Schools*, 1970 MERC Lab Op 285, 294-296. See also *Walled Lake Consol. Schools*, 1995 MERC Lab Op 7, 15-18, where an employer was found to have violated PERA by adjusting an individual grievance without giving the bargaining representative a chance to be present. This same conclusion has been reached by the Michigan Court of Appeals in *Mellon v Fitzgerald Public Schools*, 22 Mich App 218, 221 (1970), and by the federal courts in interpreting Section 9(a) of the National Labor Relations Act (NLRA), the federal counterpart of Section 11 of PERA, in *Broniman v Great Atlantic & Pacific Tea Company*, 353 F.2d 559 (CA 1965) cert den 384 U.S. 907 (1966) and *Black-Clawson Company, Paper Machine Div v Int'l Ass'n of Machinists Lodge 355,* 313 F.2d 179 (CA 2 1962).

Charging Party asserts that the instant case is distinguishable from the authority cited above because the collective bargaining agreement covering P&A members specifically requires the University to accept grievances filed by individual employees. I find this argument to be

lacking in merit for several reasons. First, the contract provision relied upon by Richardson, Article 2(B), essentially codifies the language of Section 11 of the Act which, as noted, does not confer upon individual employees the right to present his or her grievance to an employer without the intervention of the bargaining representative. Even if Article 2(B) can be interpreted as specifically authorizing employees to individually process their own grievances, no PERA claim has been stated based upon the University's refusal to accept Richardson's grievance. The Commission has consistently held that an alleged breach of contract will not constitute an unfair labor practice unless a repudiation can be demonstrated. Rather, such matters are left to the bargaining process or to the contractual grievance procedures. See e.g. *AFSCME Council 25*, 1995 MERC Lab Op 195, 199, 208; *Coldwater Comm Schools*, 1993 MERC Lab Op 94, 96-97. Moreover, because a collective bargaining agreement is a contract between an employer and a union, an individual employee such as Richardson has no standing to bring a claim under PERA arising from an alleged contract breach or repudiation. See e.g. *City of Detroit (Bld & Safety Engineering)*, 1998 MERC Lab Op 359, 366; *Oakland Univ*, 1996 MERC Lap Op 338, 342-343; *Detroit Fire Dep't*, *supra* at 613-615. For the above reasons, I find that the charge fails to state a claim under PERA based upon Respondent's alleged refusal to accept Richardson's grievance.

II. Retaliation for Union Activity

Charging Party alleges that the negative evaluation she received in 2010 was motivated by anti-union animus. According to Richardson, the evaluation was in retaliation for her Union activities, including the filing of a grievance asserting that Anderson was performing bargaining unit work following his promotion.

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to public employees under Section 9 of the Act, including the right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." While anti-union animus is not a required element to sustain a charge based on a Section 10(1)(a) violation, a party must still demonstrate that the complained of actions by an employer have "objectively" interfered with that party's exercise of protected concerted activity. *Huron Valley Sch*, 26 MPER 16 (2012); *Macomb Academy*, 25 MPER 56 (2012).

Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. 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 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. *Huron Valley Sch, supra; Univ of Michigan,* 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. 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. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA, supra*.

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 Pub Sch*, 125 Mich App 71 (1983). The timing of the adverse employment action in relation to the employee's union activity is circumstantial evidence of unlawful motive, and the closer the employer's action follows upon its learning of the union activity, the stronger that evidence becomes. *Mid-Michigan Comm Coll*, 26 MPER 4 (2012) (no exceptions). However, 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).

I conclude that Charging Party has not met her burden of establishing a prima facie case of discrimination. As proof that the 2010 performance evaluation was discriminatorily motivated, Richardson relies primarily upon the comment made by Usmen during the October 29, 2009 meeting. While an employer and its agents may not lawfully threaten, either expressly or impliedly, to penalize employees for the exercise of other protected activity, the remark by Usmen was made in the context of a meeting which appeared to involve legitimate management concerns with respect to Richardson's availability and her understanding of the contract's release time provisions. Although Richardson asserts that Respondent was violating the contract and attempting to infringe upon her protected activity by prohibiting her from using more than five hours of release time per week, that contention is contradicted by the email Anderson sent to Richardson just prior to the special conference. In the email, Anderson explicitly assured Richardson that the University would, consistent with the contract, grant her a reasonable amount of release time beyond the five hours per week agreed to by the Employer and the Union. The record further establishes that Respondent's insistence that Richardson obtain supervisor approval before taking time off for Union business was reasonable. The contract describes release time as a "privilege" and specifically mandates that a Union representative must give his or her supervisor "as much advance notice as possible of date, time and purpose of such needed released time." Moreover, current P&A president Michelle Burns testified that the Union has historically interpreted the contract as requiring the Union president to provide his or her

supervisor with “very specific information” before exceeding the five hours specified in the contract. In fact, Burns, who was president of the P&A both before and after Richardson’s term in office, testified she always consults with her supervisor before taking any time off for Union business.

Even if anti-union animus could be inferred from statements made by Employer representatives before and during the October 29, 2009 meeting, I find that the 2010 performance evaluation does not, by itself, amount to the kind of adverse employment action that constitutes discrimination or retaliation under the Act. In order for there to be an actionable discrimination claim under PERA, there must be proof of some act on the part of the employer which resulted in adverse consequences affecting the charging party’s terms of employment, such as a demotion, diminution of wages, material change in job responsibilities or other tangible consequences. See e.g. *City of Kentwood*, 26 MPER 40 (2013) (no exceptions) (dismissing charge where there was no factually supported allegations that the employer actually took any adverse employment action, or threatened to take such action); *County of Wayne (Jail Health Services)*, 23 MPER 26 (2010) (no exceptions) (counseling memo did not constitute an adverse employment action where there was no allegation that the charging party was disciplined or punished in any way as a result of the memo). Federal courts have defined adverse employment action in the employment law arena as a materially adverse change in the terms and conditions of employment, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Burlington Indus, Inc v Ellerth*, 524 US 742, 761 (1998).

Although adverse employment actions are not limited to pecuniary damages, negative evaluations unaccompanied by some tangible job consequence have generally been found insufficient, as a matter of law, to constitute adverse employment actions for purposes of discrimination or retaliation claims. See e.g. *Blizzard v Marion Technical Coll*, 698 F3d 275 (CA 6 2012) (adverse action not shown where plaintiff produced no evidence to support a conclusion that her performance appraisal reduced her compensation or possibility for future advancement); *Tuttle v Metro Gov't of Nashville*, 474 F3d 307, 322 (CA 6 2007) (a negative performance evaluation does not constitute an adverse employment action, unless the evaluation has an adverse impact on an employee's wages or salary); *Smart v Ball State Univ*, 89 F3d 437, 441 (CA 7 1996) (finding that negative criticism or a poor performance evaluation, unaccompanied by a materially adverse change in terms or conditions of employment, does not constitute adverse employment action). Cf. *Ray v Henderson*, 217 F.3d 1234 (CA9 2000) (adopting EEOC test which focuses on the deterrent effects of the employment action); *Wyatt v City of Boston*, 35 F3d 13, 15-16 (CA1 1994) (adverse employment actions include unwarranted negative job evaluations). The Sixth Circuit has held that in order to prove an adverse employment action, “[a]t a minimum, the plaintiff must point to a tangible employment action that she alleges she suffered, or is in jeopardy of suffering, because of the downgraded evaluation.” *Policastro v Northwest Airlines, In.*, 297 F3d 535, 539 (CA6 2002); *Morris v Oldham Cnty Fiscal Ct*, 201 F3d 784, 789 (CA 6 2000); *White v Baxter Healthcare Corp*, 533 F3d 381, 402 (CA 6 2008). See also *Lake Forest Professional Firefighters Union, IAFF, Local 1898*, 29 PERI 52 (2012), in which the Illinois Labor Relations Board affirmed the conclusion of its ALJ that no adverse

employment action had been established where the union failed to demonstrate that the City's negative comments in an evaluation had any effect on the employee's terms and conditions of employment.

In the instant case, the 2010 evaluation, while critical of certain aspects of Richardson's job performance, cannot objectively be characterized as negative. Richardson received a "fully satisfactory" rating in more than half of the individual categories presented on the evaluation form. Although her job performance was characterized as "less than satisfactory" in four categories, Richardson did not receive any "unsatisfactory" ratings, which constitute the lowest level of job performance on the evaluation form utilized by Respondent and which, presumably, would have put her job at jeopardy or impacted the possibility of promotion to another position. Even construed as a negative evaluation, however, Anderson's review of Richardson's work performance was conducted in June of 2010, approximately eight months after Charging Party engaged in the protected activity for which she was allegedly discriminated against. There is no allegation that Richardson was subjected to any incidents of discrimination or retaliation following the October 29, 2009 meeting or at any time prior to the hearing in this matter on January 20, 2012. Despite criticizing Richardson for allegedly abusing Union release time, there is no evidence indicating that Respondent ever denied Richardson time off or failed to compensate her for release time taken. Finally, and perhaps most importantly, Richardson has not asserted that as a result of the 2010 performance evaluation, she was demoted or disciplined, nor does she claim to have suffered any loss of pay or benefits or been subject to any material change in job responsibilities due to the evaluation. Under these circumstances, I find that the record is insufficient to establish that the 2010 evaluation constituted retaliation for Richardson's union activities. For the same reasons, I find that the evaluation would not objectively tend to restrain, interfere or coerce a reasonable employee in the exercise of her rights under the Act, in violation of Section 10(a)(1).

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 Barbara Richardson against Wayne State University in Case No. C10 L-237 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: June 28, 2013