STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WARREN CONSOLIDATED SCHOOLS,
Public Employer-Respondent,

Case No. C09 A-001
-and- Docket No. 09-0000023-MERC

KATHRYN COMBS, DAWN STROUD,
AND GLENN HYATT,
Individual Charging Parties.
_____/

APPEARANCES:

Collins & Blaha, P.C., by Gary J. Collins, John Kava and Lorie E. Steinhauser (on brief) for Respondent

The Law Office of Eric I. Frankie, PLC, by Eric I. Frankie, for Charging Parties

DECISION AND ORDER

On December 29, 2014, 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: February 20, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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The Law Office of Eric I. Frankie, PLC, by Eric I. Frankie, for the Charging Parties

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 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, 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 matter has a long and complex procedural history with many fits and starts, as explained in detail below. The case arises from an unfair labor practice charge originally filed on January 2, 2009, by Collen Vandermeer, Kelly Elliott, Layla Habhab, Sonia Daniv, Paul Roodbeen, Dawn Stroud, Kathryn Combs, Mike Lang and Glenn Hyatt.[1] The charge asserts that Vandermeer, a school psychologist employed by Warren Consolidated Schools ("Respondent" or "the Employer"), filed a grievance in 2008 challenging the Employer's denial of her request to return to full-time status. According to the charge, the grievance was settled and Vandermeer was brought back to work on a full-time basis pursuant to a Letter of Agreement entered into between the Employer and the

1 The unfair labor practice charge form did not list Hyatt as one of the individual Charging Parties. However, in the attachment to the charge which described the allegations against Respondent in detail, Hyatt was identified as one of the purported discriminates and the school district did not subsequently challenge Hyatt's status as a party in this matter.

Warren Education Association ("WEA" or "the Union"). The charge alleges that in retaliation for the Vandermeer grievance, the Employer, on or about September 3, 2008, eliminated school psychologist positions held by Combs, Stroud and Hyatt, and that as a result of that action, the remaining school psychologists (Vandermeer, Elliot, Habhab, Daniv and Lang) experienced increased workloads, lost prep time and a decrease in compensation. The charge further asserts that Respondent refused to sponsor Habhab's request for U.S. resident status in retaliation for the Vandermeer grievance.

Because it appeared that the WEA and/or the Michigan Education Association ("MEA") might have an interest in the subject matter of the action such that their presence would be essential to permit the Commission to render complete relief, I immediately forwarded a copy of the charge to both labor organizations. The cover letter attached to the charge requested that the Unions contact my office as soon as possible and indicate whether they intended to participate in this matter. On February 17, 2009, MEA staff attorney Daniel J. Zarimba notified the undersigned in writing that the WEA/MEA had no interest in taking part in this litigation. Nevertheless, MEA Uniserv Director Jennifer Miller participated in several prehearing conferences and was called as a witness at hearing.

On January 13, 2009, I issued an order requiring Charging Parties to show cause why the charge should not be partially dismissed on summary disposition. The order specifically directed Charging Parties to address the issue of whether an individual employee may bring a claim under PERA based solely upon the collateral effects of anti-union discrimination or retaliation by a public employer directed against other employees. The order specified that Charging Parties' response was due in a Commission office by no later than the close of business on January 27, 2009. Charging Parties' attorney, Eric Frankie, subsequently sought, and was granted, a ten-day extension of the briefing deadline.

Charging Parties filed their response to the order to show cause on February 9, 2009. Rather than specifically respond to the "collateral effect" issue which I had identified in the show cause order, Vandermeer, Elliott, Habhab, Daniv, Roodbeen, Stroud, Combs, Lang and Hyatt instead sought to amend the unfair labor practice charge to allege that they were all directly subjected to discrimination by the school district in retaliation for Vandermeer's exercise of protected rights. In the amended charge, Charging Parties referenced an alleged admission by supervisor Shari Fitzpatrick concerning the reason that the workload of the psychologists who remained on staff following the layoffs had increased. According to the amended charge, Fitzpatrick wrote in a September 9, 2008, memorandum that the increased workload, lost prep time and lost compensation experienced by the school psychologists was the result of the elimination of psychologist positions.

Following receipt of the response to the order to show cause, I notified the parties that I was not convinced that the allegations in the amended charge stated a viable claim under PERA. For that reason, I directed the parties to appear before the undersigned for oral argument on May 8, 2009. The parties were instructed that to the extent an evidentiary hearing proved necessary, it would commence immediately following the conclusion of the oral argument. The oral argument/evidentiary hearing was subsequently adjourned and rescheduled for June 24, 2009, at the request of the Employer with Charging Parties' consent.

On May 18, 2009, Charging Parties filed a proposed second amended charge. Respondent filed an answer to that charge on June 4, 2009. On that same date, Respondent filed a motion for summary disposition asserting that Charging Parties had failed to plead sufficient facts to establish a prima facie case of unlawful discrimination under PERA. In its motion, the Employer argued that there was no showing that any of the individual Charging Parties had engaged in protected concerted activity. According to the Employer, Vandermeer's attempt to return to work on a full-time basis in 2008 did not constitute protected activity for purposes of the Act because the act was undertaken for the sole purpose of securing a personal benefit. The Employer further asserted that the charge failed to allege any facts which would demonstrate that the school district was motivated by anti-union animus toward Vandermeer or any of the Charging Parties. Finally, Respondent argued that dismissal was warranted on the ground that Charging Parties had failed to exhaust their internal remedies under the collective bargaining agreement by advancing a grievance challenging the increased workload and other changes in working conditions to arbitration.

Following receipt of the motion for summary disposition, I issued an order which stated that rather than immediately proceed to an evidentiary hearing on June 24, 2009, I would instead convene a pretrial conference on that date, to be followed immediately thereafter by oral argument on the Employer's motion for summary disposition. The parties were again instructed that if an evidentiary hearing was necessary, it would commence immediately following the conclusion of the oral argument.

By letter dated June 12, 2009, Charging Parties requested an extension of thirty days in which to respond to the Employer's motion for summary disposition and an adjournment of the June 24, 2009, hearing. Both requests were granted and the hearing was rescheduled for October 5, 2009. Following two additional extensions, Charging Parties filed a response to the Employer's motion for summary disposition on August 5, 2009. In their response, Charging Parties asserted that pursuant to the decision of the Michigan Court of Appeals in *AFSCME v Louisiana Homes*, 192 Mich App 187 (1991), individual employees such as Elliott, Habhab, Daniv, Roodbeen, Stroud, Combs, Lang and Hyatt are protected from retaliation even if they themselves did not engage in protected concerted activity. Charging Parties asserted that a prima facie case of unlawful discrimination had been established because they had presented substantial evidence of management's anti-union animus, as well as a direct link between the 2008 layoffs and Vandermeer's grievance filing. Finally, citing *Bay City Sch Dist v Bay City Educ Ass'n*, 425 Mich 425 (1986), Charging Parties argued that there was no requirement under PERA that they exhaust the contractual grievance procedure in order to bring a retaliation claim under the Act.

The parties convened in Detroit for a prehearing conference with the undersigned on October 5, 2009. During the conference, the parties discussed the terms of a possible settlement agreement which, if finalized, would have resolved the unfair labor practice charge. In order to facilitate further discussion concerning the proposed settlement, the parties agreed to adjourn the evidentiary hearing and reschedule the matter for November 19, 2009. As part of that agreement, Charging Parties promised to provide Respondent with the specific back pay amounts sought for each of the alleged discriminatees, along with supporting affidavits. Pursuant to a subsequent agreement between the parties, the November 19, 2009, hearing date was converted to a settlement conference and the matter was again rescheduled, this time with five consecutive dates in March of 2010 set aside for an evidentiary hearing.

On November 18, 2009, the parties notified the undersigned that they had agreed to cancel the settlement conference scheduled for the following day and adjourn the matter without date pending the issuance of an arbitration decision concerning a grievance filed by the WEA over the increased workload, lost prep time and lost compensation allegedly experienced by the school psychologists. The parties hoped that the issuance of the arbitration award might help in facilitating settlement of the underlying unfair labor practice charge. On or about December 3, 2009, arbitrator William P. Daniel issued a decision denying the grievance on the ground that the Union had not proven by a preponderance of the evidence that the school district had violated any term of the collective bargaining agreement.

Upon receipt of the arbitration award, I scheduled a pretrial/status conference for January 21, 2010. During the conference, the parties reviewed the prior settlement offer and confirmed that a number of the issues set forth in the charge had since been resolved to the satisfaction of the Charging Parties. There was also discussion of a forthcoming change with respect to the supervision of the school psychologists which, both parties agreed, could have a significant impact on resolving the remaining issues. With respect to those issues, I continued to press Charging Parties to provide legal support for their claim that the assignment of additional work to the psychologists following the 2008 layoffs constituted unlawful discrimination for purposes of PERA. I also reminded Frankie of his agreement at the previous prehearing conference to provide information concerning the amount of back pay sought for each of the individual Charging Parties. At the conclusion of the conference, Frankie indicated that he would be out of town beginning in early February. For that reason, and to facilitate the still ongoing settlement discussions, the parties agreed to adjourn the five hearing dates scheduled in March until sometime in the fall of 2010.

Another prehearing conference was held on February 4, 2010. Over the eight months which followed that conference, I received no further updates on the status of the settlement discussions, nor did either party contact my office seeking to have a date scheduled for an additional prehearing conference or evidentiary hearing. Accordingly, as is my usual practice with respect to inactive cases, I issued a "21-Day Order" on October 28, 2010, requesting that Charging Parties notify my office in writing whether they intend to proceed with the charge or have the matter continue in adjourned without date status. A response to this order was due in a Commission office by November 18, 2010. On that date, counsel for Charging Parties filed a request to proceed with the case. In his letter, Frankie suggested that a prehearing conference be convened to "narrow the issues for hearing."

On January 11, 2011, the parties once again gathered in Detroit for a prehearing conference. Frankie confirmed that several of the issues set forth in the charge had either been resolved or rendered moot and that the only matter left to be tried concerned whether the 2008 layoffs were discriminatorily motivated. According to Frankie, two of the school psychologists who had been laid off, Hyatt and Combs, had since returned to work for Respondent. In addition, the parties indicated that Shari Fitzpatrick, the supervisor who had allegedly instigated the actions complained of by Charging Parties, was no longer employed by the school district. Both parties indicated that as a result of Fitzpatrick's departure, the relationship between members of the bargaining unit and management had significantly improved. Collins expressed concern that going forward with a hearing at that time might damage that relationship. Ultimately, the parties agreed not to immediately schedule a new hearing date, but rather to hold another prehearing conference with Miller, the MEA Uniserv Director, present.

By letter dated February 22, 2011, Collins notified my office that Miller was on maternity leave until May 1, 2011. For that reason, the parties agreed to delay the next prehearing conference until Miller was available to participate. The conference was finally held on May 9, 2011, during which I offered the parties two dates in August to commence the evidentiary hearing. Following the conference, on or about May 25, 2011, Charging Parties filed their second amended charge. Around that same time, Collins provided notice that his client was not available for the August dates. By telephone, I directed the parties to consult with each other on new dates in September of 2011 and report back to my office. Thereafter, I received no communication from either party regarding this matter. Finally, on October 25, 2012, I issued another "21-day Order" requiring Charging Parties to indicate whether they still wished to proceed with their charge. Charging Parties responded in a letter to the undersigned dated November 15, 2012. In that letter, Charging Parties requested that another prehearing conference be scheduled.

The parties once again convened in Detroit for a prehearing conference on December 10, 2012. During the conference, questions arose regarding which witnesses would be needed at hearing and the exact nature of their testimony. To ensure that the hearing would proceed efficiently and to avoid duplicative testimony, I directed Charging Parties to file, by no later than the close of business on January 15, 2013, a list of the names of all witnesses expected to testify on their behalf and a summary of the expected substance of the testimony for each witness. Within fourteen days from receipt of that information, the Employer was to similarly file its own witness list, along with a summary of expected testimony. The parties agreed to participate in another prehearing conference on January 31, 2013, for the purpose of setting final hearing dates, reviewing the witness lists and clarifying any additional issues prior to hearing.

On January 15, 2013, Charging Parties filed by fax a list containing the names of 194 proposed witnesses, as well as a request to call "[a]ny and all records Keeper(s) of Warren Consolidated Schools. Full names were not provided for many of the individuals listed by Charging Parties. Moreover, contrary to my directive at the December 10, 2012, prehearing conference, the document filed by Charging Parties did not provide a summary of the expected substance of testimony for any of the proposed witnesses or in any way attempt to explain the possible relevance of the testimony to be given by the individuals listed therein.

On January 18, 2013, I issued an order requiring Charging Parties to show cause why this matter should not be dismissed based upon the failure of Charging Parties to comply in any meaningful respect with the pretrial directive I issued to the parties concerning the production of witness lists. In the order, I noted that it was "simply implausible" that Charging Parties would require such a large number of witnesses in order to present its case and that a MERC hearing involving "even a quarter of that number would, to my knowledge, be unprecedented." I opined that "Charging Parties' conduct in filing such a document, which so blatantly disregards my earlier directive and which seems to have been intended to harass the opposing party and/or cause unnecessary delay or result in a needless increase in the cost of this litigation, can only be interpreted as an abuse of process." I further indicated that any response to the order to show cause must be accompanied by the filing of a proper list containing a "more manageable and rational" number of proposed witnesses. Finally, I noted that the prehearing conference, which had been scheduled for January 13, 2013, was adjourned without date.

Charging Parties did not immediately file a response to the order to show cause or an amended witness list. Rather, on January 24, 2013, Frankie sent a letter to the undersigned, copied to Michael Zimmer, MAHS Executive Director at the time, requesting clarification of the deadline for filing a response to that order. In the letter, Frankie took issue with my conclusion that the witness list filed by Charging Parties constituted an abuse of process and questioned my ability to preside over this case.2

On February 6, 2013, I issued a clarification of the order to show cause, per Frankie's request. I indicated that because it is Charging Parties who are seeking relief in this matter, and given that the Employer had not requested to have a hearing or conference date scheduled, I had purposely left the deadline for Charging Parties to file a response to the order to show cause open ended. I further noted, "This matter will proceed once [Charging Parties] have filed the proper response to the Order." Charging Parties did not file a response to the order to show cause or otherwise communicate with the undersigned regarding this matter until July 17, 2013, when they filed an amended witness list containing the names of six proposed witnesses and a description of the anticipated testimony of each individual listed therein.

On July 25, 2013, Charging Parties filed a proposed third amended unfair labor practice charge. Several days later, on or about August 2, 2013, Respondent filed its own witness list which identified nine potential witnesses, along with a summary of their anticipated testimony. The Employer filed an answer to the third amended charge on August 8, 2013.

On August 14, 2013, I convened a prehearing conference for the purpose of identifying potential hearing dates and discussing the witness lists and third amended charge. At the start of the conference, I indicated to the parties that this case had remained pending for far too long and stressed that an evidentiary hearing must be held as soon as possible. After consultation with counsel, an evidentiary hearing was scheduled for five dates in November of 2013. In order to ensure that the hearing proceeded efficiently, I directed both parties to exchange copies of proposed exhibits two weeks in advance of the start of the hearing.

Following the prehearing conference, Frankie once again confirmed in writing that the only portion of the charge which remained outstanding was the allegation that Respondent laid off Combs, Hyatt and Stroud in retaliation for Vandermeer's efforts to return to full-time status. According to the letter, allegations concerning all other individuals originally named in the charge had been resolved or were moot. In addition, Frankie indicated that there was a scheduling problem with one of Charging Parties' witnesses and that three of the five hearing dates set for November would have to be changed. I immediately sent both parties another list of potential hearing dates and directed counsel to confer with each other and then notify me as soon as possible regarding which dates were acceptable to the parties. On September 27, 2013, the parties indicated that they had agreed upon four hearing dates beginning the second week of January 2014.

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2 By letter dated February 11, 2013, Yasmin Elias, MAHS Administrative Law Manager, responded to Frankie on Zimmer's behalf. Elias indicated that she had reviewed the case file, including the January 18, 2013, order to show cause, and concluded that "ALJ Peltz's conduct in this matter did not reveal any basis for questioning his ability to preside over hearings" and that she was "confident ALJ Peltz will afford both sides a fair opportunity to present and defend their positions."

The hearing was scheduled to commence on January 8, 2014. On January 7, 2014, Respondent requested that the first day of hearing be postponed due to expected extreme weather conditions. Charging Parties consented to the adjournment and the hearing finally began on January 12, 2014. The matter concluded on January 17, 2014, after three days of hearing. The transcript was filed on February 17, 2014, and post-hearing briefs were due on or before March 17, 2014. Following two extensions, post-hearing briefs were filed on behalf of both parties by April 4, 2014.

Findings of Fact:

I. Background

Charging Parties Kathryn Combs (known as Katheryn Cleere at the time of hearing), Dawn Stroud and Glenn Hyatt are all current or former school psychologists employed by the Warren Consolidated School District. Other school psychologists employed by the district include Colleen Vandermeer, Paul Roodbeen and Layla Habhab. The psychologists are part of the school district's Special Education Services Department. Other classifications within the department include speech and language therapists, teacher consultants and social workers. Classifications within the Special Education Services Department are referred to collectively by the parties as "itinerants." The itinerants are part of a bargaining unit represented by the WEA. The unit also includes certified teachers, occupational therapists, counselors, consultants and nurses.

At the time of the events giving rise to this dispute, each psychologist was assigned to particular buildings within the school district. The psychologists were responsible for identifying and evaluating students for placement within the special education program. As part of the evaluation process, the psychologists attended meetings to share the information that they had compiled with parents and other staff members. They also conducted evaluation review meetings to reassess students who were already part of the special education program. In addition to conducting student evaluations, the psychologists were charged with implementing processes to prevent at-risk students from having to enter the special education program. As part of this "pre-referral" phase, the psychologists ran student support groups, attended child study meetings and participated in crisis response teams.

II. Colleen Vandermeer

Vandermeer began working for Warren Consolidated Schools as a full-time school psychologist in 1997. When she became pregnant with her second child, Vandermeer sought and was granted a change to part-time status. The change went into effect at the start of the 2001-2002 school year. At that time, Vandermeer went from a 1.0 full time equivalency ("FTE") to a .6 FTE, which meant that she worked three days per week. There was a corresponding reduction in pay, but Vandermeer's benefits remained the same. She continued to receive health care coverage at the same level as full-time employees without any increase in co-pays. Vandermeer's duties did not change as a result of the reduction in hours; rather, the number of buildings which she serviced was reduced.

At some point in 2006, Vandermeer decided that she wanted to return to working full-time as a school psychologist. She first expressed this desire in an email to her supervisor, Shari Fitzpatrick, dated May 3, 2006. Approximately two weeks later, Fitzpatrick, the Director of Special Education, wrote to Vandermeer and indicated that she would be happy to meet and discuss the issue. No

resolution was reached at that time and Vandermeer continued to contact Fitzpatrick about increasing her hours, both in person and in writing, on an intermittent basis through the end of 2007. Fitzpatrick never gave Vandermeer a definite answer. Rather, Fitzpatrick repeatedly indicated to Vandermeer that she would need to wait on student enrollment numbers and assess whether the budget would allow for such a change. At no point did Vandermeer ever contact the school's human resources department to discuss the issue.3

In 2008, Vandermeer was offered a part-time job by another school district within Macomb County for the two days a week that she was not working for Respondent. Before deciding whether to accept the offer, Vandermeer contact the WEA to determine whether signing a contract with another district would violate the collective bargaining agreement between the Union and Warren Consolidated Schools. She received a return call from Robert Naski, the WEA president, who advised her that the contract did not prohibit her from working for both districts simultaneously. However, Naski questioned why Vandermeer would want to work part-time for another school district instead of working full-time for Respondent. When Vandermeer informed Naski of her desire to return to full-time status and her prior efforts to seek Fitzpatrick's approval for such a change, the MEA agreed to look into the matter for her.

Jennifer Miller, the MEA Uniserv Director assigned to the WEA bargaining unit, testified that there was no basis for filing a grievance over Respondent's failure or refusal to return Vandermeer to full-time status. Nevertheless, Miller testified that the WEA decided to raise the issue with Respondent because the Union had a "really good" relationship with the administration and, for that reason, thought that it might be able to help Vandermeer with her request. Miller explained:

> Colleen and I discussed that there wasn't a basis for a grievance 'cause she hadn't requested from HR to go full time. But I try to be proactive, and so even though we couldn't file a grievance; that there wasn't a contract violation, I still thought maybe that we could work with the District and see if we could resolve the issue because of our relationship . . . . We have very good labor relations. And so I said I would go meet [with the Employer] and see if we could resolve the issue. But there wasn't a contract violation.

Miller proceeded to discuss the issue with management at several of the regularly scheduled meetings between the Union and the school district. At some point, David Walsh, the superintendent for K-12 instruction, became involved in the discussions regarding Vandermeer's desire to return to work on a full-time basis. Walsh, who was responsible for overseeing the Special Education Department, reviewed the situation and agreed with the Union that there had been no violation of the collective bargaining agreement on the part of the school district. However, Walsh testified that because Vandermeer had made an attempt to return to full-time status by talking to Fitzpatrick, the school district "had a responsibility to go ahead and bring her back" on a full-time basis.

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3 At hearing, Vandermeer testified that she "may" have sent a written request to return to full-time status to Bruce Grusecki, the Director of Human Resources, in December of 2007. However, no such document was ever produced at hearing.

The issue became complicated when it was discovered that Vandermeer had been underpaying for health insurance during the entire period in which she was working part-time. Vandermeer should have been paying approximately fifty-percent of her health care costs in order to receive the equivalent of full-time health care benefits. Ultimately, representatives for the Union and the school district reached an agreement on the terms of Vandermeer's return to full-time status. The agreement was codified in a letter from Naski to Grusecki dated May 21, 2008. The letter, which Grusecki signed on June 12, 2008, stated:

> In an effort to resolve any and all outstanding disputes regarding the seniority status, position status, back pay, and insurance premiums for Ms. Colleen Vandermeer, without resorting to litigation or other adversarial proceedings, the parties have reached the following agreement:
>
> 1. Ms. Vandermeer will be granted full time seniority for the 2006-07 and 2007-08 school years;
>
> 2. On March 17, 2008, Ms. Vandermeer was brought back to full-time status as a school psychologist position [sic] and will remain in a full-time school psychologist from this date forward, pursuant to the collective bargaining agreement between the parties;
>
> 3. Warren Consolidated School District will not bill nor collect from Ms. Vandermeer any benefit plan premiums owed by Ms. Vandermeer for any time prior to March 17, 2008; and
>
> 4. Ms. Vandermeer's current wages will be adjusted so that she will receive her full-time Schedule A salary for the 2007-08 school year which is $83,789.009.

As specified in the letter, Vandermeer returned to work full-time effective March 17, 2008. At that time, she had the second most seniority of the eleven school psychologists on staff. Her return to full-time status resulted in another psychologist, Dawn Stroud, being bumped from full-time to .6 hours FTE. Stroud learned that her hours were being reduced during a meeting with Fitzpatrick in late May or early June of 2008. According to Stroud, Fitzpatrick paced the room during that conversation and was visibly angry and upset. When Stroud asked for an explanation for the change, Fitzpatrick told her that it was a "union issue" and that it was out of her hands. Fitzpatrick advised Stroud that she should contact the WEA and "talk to Colleen."

Fitzpatrick had several conversations with individual school psychologists around that time during which she repeatedly expressed concern for Stroud and ruminated on the impact of Vandermeer's decision on other members of the bargaining unit. Stroud testified that Fitzpatrick told her things such as "I can't believe that Colleen is doing this to you. She's married. She has two incomes. How could she do this to you" and "Colleen doesn't need the money; she has a husband. You just bought a house." Fitzpatrick advised Stroud not to worry and promised to find some other program which would enable her to make up for the reduced hours.

Layla Habhab testified that Fitzpatrick similarly expressed to her concern over how Vandermeer's decision would impact Stroud and whether the change would cause a divide amongst the psychologists. With respect to Fitzpatrick's expressions of support for the psychologists, Habhab testified:

> I think Shari did take a personal interest in people's lives at some point. She knew a lot about my background with my family and, you know – and I think she had the same relationship with Ms. Stroud. [It was] – the feeling I remembered, if anything, more than the words during the time of that conversation; that she did have – expressed concern over Dawn and her financial status if she were to be laid off.

Vandermeer testified that although she had little contact with Fitzpatrick following her return to full-time status, she "definitely felt an adversarial relationship" with her supervisor. Vandermeer asserted that this sense was based on Fitzpatrick's "body language [and] knowing her past history with – in terms of it she doesn't like somebody, just those kinds of things where I made it very much a point not to find myself in her presence if possible." Vandermeer also recalled a staff meeting in April or May of 2008 during which the psychologists were discussing the various activities and programs in which they were involved. Vandermeer revealed to the group that she was working on a reading intervention program at one of the elementary schools. According to Vandermeer, Fitzpatrick reacted with hostility and indicated that a teacher aide should be directing the reading program instead of a psychologist.4 In addition, Vandermeer testified that Fitzpatrick gave her a written reprimand during the 2009-2010 school year, although no further details regarding the incident were provided at hearing.

III. Budget Issues and Layoffs

In the spring of 2007, long before Vandermeer ever spoke with the Union regarding her desire to return to full-time status, the administration began preparing the budget for the following school year. At the time, Respondent was working under the assumption that there would be no change in the per-pupil foundation allowance from the State of Michigan and that the school district would be operating under a 5.4 million dollar deficit for 2007-2008. In response, the administration prepared a document entitled "Deficit Reduction Plan Alternative Options 07-08" which called for 7.8 million dollars in spending cuts. The proposed cuts, which were district-wide, specifically included a 4.6 FTE reduction in the school psychologist classification for an estimated savings of $312,000. According to Walsh, the recommendation to eliminate 4.6 psychologist positions was based on the administration's belief that the work could be performed effectively by less staff if the psychologists were no longer required to attend as many meetings. Later that summer, Respondent received revised financial information, including news that the district would see an increase in the foundation allowance. As a result, the plan to reduce staff was scrapped.

On April 1, 2008, Dr. Robert Livernois became the new superintendent of Warren Consolidated Schools. On his first day on the job, Livernois had a meeting with the school board president and John Sloane, the district's interim chief financial officer. During the meeting, Livernois

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4 On cross-examination, Vandermeer conceded that teacher aides are paid substantially less then psychologists and that it might make sense to have a lower paid employee perform the work.

was informed that the budget for the current school year was $4.8 million in deficit due to structural revenue problems. In addition, Livernois learned that the district was facing a significant deficit for the 2008-2009 school year. Livernois' initial response to this information was to create a cabinet of what he described as "key people leading each division" to review the district's finances and, over the course of the following ninety days, determine how to balance the budget for the 2007-2008 and 2008-2009 school years. The cabinet was comprised of Livernois, Walsh, Sloane and Grusecki, as well as Livernois' administrative assistant, Sue Petroney, and Eleanor Evans, the district's Executive Director of Employee Benefits and Services. Other members included an employee in the school district's financial department and Respondent's operations supervisor. Shari Fitzpatrick was not part of the cabinet.

Dr. Livernois testified that around the time the cabinet began meeting, there was "tremendous speculation, rumor and fear" amongst the staff regarding the school district's financial problems. For that reason, Livernois directed members of the cabinet not to share information regarding any proposed budget cuts. Livernois testified, "[I]t was really important for me to keep a really, a very small, and I guess you'd call it a close-knit, close to the vest group who would keep in confidence some of the really difficult decisions we had to make at that time, and really to keep a . . . lid on the rumors and the fear among employees." Describing the cabinet meetings as a "very confidential process," Livernois testified that "many times we would dole out reports, review them, and then collect them in an effort to, not always, but in an effort to keep things as confidential as possible."

The cabinet managed to balance the budget for the school year already in progress by using money from the school district's fund equity. With respect to the impending 2008-2009 budget deficit, Walsh recommended that the cabinet begin the financial review process by looking at the list of staff cuts which were proposed, but never implemented, in 2007. Walsh testified that he told Dr. Livernois, "[W]hy don't we look at that list – cause we had done our due diligence on it – look at those items that did not make the cut list, if you will, for the '07-'08 school year, and why don't we bring those back to the cabinet for consideration for '08-'09? And that was where we began."

Eventually, the cabinet proposed the elimination of 99.85 FTEs which represented a savings of $10,479,123 for Respondent during the 2008-2009 school year. Among the proposed job cuts was the elimination of 4.6 school psychologist positions, the same number considered by Respondent in 2007. The layoff of the psychologists was expected to save the school district $427,260 in salary and $52,036 in health care benefits. Livernois testified that a consideration in eliminating the psychologist positions was the fact that some of the work they performed was discretionary. Other job cuts within the Special Education Department which were proposed by the cabinet and submitted to the board of education for approval included all five elementary counselors, IEP coordinators and the Supervisor of Special Education, a position within the administrator bargaining unit who served as Fitzpatrick's assistant.

Stroud and Hyatt testified that when there had been staff reductions in prior years, Fitzpatrick worked to ensure that the cuts were spread out evenly so as to prevent any one department or classification from bearing the brunt of the staff reductions. With respect to the 2008-2009 cuts, the administration's goal was for the position eliminations to be spread proportionately amongst the various bargaining units, including the administrators' unit. Livernois testified, "There was a big incentive in the District at that time about fairness and as the new Superintendent, I thought it was

important to demonstrate that we're all feeling the pain equally in terms of positions." The total breakdown of staff cuts by bargaining unit in the 2008-2009 budget was 6.26 percent from the clerical unit, 6.07 percent from the custodial unit, 6.33 percent from the WEA unit, 7.46 percent from the administrative unit and 5.92 percent of the school district's residual unit of unrepresented employees.

The proposed budget for the 2008-2009 school year was ultimately approved by the board of education and the layoffs went into effect in September of 2008. As part of the reductions, the four least senior school psychologists, Combs, Stroud, Hyatt and Chris Mayer, were laid off, leaving six psychologists on staff. Habhab was supposed to have had her hours reduced to .6 as part of the elimination of 4.6 psychologists. However, she was informed at the start of the 2008 school year that she would remain on staff full-time.[5] After the layoffs were announced, the WEA provided each affected employee within the bargaining unit with information regarding their right to appeal the decision. Under the contract, the time limit for filing an appeal was ten days. None of the psychologists contacted the Union until several months later, when they requested a meeting with the WEA to discuss the filing of an unfair labor practice charge.

IV. Fitzpatrick's Alleged Involvement with the Staff Cuts

At hearing, Stroud recalled a telephone conversation she had with Livernois in the summer of 2008 during which the superintendent confirmed that the school district was considering job cuts due to the deficit. Stroud testified that she asked Livernois whether Fitzpatrick was involved with the decision. According to Stroud, Livernois indicated that he was getting input from all of his department heads, including Fitzpatrick. However, Stroud also testified that in her various conversations with Fitzpatrick throughout that summer, Fitzpatrick suggested that she had been trying to talk to Livernois and that the superintendent was not returning any of her calls.

Vandermeer also provided testimony concerning Fitzpatrick's purported involvement with the decision to lay off 4.6 psychologists. Vandermeer asserted that from her interactions with Livernois, she got the impression that the superintendent was relying upon his department heads to provide input into the decision regarding job cuts and that Fitzpatrick was one of the individuals to whom he was looking for guidance. On cross-examination, however, Vandermeer conceded that when Livernois indicated that he would be relying on input from "department heads," he could have been referring to Fitzpatrick's supervisor, David Walsh.

School psychologist Paul Roodbeen testified regarding a meeting with Livernois which he attended in October of 2008 along with three other school psychologists. At hearing, Charging Party's attorney asked Roodbeen whether Livernois indicated during that meeting that Fitzpatrick played a significant role in the decision to cut the psychologist positions. Roodbeen's initial answer was "I don't recall." Roodbeen subsequently testified that Livernois had indeed told the psychologists at that meeting that it was "the Director of Special Education" who made the decision to eliminate 4.6 positions. Livernois denied ever making such a statement and testified at hearing that

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5 Although the budget also called for the elimination of the elementary counselors, those positions were reinstated at the start of the 2008 school year. At hearing, Livernois explained that many of the counselors were also certified teachers and would have been able to bump into classroom teaching positions, thereby creating what Livernois described as a "domino effect" which would have been disruptive for students.

Fitzpatrick had no input in the layoff decision. Moreover, no other witnesses corroborated Roodbeen's assertion that the superintendent specifically identified Fitzpatrick at the October meeting as the individual responsible for the job cuts.

Hyatt testified that he went to speak with Fitzpatrick about the layoff rumors during the summer of 2008. According to Hyatt, Fitzpatrick indicated that she couldn't do anything about it. When Hyatt asked why the cuts were not spread more evenly amongst the special education itinerants, Fitzpatrick responded, "I don't know. I was told who to cut." Hyatt testified that Fitzpatrick indicated that she had tried to talk to Livernois about the layoffs but that the superintendent would not return her calls. According to Hyatt, Fitzpatrick stated, "I can't get through to him. I don't have anything – I can't do anything. My hands are tied." Hyatt asked whether there were any other avenues that the psychologists could take and Fitzpatrick suggested meeting with Livernois as a group.

Combs left a message for Fitzpatrick after she learned that her position was being eliminated. When Fitzpatrick called back approximately a week later, Combs asked, "how did this happen?" According to Combs, Fitzpatrick responded, "Kiddo, I had nothing to do with this."

Livernois testified unequivocally that he never consulted with Fitzpatrick regarding the budget cuts. Walsh testified that although Fitzpatrick had served on cabinets assembled by the prior superintendent of Warren Consolidated Schools, James L. Clor, she was not involved in formulating the proposed budget recommendations for the 2008-2009 school year. According to Walsh, Fitzpatrick was not even informed of the decision to eliminate positions within the Special Education Department until after the school board approved the decision. According to Walsh:

> Dr. Livernois was very, very specific to this cabinet that we do not discuss those kinds of decisions until the Board takes action. And we do that for two reasons; one, we know that we don't speak for the Board. The Board could change their mind that night. And if we had gone out there and just started informing various groups about the list, then you run the risk of having educational chaos in the organization. So Dr. Livernois was crystal clear to us; and that is, we're not talking about this with anybody until the Board actually acts.

Walsh testified that the May 21, 2008, letter of agreement providing for Vandermeer's return to full-time status played no role in the cabinet's budget recommendations for the 2008-2009 school year.

Viewing the record as a whole, I credit Walsh and Livernois with respect to Fitzpatrick's involvement, or lack thereof, in the decision to layoff 4.6 psychologists. Both individuals testified extensively regarding the formation of the cabinet assembled by the superintendent in 2008 and both were emphatic that inclusion in the group was limited to a handful of high-ranking administration officials who were expected to keep the rest of the staff in the dark about the nature of their discussions and deliberations. Walsh and Livernois were both credible witnesses with excellent recollection of the events about which they testified. Moreover, their characterization of the cabinet's work as being strictly confidential was corroborated by the varying witnesses who testified that Fitzpatrick complained publicly about not being able to speak with Livernois during the period in which the budget discussions were taking place.

Although Roodbeen asserted that Livernois identified Fitzpatrick as the individual responsible for the decision to eliminate 4.6 school psychologist positions, he did so after first indicating that he could not recall whether the superintendent ever made such a statement. Moreover, no other witnesses corroborated Roodbeen's assertion that the superintendent specifically identified "the Director of Special Education" as the individual responsible for the job cuts, despite the fact that there were other psychologists in attendance at that meeting during which Livernois purportedly made the remark. In fact, the bulk of the testimony elicited by Charging Party established only that Livernois had discussed relying on "department heads" in crafting the proposed budget, a reference which, for purposes of the Special Education Department, could have just as likely meant Walsh.

In reaching this conclusion, I also take into account the fact that the Supervisor of Special Education position was eliminated as part of the 2008 staff reductions. The record establishes that the position served as Fitzpatrick's assistant and that following its elimination, many of the duties assigned to the position were transferred to Fitzpatrick. Had Fitzpatrick been involved in deciding which jobs to cut, it seems unlikely that she would have eliminated her own assistant, thereby creating more work for herself. For all the above reasons, I find that Fitzpatrick had no input in deciding which positions within the Special Education Department were to be eliminated for the 2008-2009 school year.

V. Change in Job Duties and October Meeting

After the proposed budget was approved, Walsh directed Fitzpatrick to develop and implement a plan for how the Special Education Department would function with reduced staff. With respect to the school psychologists, this meant figuring out how to operate with 40% fewer employees. On or about September 9, 2008, Fitzpatrick issued a memorandum to all building administrators with the subject "Psychologists' Assignments." The memo stated:

> As you are aware, 4 Psychologists were part of the restricting cuts. Attached is the new Psychologists' schedule for the 2008-09 school year. Each Psychologist has been assigned 1 Middle School and 3 Elementary feeder schools. Each Psychologist is expected to follow this schedule. The only exception would be if a Principal calls another Principal to make different arrangements. The High Schools will be covered on a round robin basis and will be assigned thru [sic] our Department. These evaluations will be completed on their office day. There should be no reason for Psychologists to leave their assigned building except for an emergency, which would be Principal driven.
>
> Their primary responsibility is the:
>
> 1. Evaluation of students (initial, 30 day, re-eval)
>
> Other responsibilities may include:
>
> - Small group intervention
> - Principal requests
> - Staffings – if time permits. Please make sure they have sufficient time to work on their reports in the building
> - Special projects (such as RTI)

FOR NOW – They will **not** be responsible for:

1. Attending IEP's (other itinerants will present their findings)
2. Observations, behavioral intervention plans or functional behavioral plans (Social Workers will be responsible) [Emphasis in original.]

After the memorandum was implemented, the psychologists became concerned that the changes put in place by Fitzpatrick had a negative impact on their ability to comply with special education laws and provide quality service to special education students and their families. In addition, their workload increased as a result of the department having four fewer psychologists on staff to perform the same caseload as in prior years. Based upon these concerns, as well as a growing sense of dissatisfaction amongst the itinerants with Fitzpatrick as a supervisor, MEA Univserv Director Miller contacted Walsh, who agreed to hold a staff meeting to discuss the issues. Walsh convened the meeting on October 7, 2008, with more than 40 itinerant employees, including Vandermeer, Habhab and Roodbeen, in attendance. Miller also attended the meeting. Walsh did not invite Fitzpatrick to the meeting because he wanted it to be an open discussion "without personalities being part of the conversation."

According to Walsh, the predominant concern raised by the psychologists during the October 2008 meeting was the difficulty in getting work done with fewer employees on staff. However, Walsh also heard various complaints from the itinerants about Fitzpatrick. Walsh testified that the complaints were based on the employees' perception that Fitzpatrick's management style was "inconsistent," a view which Walsh shared. When asked to explain what that meant, Walsh testified that things were being done varying ways at different locations. Walsh concedes that the staff seemed reluctant to talk openly and that he heard the word "retaliation" used during the meeting, but he assured the assembled itinerants that he would not share the specifics of the discussion with anyone outside the group. Miller recalled that the main issue raised by the psychologists at the meeting with respect to Fitzpatrick was their perception that she was "mean." According to Miller, the psychologists asserted that Fitzpatrick was unresponsive to their concerns and that she made "snarky comments." Miller testified that Walsh told the group that he could not redress these issues based upon generalizations and advised them to do a better job documenting individual incidents involving Fitzpatrick.

Roodbeen's primary concern going into the meeting with Walsh was his perception that there had been a disproportionate number of psychologists laid off. However, Roodbeen testified that the itinerants in attendance at the October 2008 meeting expressed to Walsh that they were fearful of retaliation by Fitzpatrick for openly speaking about their supervisor. According to Roodbeen, there was reference during the meeting to a "list" maintained by Fitzpatrick. At hearing, Roodbeen explained, "[E]veryone knew about the list in the special ed department. It was, I'm assuming, an unofficial document – or probably not even a document – that you're either on Shari's good side or her bad side. And if you're on her good side, then usually it doesn't mean anything negative to you." Roodbeen testified that Walsh did not seem surprised by reference to "the list" and indicated that the school district kept her on as an administrator because she was "good with budgets." Walsh recalled having told the group that Fitzpatrick was "a very good director with her knowledge of special education law and her ability to represent the District in special education lawsuits." Walsh denied that he ever acknowledged awareness of any "list" maintained by Fitzpatrick.

At some point, the WEA filed a grievance on behalf of the psychologists challenging the change in job duties. Pursuant to the grievance procedure set forth in the collective bargaining agreement between the WEA and the school district, the matter proceeded to binding arbitration. The Union argued to the arbitrator that by expecting and requiring the remaining staff to perform all the duties and responsibilities assigned to them, the school district had created an "intolerable situation." The WEA asserted that the school psychologists should be compensated at their hourly rate for the additional time required above and beyond their normal responsibilities. In 2009, the arbitrator issued a decision denying the grievance on the ground that the contract did not provide for the relief sought by the Union. The arbitrator determined that it was within management's authority to assign such duties as necessary to fulfill the school district's obligations and that there was no contractual duty on the part of Respondent to provide an "office day." Although the arbitrator empathized with the plight of the psychologists, he concluded that Fitzpatrick had implemented the plan in the hope that it would enable the employees to have the necessary free time to assume the greater workload and that it was ultimately "no one's fault" that the plan did not work out.

VI. Fitzpatrick Generally

Despite the complaints raised by the psychologists during the October 2008 meeting, Combs testified at the hearing in this matter that she had a good relationship with Fitzpatrick, while Hyatt similarly asserted that he had no issues with Fitzpatrick during the time he worked for Warren Consolidated Schools. Combs further asserted that Fitzpatrick never made any remarks to her which could be interpreted as hostile toward Vandermeer.

Stroud testified at hearing that she did not feel as if Fitzpatrick had any bias toward her. In fact, when Stroud learned of possible layoffs in the summer of 2008, Fitzpatrick offered to help Stroud find new employment by giving her leads on potential job openings with other school districts. Ultimately, Stroud found a position with L'anse Creuse Public Schools as a direct result of assistance she had received from Fitzpatrick.

At hearing, Miller was asked whether she felt that Fitzpatrick was vindictive. Miller testified, "I can honestly say no. I thought she was mean. Because I've never had a grievance against Shari directly. And I'm a fighter. And if I thought I had her, I would have gotten her." Miller asserted that she did not see any behavior on the part of the school district which could be deemed a retaliatory response to the letter providing for Vandermeer's return to full-time status.

By the time of the hearing in this matter, Fitzpatrick was no longer employed by Warren Consolidated Schools. Hyatt and Combs were recalled to their positions as school psychologists before the start of the 2010-2011 school year. Hyatt later retired from employment with the school district effective June of 2013. Stroud was never recalled.

Discussion and Conclusions of Law:

Charging Party contends that Warren Consolidated Schools laid off psychologists Kathryn Combs, Dawn Stroud and Glenn Hyatt in retaliation for Colleen Vandermeer's efforts to return to work as a full-time employee. As set forth in detail below, I find that this allegation has no merit. In

seeking to return to full-time status, Vandermeer was pursuing a purely personal claim and, despite the involvement of the Union, was not engaged in protected activity under PERA. More importantly, Charging Parties failed to establish any connection between Vandermeer's effort to return to full-time status and the subsequent elimination of 4.6 psychologist positions. To the contrary, the record overwhelmingly establishes not only that Shari Fitzpatrick played no role in the decision to layoff 4.6 school psychologists, but also that the same staff reductions would have been made by the school district even if Vandermeer had never sought an increase in her hours of work.

In their unfair labor practice charge, Combs, Stroud and Hyatt assert that the 2008 staff reductions constituted a violation of Sections 10(1)(a) and (c) of PERA. Section 10(1)(a) of the Act 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*.

As set forth above, the first element necessary to establish a prima facie case of retaliation or discrimination is proof of concerted activity by a public employee. Section 9 of PERA protects the rights of public employees to "form, join or assist in labor organizations" and to "engage in lawful concerted activities for the purposes of collective negotiation or bargaining." Section 9 is patterned after Section 7 of the National Labor Relations Act (NLRA), 29 USC 151 *et seq*., and the Commission has utilized the same test as the National Labor Relations Board (NLRB) for determining whether an individual's actions are sufficiently linked to the actions of fellow employees to be deemed concerted. Activity undertaken by an individual employee is deemed to be concerted for purposes of Section 7 of the NLRA or Section 9 of PERA where the evidence supports a finding that the individual's efforts to protest matters pertaining to wages, hours and other terms and conditions of employment are a logical outgrowth of the concerns expressed by the group. *Grandvue Medical Care Facility*, 27 MPER 14 (2013); *C & D Charter Power Systems, Inc*, 318 NLRB 798,

798 (1995), citing *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992), enf'd 53 F3d 261 (CA 9, 1995).

In the lead case on concerted activity, *Meyers Indus, Inc v Prill*, 268 NLRB 493 (1984) (*Meyers I*), rev'd sub nom *Prill v NLRB*, 755 F2d 941 (DC Cir), cert, den, 487 US 948 (1985), on remand, *Meyers Indus, Inc v Prill*, 281 NLRB 882 (1986) (*Meyers II*), aff'd sub nom *Prill v NLRB*, 835 F2d 1481 (DC Cir, 1987), cert denied, 487 US 1205, (1988), the NLRB held that complaints made by a single employee acting on his own about the safety of his truck were not protected. The Board explained that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." On remand in *Meyers II*, the Board reiterated that standard, but clarified that concerted activity also "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II* at 887. Thus, activity undertaken by one employee on behalf of others is protected activity even in the absence of the participation or authorization of a labor organization. See e.g. *City of Detroit (Police Dept)*, 19 MPER 15 (2006). See also *Asheville Sch, Inc*, 347 NLRB No. 84 (2006) (an individual employee's activities are concerted when they grow out of prior group activity or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected).

An employee filing a grievance based upon a provision in a collective bargaining agreement is protected from adverse action for filing that grievance as long as the grievance is made in good faith. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 265-66 (1974). An employee's initial statement to the employer suggesting that he or she believes a collectively bargained right is being violated is protected concerted activity because such action might serve as a natural prelude to, or an efficient substitute for, the filing of a formal grievance. As long as the employee's statement is based on a reasonable and honest belief that the contract is being violated, the statement is reasonably directed toward the enforcement of a collectively bargained right, and the employee does not behave in a manner to remove his or her conduct from the protection of the Act, the activity is protected. *City of Detroit*, 20 MPER 24 (2007); *NLRB v City Disposal Systems, Inc*, 465 US 822, 837 (1984). See also *Interboro Contractors, Inc*, 157 NLRB 1295 (1966), enf'd 388 F2d 495 (CA 2 1967). However, it is well-established under both PERA and the NLRA that an employee who simply pursues a personal claim, even with the assistance of coworkers, or to the benefit of other employees, is not engaged in protected activity. *Grandvue Medical Care Facility* at 172; *Meyers II*.

At hearing, Charging Parties stipulated that the alleged protected concerted activity which forms the basis of the unfair labor practice charge was Vandermeer's effort to return to full-time status as a school psychologist. Vandermeer first requested a change to full-time status in a May 3, 2006, email to Fitzpatrick. There is nothing in that message which suggests that Vandermeer was acting on behalf of anyone other than herself in raising the issue of a return to full-time employment, nor does the record establish that Vandermeer was engaged in group action with respect to any of the various communications which followed between herself and Fitzpatrick regarding her work schedule. The record establishes that throughout those discussions, Vandermeer was merely seeking to increase her own hours of work. There is no evidence that Vandermeer at any time solicited another employee to join in her campaign or that she was ever acting on the behalf of her fellow

bargaining unit members. There is also nothing in the record suggesting that Vandermeer's concern regarding her hours of work arose from some prior group activity.

Although Vandermeer ultimately discussed the issue with WEA representatives, she testified that the subject came up "in an inadvertent way" when she was seeking information about taking a job with another school district. The Union offered to help her because it had a good relationship with the administration and believed that Respondent would be amenable to engaging in a discussion about the issue. However, MEA Uniserv Director Miller testified there was no breach of contract by Respondent, a conclusion shared by Walsh, and the record establishes that no grievance was ever threatened or filed by either Vandermeer or the Union – despite repeated assertions to the contrary in the original and amended charges filed in this matter. There is no evidence to indicate that Vandermeer ever made a statement to Fitzpatrick or any other management representative suggesting a belief that a collectively bargained right had been violated, nor is there any proof that Vandermeer herself actually believed that she was seeking to enforce the contract. Notably, neither at hearing nor in their post-hearing brief have Charging Parties identified any provision in the collective bargaining agreement or in a personnel policy which would have even arguably obligated the school district to grant Vandermeer's request to return to full-time status or which might have caused her or the WEA to reasonably believe that a collectively bargained right was being violated.

Although the Union met with representatives of the school district several times to discuss Vandermeer's situation, there were never any meetings held specifically for that purpose. Rather, the issue was brought up during the course of the regularly scheduled meetings between the WEA and Respondent. Charging Parties do not claim, and the record does not establish, that any of these discussions were required by, or held pursuant to, the terms of the collective bargaining agreement. Similarly, there is nothing in the record to suggest that the letter which provided for Vandermeer's return to full-time status was intended by either the school district or the WEA to be precedential or to impact the rights of any employee other than Vandermeer. Instead, the record overwhelmingly establishes that the Union was simply providing assistance to Vandermeer on a matter of personal concern to that specific employee. Under these circumstances, I conclude that Vandermeer's efforts to return to full-time status did not constitute concerted activity protected under Section 9 of PERA. See *City of Detroit (Water & Sewerage Dept)*, 17 MPER 79 (2004) (the fact that union representatives attended a meeting with the employer during which it spoke on the charging party's behalf did not convert her individual complaints into group action).

Even assuming arguendo that Charging Parties had met their burden of establishing that Vandermeer engaged in protected concerted activity, I find no credible evidence that Fitzpatrick or any other agent of the school district harbored anti-union animus. Although 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 (2003).

In the instant case, there is no direct evidence establishing that Fitzpatrick harbored anti-union animus. Not a single witness testified that Fitzpatrick ever made remarks which were hostile toward the Union or collective bargaining generally, nor is there any suggestion in the record that Fitzpatrick ever previously engaged in retaliation based on concerted activity. Miller, the Uniserv Director assigned to Warren Consolidated Schools, indicated that she never had to file a single grievance against Respondent involving conduct by Fitzpatrick. In fact, Miller testified that she considered herself to be a "fighter" and vowed that if Fitzpatrick had ever acted in a manner which was vindictive, the Union would have "gotten her." With respect to the agreement providing for Vandermeer's return to full-time status, Miller specifically asserted that she never saw any behavior on Respondent's part which could be considered retaliatory. The WEA never filed an unfair labor practice charge against Respondent over the 2008 layoffs and the Union specifically declined to participate as a party in this proceeding. This is notable given the fact that the MEA and its various locals have a long history of vigorously pursuing claims of anti-union discrimination or retaliation, a fact about which I take judicial notice.

Charging Parties assert that anti-union animus is established by Fitzpatrick's attitude and demeanor toward Vandemeer after the school district signed the letter increasing her hours. In support of this contention, Charging Parties cite Vandermeer's testimony that Fitzpatrick's "body language" was indicative of an adversarial relationship. In addition, Charging Parties refer to the fact that shortly after Vandermeer returned to full-time status, Fitzpatrick criticized her at a staff meeting for spending time on a reading program, instructing her to instead assign the work to a teacher's aide. However, there is no indication that Fitzpatrick disciplined Vandermeer for her work with the reading program or that the school district ever took improper or unlawful action against her for that or any other reason during the period following her return to full-time status.6 To conclude that Fitzpatrick harbored anti-union animus based on her demeanor toward Vandermeer and the isolated incident during the staff meeting would be to engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, and I decline to do so here.

In a further attempt to establish animus on the part of Respondent, Charging Parties rely on the statements which Fitzpatrick made to other psychologists following Vandermeer's return to work

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6 As noted above, Vandermeer testified that Fitzpatrick gave her a written reprimand during the 2009-2010 school year. However, no further details regarding the incident were offered at hearing and Charging Parties do not claim that the discipline was unlawful or that it violated the collective bargaining agreement. In fact, the incident is not even referenced by Charging Parties in their post-hearing brief.

on a full-time basis. Specifically, Charging Parties cite the various conversations between Fitzpatrick and Stroud in the summer of 2008 and the discussion between Fitzpatrick and Habhab concerning the possible impact of Vandermeer's decision on Stroud and the other psychologists. There appears to be no dispute that Vandermeer's return to full-time status was a subject of considerable agitation for Fitzpatrick. However, even if Vandermeer's actions constituted concerted activity for purposes of Section 9 of PERA, it does not necessarily follow that Fitzpatrick's irritation was the result of, or directed against, that protected conduct. Rather, viewing Fitzpatrick's statements as a whole, it appears that she was primarily concerned with the impact that the change would have on Stroud, the employee whose hours were reduced as a result of Vandermeer's decision to return to work on a full-time basis. Fitzpatrick repeatedly brought up the fact that, unlike Vandermeer, Stroud was living on a single income and she referenced the fact that Stroud had recently purchased a house. To this end, Habhab testified that Fitzpatrick took a personal interest in people's lives and that her supervisor's remarks concerning the Vandermeer situation appeared to reflect "concern over [Stroud] and her financial status if she were to be laid off."

There appears to be no question that Fitzpatrick could be a mean and, at times, difficult person with whom to work. This conclusion is based not only on Miller's testimony, but also on Walsh's admission at hearing that Fitzpatrick's management style could be inconsistent. In addition, there appears to be no dispute that at least some of the itinerants had the impression that Fitzpatrick treated employees differently depending on whether they were on her "good side" or "bad side" and that certain employees expressed concern that Fitzpatrick would retaliate against them if she learned that they had aired their complaints to Walsh. However, those beliefs are purely subjective; there is simply no evidence in the record which would establish that the anxiety expressed by the psychologists was reasonable or that Fitzpatrick had ever in fact taken action against one or more of her staff members based upon their union or other protected activities. What Charging Parties seem to overlook is that it is not a violation of PERA for a supervisor to act in an unpleasant or distasteful manner toward employees, nor does it violate the Act for management to favor one employee over another, provided that such actions are not motivated by the protected concerted activities of such employees. In addition, it should be noted that the psychologists who testified at hearing were largely positive with respect to how they characterized their interactions with Fitzpatrick.As noted, Stroud and Habhab recalled that Fitzpatrick expressed genuine concern when it appeared that Stroud's hours might be reduced. Combs testified that she had a good relationship with Fitzpatrick and Hyatt asserted that he had no issues with Fitzpatrick during the time he worked for Respondent. In fact, Stroud indicated that Fitzpatrick was instrumental in helping her find a new job after the layoffs became effective.

In addition to there being no credible evidence that Fitzpatrick harbored anti-union animus, Charging Parties failed to establish any connection between Vandermeer's return to full-time status and the subsequent layoff of 4.6 psychologist positions. Charging Parties would have this tribunal believe that Fitzpatrick was so angry at Vandermeer for attempting to return to full-time status that she retaliated, not against Vandermeer herself, but against other employees who had no involvement with, or connection to, Vandermeer's situation, including one of the very same employees about whom Fitzpatrick had previously expressed genuine and heartfelt concern. Absent some indication that Vandermeer had a special relationship with the psychologists who were laid off or a showing of some other unique set of facts connecting the two events, such an argument simply defies logic and is entirely unpersuasive.

Most importantly, the record overwhelmingly establishes that Fitzpatrick played no role in the decision to layoff the psychologists and that the same budget decisions would have been made by Respondent regardless of any action by Vandermeer. As noted above, Livernois assembled a close-knit cabinet of high-level administrators to review the school district's financial situation and determine how to balance the budget. Fitzpatrick was not a member of the cabinet and her opinion was not sought regarding the proposed budget cuts. In fact, Fitzpatrick herself told other employees around that time that Livernois was not returning her phone calls. The proposed budget was ultimately approved by the school board and there is no evidence that any of the individual board members harbored animus toward Vandermeer or any of the psychologists or that the board was even aware of Vandermeer's prior efforts to return to work full-time. Moreover, the record establishes that in crafting the proposed budget cuts for 2008-2009, the cabinet relied upon the aborted budget recommendations for 2007-2008, the creation of which predated Vandermeer's return to full-time status and which similarly called for the elimination of 4.6 psychologists. Finally, it should be noted that Fitzpatrick's own assistant was laid off as part of the 2008-2009 budget cuts, as were 99.85 other employees, with the layoffs spread equally amongst the various bargaining units.

Under these circumstances, I conclude that Charging Party has failed to establish a prima facie case of discrimination or retaliation under PERA. For the same reasons, I find that Respondent's actions in connection with this matter would not objectively tend to restrain, interfere or coerce a reasonable employee in the exercise of his or 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 Kathryn Combs, Dawn Stroud and Glenn Hyatt against Warren Consolidated Schools in Case No. C09 A-001; Docket No. 09-0000223-MERC, 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: December 29, 2014