STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SAGINAW VALLEY STATE UNIVERSITY,
Public Employer-Respondent,

MERC Case No. C13 J-175
-and- Hearing Docket No. 13-013933

R. LEE ROSS,
An Individual-Charging Party.
_____/

APPEARANCES:

John Decker, for Respondent

R. Lee Ross, appearing on her own behalf

DECISION AND ORDER

On December 30, 2015, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in the above matter finding that Respondent Saginaw Valley State University (Employer) did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Charging Party R. Lee Ross failed to meet her burden of showing that anti-union animus was a motivating cause of either Respondent's decision to pursue disciplinary action against her or its decision to terminate her employment effective June 30, 2013. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Charging Party filed exceptions and a brief in support of her exceptions to the ALJ's Decision and Recommended Order on January 26, 2016. In her exceptions, Charging Party contends that the ALJ erred by not finding that Respondent acted with anti-union animus and hostility. The Charging Party further contends that the ALJ erred by not issuing an order allowing discovery for a longer period of time and a wider range of documents.

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

Factual Summary:

We adopt the factual findings of the ALJ and recite them only as necessary here.

In December 2007, Charging Party was hired by Respondent as an assistant professor, a tenure-track position, in its College of Business and Management. On this basis, she became a

member of a bargaining unit represented by the Saginaw Valley State University Faculty Association (Union).

Under the collective bargaining agreement between Respondent and the Union, tenure-track faculty members are considered for tenure in two successive years. After a second denial of tenure, they are no longer eligible to receive tenure and their employment is terminated.

In the fall of 2011, Ross was scheduled to teach 18.67 credit hours. Ross, however, believed that this workload was too heavy. On August 16, 2011, she asked Jill Wetmore, the Dean of the College of Business and Management and her supervisor, to change her class schedule.[1] Ross proposed several options that included dropping one of her assigned classes. Wetmore denied her request as having been submitted too late and criticized Ross for making it.

Ross then asked the Union grievance chair to file a grievance over her schedule. After a discussion between the grievance chair and Wetmore, and another discussion between Wetmore and the Dean of the College of Science and Engineering, Wetmore decided that Ross had been assigned too many classes, and she removed one class from Ross' schedule.

On January 26, 2012, a team of faculty appointed to evaluate Ross, recommended against granting her tenure. On August 1, 2012, Ross received a letter from Respondent's Vice-President for Academic Affairs/Provost Donald Bachand informing her that she had not been granted tenure.

One year later, on or about January 28, 2013, another team of faculty appointed to evaluate Ross again recommended against granting her tenure.

On March 27, 2013, Provost Bachand sent Ross an email requesting to meet with her to discuss "an issue of outside employment." On April 2, he sent her another email demanding that she advise him if she was or had been teaching courses for Michigan State University and/or other universities while employed by Respondent.[2] Ross replied that, on the advice of her attorney, she would not respond.[3]

On April 22, 2013, Ross received a letter from Respondent notifying her that she had been denied tenure at the University for the second time.

On May 1, 2013, Ross contacted the union about filing a grievance over this decision and, on June 21, 2013, the Union filed a grievance over Respondent's decision to deny Ross tenure for a second time.

[1] The collective bargaining agreement prohibits a faculty member from being scheduled for more than 24 credit hours over the fall and winter semesters of a single academic year.
[2] Article D 15 of the collective bargaining agreement prohibits such employment.
[3] Ross admitted at the hearing that she taught full-time at Michigan State University as an adjunct during the 2011-2012 academic year, although she taught those classes online.

On June 28, 2013, Provost Bachand sent Ross two letters. The first letter advised her that since she had been denied tenure for the second time, her employment would be terminated effective June 30, 2013. The second letter stated that Bachand had attempted to meet with Ross several months ago to discuss an issue of outside employment, that she failed to respond, and that the University had recently confirmed that she had been employed at Michigan State University as a full-time faculty member in violation of the collective bargaining agreement. The second letter also stated that Ross had until July 12, 2013 to respond in writing before the University initiated formal disciplinary action. Although Ross did not respond to this letter, no disciplinary action was initiated.

On November 6, 2013, Ross filed the instant charge against her former employer alleging that Respondent unlawfully interfered with her rights and unlawfully discriminated against her in violation of § 10(1)(a) and (c) of PERA because she sought the counsel of her Union regarding contract matters and because she filed a grievance under the collective bargaining agreement.

Discussion and Conclusions of Law:

PERA does not prohibit all types of discrimination or unfair treatment; nor does the Act provide an independent cause of action for an employer's breach of the collective bargaining agreement. Rather, the Commission's jurisdiction with respect to claims brought by individual charging parties against public employers is limited to determining whether the employer interfered with, restrained and/or coerced an employee with respect to his or her right to engage in union or other protected activities.

The elements of a prima facie case of unlawful discrimination under §10(1)(c) of 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. *Taylor Sch Dist*, 28 MPER 66 (2015); *Waterford Sch Dist*, 19 MPER 60 (2006); *Univ of Michigan*, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707. 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 v Evart Pub Sch*, 125 Mich App at 74.

Notably, suspicious timing is not normally sufficient, by itself, to establish that the employee's union activity was a motivating factor in the employer's decision. *City of Detroit (Water & Sewerage Dep't)*, 1985 MERC Lab Op 777, 780; *Macomb Twp (Fire Dep't)*, 2002

MERC Lab Op 64, 73. There must normally be other circumstantial evidence to support a conclusion that the temporal relationship was not mere coincidence. *Mid-Michigan Cmty College*, 26 MPER 4 (2012) (no exceptions).

In the present case, Ross admits that the collective bargaining agreement requires the termination of a tenure-track faculty member after a second denial of tenure. Further, she does not allege that Respondent violated PERA by denying her tenure. In her exceptions, Ross argues instead that Respondent violated PERA by terminating her employment on June 30, 2013, instead of allowing her to work for an additional "terminal year" after the denial of tenure as required by Ross' interpretation of the collective bargaining agreement. The record, however, does not establish that anti-union animus was a motivating cause in any employment action taken against her.

First, although Dean Wetmore reacted angrily to Ross' August 2011 request to change her fall schedule to remove one of her assigned classes, there is no evidence that Wetmore had any role in any adverse action taken against Ross.

Additionally, Ross asserts that, shortly after she contacted the Union about filing a grievance over her denial of tenure, Respondent began an investigation of her personal life to determine if she was employed by another university. However, the record actually establishes that Respondent's investigation of Ross' possible outside employment began in March 2013, two months before Ross inquired about filing a grievance.

Similarly, the timing of Provost Bachand's June 28, 2013 letter notifying Ross of her termination does not prove that the filing of Ross' grievance caused Respondent to terminate her immediately instead of employing her for an additional year. On the contrary, Article H 2.3.5 of the collective bargaining agreement provides that, after a faculty member has been denied tenure for the second time, his or her contract cannot be renewed. According to the testimony of Provost Bachand, Respondent believed that once a faculty member was denied tenure for the second time, the faculty member's employment would end when his or her contract expired at the end of the academic year. Charging Party's contention that Article H 2.1.2 required her continued employment for another academic year is not supported by the language of that provision. Even if Article H 2.1.2 could be read as Ross reads it, the Union itself did not agree with Ross' interpretation. The Union initially amended Ross' grievance over her denial of her tenure to allege that Article H 2.1.2 had been violated when Respondent failed to employ Ross for another year after her tenure denial. Nonetheless, the Union eventually decided not to proceed with the grievance and withdrew it in its entirety. The Union's decision was subsequently upheld by its Executive Committee.

Furthermore, Charging Party has produced no evidence that any other employee was allowed to work for any time period after being denied tenure a second time.

Consequently, the Commission agrees with the ALJ that Respondent, in terminating Charging Party, was acting in accord with what it believed the collective bargaining agreement required and not based on animosity toward any protected activities in which Charging Party had engaged.

In her exceptions, Ross also argues that the ALJ should have issued an order allowing for full discovery, including interrogatories and the taking of depositions. Contrary to Ross' contentions, proceedings before the Commission are administrative proceedings governed by the Michigan Administrative Procedures Act, PERA, and the administrative rules of the Commission and the Michigan Administrative Hearing System (MAHS). Neither PERA nor the administrative rules of the Commission or MAHS provide for discovery in an unfair labor practice case except in extraordinary circumstances not present here. See e.g., *Wayne Cmty Sch,* 1970 MERC Lab Op 445. See also, *Kalamazoo Pub Sch,* 1977 MERC Lab Op 771, 779. Consequently, the ALJ correctly concluded that she did not have the authority in this case to order Respondent to answer interrogatories or participate in the taking of depositions.

We have also considered all other arguments submitted by Charging Party and conclude that they would not change the result in this case. Accordingly, we affirm the ALJ's decision.

ORDER

The unfair labor practice charge is hereby 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: June 15, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

SAGINAW VALLEY STATE UNIVERSITY,
Public Employer-Respondent,

Case No. C13 J-175
Docket No. 13-013933-MERC

-and-

R. LEE ROSS,
An Individual - Charging Party.
_____/

APPEARANCES:

John Decker, for the Respondent

R. Lee Ross, appearing for herself

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 heard in Detroit, Michigan, on April 13 and April 14, 2015, before Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including a post-hearing brief filed by the Charging Party on June 8, 2015, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

R. Lee Ross, formerly a faculty member in the Department of Law and Finance in the College of Business and Management at Saginaw Valley State University, filed this charge against her former employer on November 6, 2013. Ross alleges that Respondent unlawfully interfered with her rights under §9 of PERA and unlawfully discriminated against her in violation of §10(1)(a) and (c) of PERA because she sought the counsel of her Union regarding contract matters and because she filed a grievance under the collective bargaining agreement. Ross amended her charge on February 27, 2015, and, after a pre-hearing conference held on March 5, 2015, amended her charge again on March 31, 2015.

As alleged by Ross, her charge can be summarized as follows. Ross was hired by Respondent in 2007 as a tenure-track professor. At the beginning of the fall 2011 term, Ross asked Jill Wetmore, the Dean of the College of Business and Management and her supervisor, to change Ross' teaching schedule so that Ross could take an online class. Ross suggested that she be allowed to drop one of her assigned classes. Wetmore angrily denied her request as having been submitted too late. Ross then spoke to her collective bargaining representative, the Saginaw Valley State University Faculty Association (the Union) about filing a grievance under the contract over the number of credit hours she had been assigned to teach that semester. After discussions between several parties, including a discussion between the Union grievance chair and Wetmore, Ross' class schedule was reduced without a grievance being filed. Wetmore mentioned this incident in her evaluation of Ross in the fall of 2011 and again in the next year's evaluation as an indication that Ross was not taking her teaching responsibilities seriously.

In January 26, 2012, a team of faculty appointed to evaluate Ross recommended against granting her tenure. The team member appointed by Wetmore was particularly critical of Ross's performance in all areas. On August 1, 2012, Ross was notified that she had been denied tenure for the first time. Under the collective bargaining agreement between Respondent and the Union, faculty members are considered for tenure in two successive years. After the second denial, they are no longer eligible to receive tenure.

On April 22, 2013, Ross received a letter from Respondent notifying her that she had been denied tenure at the University for the second time. On May 1, 2013, Ross emailed a Union representative about filing a grievance over this decision, and, on June 21, 2013, the Union filed the grievance. On June 28, 2013, Ross received two letters from Respondent Vice-President for Academic Affairs/Provost Donald Bachand. One letter accused her of violating the collective bargaining agreement by working for another employer during her University employment and gave her a deadline for responding to this allegation. The other letter stated that since she had been denied tenure for the second time, her employment was being terminated effective June 30, 2013.

Ross alleges that Respondent violated §10(1)(a) of PERA by conducting an investigation of her personal life after Respondent learned that she planned to file a grievance over her tenure denial, and by threatening to discipline her on June 28, 2013, because she had filed the grievance. She also alleges that Respondent violated §10)(1)(a) and (c) by taking the following actions because she had sought the Union's assistance in 2011 and because she filed a grievance over her tenure denial: (1) terminating her employment on June 30, 2013, instead of allowing her a "terminal year" after denial of tenure as the collective bargaining agreement required; (2) refusing to pay her the remainder of the salary it owed her for the 2012-2013 academic year; and (3) terminating her insurance benefits effective June 30, 2013. Ross does not allege that Respondent violated PERA by denying her tenure, an action which in any case occurred outside the six month statute of limitations in §16(a) of PERA.

Ross' Objections to the Lack of Discovery and Compliance with the Subpoena:

In her post-hearing brief, Ross asserts that she was unfairly prejudiced by my failure to allow her full discovery in this matter and by my failure to compel Respondent to fully comply with the document subpoena issued by me on October 30, 2014.

The hearing in this matter was originally scheduled for February 2014, but was adjourned without date on the agreement of the parties. On September 29, 2014, Ross requested that I issue a subpoena to Respondent for the production of documents, although no new hearing date had been set at that time. After discussion of Ross' subpoena request at a pre-hearing conference held on October 27, 2014, I issued a subpoena to Respondent on October 30, 2014, for the production of certain documents at a hearing whose date was, at that time, not yet determined. For reasons explained to the parties at the October 27, 2014, conference, I modified the language proposed by Ross to narrow the documents required to be produced to those I concluded were relevant to the issues before me. Respondent voluntarily agreed to turn over these documents to the Charging Party prior to the hearing and on or before January 9, 2015.

The hearing was rescheduled for April 13 and 14, 2015. At a second pre-hearing conference, held on March 5, 2015, Ross complained that Respondent had not fully complied with the subpoena. At this conference, Respondent agreed to search for additional documents. On March 30, 2015, Ross filed a motion to compel compliance with the subpoena, asserting that Respondent was withholding documents. In its written reply, Respondent denied that it had withheld any documents. In an order dated April 3, 2015, I concluded that Charging Party had not established, or provided good cause for me to conclude, that Respondent had withheld documents under the subpoena. I stated, however, that Charging Party would have the opportunity to question Respondent's witnesses at the hearing about the existence of additional documents, and, if testimony or other evidence indicated that other documents existed, she would be given a continuance to allow her to obtain the other documents. I also held that I lacked the authority to grant the relief Ross had requested in her motion for the alleged refusal to comply, including limiting the defenses Respondent could assert at hearing.

In her post-hearing brief, Ross complains that, other than the emails and documents mentioned below in my findings of fact, Respondent did not produce the notes and writings of its agents concerning her termination or the emails or correspondence discussing her termination. However, Ross presented no evidence that documents beyond those provided by Respondent ever existed.

Ross also argues that I should have issued an order allowing for full discovery, including interrogatories and the taking of depositions. She asserts that she was prevented from obtaining evidence that would have established that Respondent's actions were discriminatory and that her due process rights were therefore violated. Proceedings before the Commission are administrative proceedings governed by the Michigan Administrative Procedures Act (APA), MCL 24.201 et seq, PERA, and the administrative rules of the Commission and MAHS. The APA and rules authorize the issuance of subpoenas by an ALJ. However, neither PERA nor the administrative rules of either the Commission or MAHS provide for discovery in an unfair labor

practice case except in extraordinary circumstances not presented here.[4] I conclude, as I stated in my April 3, 2015 order, that I lacked the authority to order Respondent to answer interrogatories or participate in the taking of depositions in this matter.

Findings of Fact:

Respondent's Pre-Tenure Review Process

The process for receiving tenure as a professor at the University is set out in detail in the collective bargaining agreement between the Union and the Respondent. When a faculty member is hired without previous teaching experience, his or her fourth year of teaching is considered his or her first "pre-tenure" year. A faculty member's first opportunity to receive tenure occurs in the fall of the fifth year. If the candidate is not granted tenure in the fifth year, his or her credentials are reviewed again in the sixth year. If the candidate is denied tenure a second time, he or she has no additional opportunity to gain tenure at the University. After a faculty member is denied tenure a second time, he or she is terminated.

The first two years of a faculty member's appointment are considered probationary years. Evaluation teams consisting of other faculty members are appointed to evaluate the faculty member in each of these years. An evaluation team consists of one member appointed by the Dean of the faculty member's College, one member appointed by the Union, and a third member selected by the other two. The team normally conducts its evaluation in the fall of the academic year and submits its report in January. The faculty member is evaluated on three criteria: teaching performance, scholarship, and service to the University community.

No evaluation team is appointed in the third year, but a team consisting of faculty appointed by the method listed above reviews the faculty member's performance again in his or her fourth, or first "pre-tenure" year. The team conducts its review in the fall and submits its report in January. If problems with the faculty member's performance are noted in the fourth year evaluation, another team may be appointed to evaluate the faculty member in the fall of year five. If the candidate is not granted tenure in the fifth year, yet another evaluation team may be appointed to review the candidate again in the fall of year six. A completely new team is normally appointed each time to ensure that the faculty member is evaluated by different faculty members.

Each faculty member has a Professional Practices Committee (PPC) file which the faculty member is responsible for maintaining. All faculty members' evaluation reports are supposed to be placed in their PPC files. Faculty members are also urged to add other items to their file, such as curriculum vitae, student evaluations of their classes, copies of published

[4] Rule 117 of the MAHS rules, R 792.10117, states that discovery in a contested case shall not be allowed except where provided for by statute or rule or by leave of the administrative law judge.

articles and presentations, and letters or other evidence of service to the University community that would support a grant of tenure or promotion.

If an evaluation team deems the faculty member's performance to be inadequate in some area, it may recommend a correction plan for the following year; the faculty member may also request a correction plan. If the evaluation team recommends a correction plan, the faculty member must submit a proposed plan or his/her contract will not be renewed for the following year. Once a correction plan is approved, it becomes part of the PPC file. According to the Article H 2.2.8 of the collective bargaining agreement, "performance with regard to the correction plan will be evaluated by the next year's evaluation team." If a correction plan is approved for a year that no evaluation team is normally scheduled, a special team is appointed to evaluate compliance with the correction plan. Article H 2.2.9 states that following the establishment of a correction plan, "an evaluation team shall undertake a re-evaluation which shall be completed by January 30 of the next appointment year. This re-evaluation is to be based solely on the plan for correction."

In addition to the evaluation reports and correction plan reviews, in the fall of each year that a faculty member is to be considered for tenure, Individual Evaluation Reports (IERs) are prepared for the faculty member by the Dean of the College, by the faculty member's department, and by up to three other faculty members chosen by the candidate for tenure. These IERs are also placed in the PPC file.

Tenure Decisions

The Professional Practices Committee (PPC) is a body that makes recommendations on tenure and promotion. The PPC consists of three appointed administrators and six elected faculty members. The Vice-President for Academic Affairs/Provost serves as the non-voting chair of the committee. The PPC normally conducts its first tenure review vote in the fall of the faculty member's fifth year. Based on the documents in the tenure candidate's PPC file, including the IERs and the report of the evaluation committee from year four, each voting PPC member rates the candidate on a scale from zero to 10 in each of three categories: teaching, scholarship, and service to the community and/or the University. Each member produces a set of preliminary scores, and, if there are discrepancies in the scoring, the members discuss the reasons for their scores and have the opportunity to alter them. The candidate receives a weighted composite score from each PPC member which is based 50 percent on teaching. Scholarship and service are given between 20 and 30 percent weight; the candidate can designate how much weight will be given to each of these factors within this range. The weighted composite scores are then averaged. In order to be granted tenure a candidate must receive a weighted average composite score and an average teaching score of at least six. If the PPC recommends that the candidate be granted tenure, its recommendation goes to the University's Board of Control. If the PPC recommends that the candidate not be granted tenure, its recommendation goes to the President of the University. The PPC's recommendations are generally, although not always, accepted.

The PPC normally makes its first tenure decision sometime between September and December of the candidate's fifth year based on the documents in the file, including the candidate's fourth year evaluation report and the IERs.

However, if there is a correction plan in effect and/or another team has been appointed to evaluate the faculty member again in the fall of year five, the PPC postpones its decision until after that evaluation team has submitted its report in January. If the faculty member is not granted tenure in year five, the PPC normally conducts another vote in the fall of year six. However, if a correction plan is in effect or another evaluation team has been appointed, the PPC postpones its decision until after the new evaluation team submits its report in January.

Procedures After Denial of Tenure

Article H 2.3.5 of the collective bargaining agreement reads as follows:

> Denial of Tenure. Any faculty member shall have two opportunities to be reviewed for tenure. If tenure is denied the first time, the faculty member may resubmit his/her credentials the following year. If tenure is denied either the first or second time, the Association Committee for Contract Grievances may grieve the decision directly to the GRC (Grievance Resolution Commission) whose decision is binding. After tenure has been denied the second time, and upheld by the GRC, the contract for a faculty member cannot be renewed. If the Board of Control/Administration denies tenure against the recommendation of the PPC, such denial shall be grievable by the Association Committee for Contract Grievances directly to the GRC for a final and binding decision. Reinstatement as a result of the GRC procedure shall be with all back salary and benefits.

The Grievance Resolution Commission consists of two members selected by the Union and two members selected by the Vice President for Academic Affairs. A fifth member, who acts as chairperson, is selected by agreement of the Vice President of Academic Affairs and the Union president. The collective bargaining agreement also allows either the Union or the University to opt to have the grievance heard by an arbitrator selected under the procedures of the American Arbitration Association.

In 2013, Article H 2.1.2 of the collective bargaining agreement read as follows:

> Pre-Tenure Appointments. Pre-tenure status is achieved when a faculty member on probationary status is granted a fourth consecutive yearly appointment or is given an appointment which includes experience credit sufficient to allow the achievement of pre-tenure status prior to the above fourth appointment. Pre-tenure faculty shall receive yearly appointments for a maximum of three years. Pre-tenure appointments shall be issued by March 31 of each fiscal year. A pre-tenure faculty member shall be given written notice, in the letter of appointment for the third pre-tenure year, of tenure granted or the extension of pre-tenure status through the third year. *If the faculty member is not granted tenure or pre-tenure status is not extended through the third year, written notice shall be given by November 1 of the second pre-tenure year.* [Emphasis added].

As Provost Bachand and Union executive board member Gary Thompson testified, it is rare for a faculty member at the University to be denied tenure for a second time, and faculty

members rarely file grievances over a denial of tenure. The record indicates that in May 2013, the Union and the Respondent did not have an agreed-upon interpretation of the last sentence of Article H 2.1.2. As discussed below, on May 7, 2013, Ross was told by the Union's UniServ Director that this language required the Respondent to give the faculty member notice that they would be denied tenure for the second time by November 1 of year six (the second pre-tenure year according to the UniServ representative's interpretation). The UniServ Director told Ross that because Respondent did not meet this deadline – Ross did not receive notice that she would be denied tenure for the second time until the spring of her year six, or April 2013 - Respondent could not terminate her until the end of the following academic year.

Respondent did not read Article H 2.1.2 as prohibiting it from terminating Ross at the end of the 2012-2013 academic year. At the hearing, Dean Wetmore offered an interpretation of the last sentence of Article 2.1.2 that differed from that of the UniServ representative. According to Dean Wetmore, under the contract the second pre-tenure year is year five. Year six is the third pre-tenure year. As Dean Wetmore interpreted it, the italicized sentence did nothing more than require Respondent to notify faculty members who were not given tenure in year five by November 1 of year five if Respondent intended not to renew their contract for a sixth year. According to Wetmore, Respondent had no obligation to provide notice under this sentence unless Respondent intended to terminate the faculty member at the end of year five. Since Ross was given a contract for the 2012-2013 academic year – year six or her third pre-tenure year – the last sentence of Article 2.1.2 did not apply to her situation.

On August 5, 2013, the Union amended Ross' grievance over her denial of tenure to allege that Article H 2.1.2 had been violated. However, as discussed below, the Union eventually decided not to proceed with the grievance and withdrew it in its entirety.

Ross's Employment and Termination

Ross was hired by Respondent as an assistant professor in the College of Business and Management in December 2007. Ross's faculty evaluations during her first two years of teaching, the 2007-2008 and 2008-2009 academic years, were positive. Her next evaluation team was appointed in the fall of her fourth academic year, 2010-2011. Ross's student evaluations that year were very positive. However, in its report the evaluation team criticized Ross for spending insufficient class time on instruction and questioned whether her class demands were rigorous enough. The team gave her a numeric rating on teaching performance of 5.9. The team also noted that Ross had a hiatus in scholarly activity in the early years of her employment at the University and that her contribution to University committees was less than would have been expected at that point in her career. It gave her scholarship and service ratings of 2 and 1, respectively. As a result of comments made by the evaluation team that year, Ross asked for and received a correction plan for the following year that addressed the team's objections to some of her teaching methods. The plan was agreed to in April 2011.

In the fall of 2011, Ross was scheduled to teach a new class on energy law in the College of Science and Engineering. Her fall schedule, with this class, was 18.67 credit hours. The collective bargaining agreement prohibits a faculty member from being scheduled for more than 24 credit hours over the fall and winter semesters of a single academic year.

On August 16, 2011, Ross asked Wetmore to change her class schedule so that Ross could take an online class; she proposed several options which included dropping one of her assigned classes. Wetmore denied her request as having been submitted too late and berated Ross for making it. In an email she copied to Provost Bachand, Ross asked the Union grievance chair to file a grievance over her schedule. Ross' email also described her conversation with Wetmore and accused Wetmore of "harassment and an intentional attempt to cause emotional distress." In his email reply, the grievance chair said that he was not sure if the contract had been violated, since the contract spoke to class load over two semesters, but that it was definitely unusual for a faculty member to be scheduled for this many hours against their wishes. After a conversation between the grievance chair and Wetmore, and another conversation between Wetmore and the Dean of the College of Science and Engineering, Wetmore concluded that Ross had erroneously been assigned too many classes and removed one from her schedule.

The 2011-2012 academic year, her fifth year, was the first year that Ross was eligible to be considered for tenure. Normally, the PPC would have made a tenure decision in the fall of 2011. However, because Ross had a correction plan in effect, the tenure vote was put off until the spring and a new team was appointed to evaluate her again in the fall of 2011. On January 26, 2012, Ross received a document prepared by this team entitled "2011-2012 Evaluation Report (Second Pre-Tenure Report and IER)." The report described its purpose as " issu[ing] a second pre-tenure IER and evaluat[ing] a correction plan submitted after the report issued by her pre-tenure evaluation team for the academic year 2010-2011." The team gave Ross a 5 rating on teaching performance, despite student evaluations that were again very positive. Ross received a 3 on scholarly activity, and a 1 on University service.

When Ross received the January 26, 2012, evaluation report, she did not place it in her PPC file. Although the report purported to be an evaluation of her compliance with the correction plan, it did not limit itself to discussing her compliance with that plan. Ross believed this to be improper and a violation of the collective bargaining agreement. Ross complained, and on or around May 23, 2012, the same document was issued again, this time entitled "Correction Plan Report."

As noted above, IERs are prepared in the fall of a faculty member's fifth year by the College Dean, by representatives of the department, and by three faculty members selected by the candidate. The IER submitted by the Department of Law and Finance on January 26, 2012, gave Ross a rating of 8 on teaching performance and ratings of 7 and 6 on scholarship and service respectively. The record does not reflect how Ross was rated by the three faculty members she selected.

In the IER Dean Wetmore submitted in January 2012, she gave Ross a rating of 5 for teaching performance, 4 for scholarship, and 2 for service. Wetmore opined that Ross was not taking her teaching obligations seriously and "had requested changes for reasons that are not appropriate." As an example, Wetmore cited Ross' request for a last minute schedule change in the fall of 2011 so that she could take an online class. Wetmore also mentioned that Ross had appealed Wetmore's decision not to allow the change to the Provost and that the Provost had denied it.

Sometime between January 2012 and the close of the 2011-2012 academic year, the PPC conducted a vote on whether to grant Ross tenure. The PPC gave Ross an average teaching score of 4.389, and her average weighted composite score for the three factors of teaching, scholarship and service was 3.792. None of the nine members of the PPC voted to grant her tenure. On August 1, 2012, Ross received a letter from Bachand informing her that she had not been granted tenure and explaining the concerns expressed by the PPC members in reviewing her file. According to this letter, a "special evaluation team" was appointed in the fall of 2011 to determine whether the concerns raised by the 2010-2011 evaluation team about Ross's teaching effectiveness had been addressed, but a report from this team was not in the PPC file. As noted above, Ross had not put the January 26, 2012, evaluation team report in her file because she believed it was issued improperly

In the fall of 2012, Ross's sixth year of teaching, Respondent appointed another faculty team to evaluate Ross. This team's report, which was not made part of the record in this case, was submitted on or about January 28, 2013. This team again gave Ross a rating of between 5 and 6 on her teaching performance, despite positive evaluations from students. The only IER for that year admitted into the record was Wetmore's, which she completed on October 5, 2012. She noted that her IER might be revised after the evaluation team submitted its report, but it apparently was not. Wetmore gave Ross a 5 rating on teaching performance, a 4 rating on scholarship, and a 2 rating on University service. Wetmore mentioned Ross' 2011 request to change her schedule again in this evaluation and again stated that this showed that Ross was not taking her teaching obligations seriously.

On March 20, 2013, Ross appealed this report and Wetmore's IER to the PPC as the collective bargaining agreement allows. One of Ross's arguments was that since she had a correction plan in effect in 2011-2012, a pre-tenure review should not have been done in that year. Ross argued that she should not have been considered for tenure until 2012-2013, and, if tenure was not granted that year, she should have been eligible for review again in 2013-2014. Ross got no response to her appeal.

In March 2013, Bachand sent Ross several emails asking to meet with her. In an email dated March 27, 2013, he identified the topic he wished to discuss as "an issue of outside employment." On April 2, he sent her an email demanding that she advise him if she was or had been teaching courses for Michigan State University and/or other universities while employed by Respondent. The Union contract explicitly prohibits such employment. Ross replied that, on the advice of her attorney, she would not respond. In fact, as she admitted at the hearing, Ross taught full-time at Michigan State University as an adjunct during the 2011-2012 academic year, although she taught her classes online.

As noted above, Article 2.1.2. states that "pre-tenure appointments shall be issued by March 31 of each fiscal year." Ross did not receive a letter in March 2013 regarding an appointment for the 2013-2014 year.

In April 2013, the PPC reviewed Ross's file again and again voted to deny her tenure. In this vote, Ross's average teaching score was 4.722, and her average weighted composite score was 4.278. None of the nine members of the PPC voted to grant her tenure. On April 22, 2013, Bachand sent Ross a letter notifying her of the decision to deny her tenure for the second time.

On May 1, 2013, Ross sent an email to the Union inquiring about filing a grievance over the tenure decision. Bachand testified that shortly thereafter he was told by a Union representative that Ross wanted to file a grievance over her tenure denial, although he could not recall exactly when he had this conversation or with whom.

On May 2, 2013, Respondent President Eric Gilbertson sent Bachand an email asking him if Ross had ever replied to the earlier emails from Bachand asking about her outside employment. Gilbertson told Bachand that if she had not, disciplinary proceedings should be initiated as soon as possible so that the time limits for disciplining her under the contract would not expire.

On May 7, 2013, Ross met with Union representatives, including the Uniserv Director, to discuss her grievance. They also discussed Article 2.1.2 of the contract. As noted above, the UniServ Director interpreted the last sentence of this article as requiring Respondent to notify faculty members of second tenure denials on or before November 1 of their sixth year of teaching. The UniServ Director told Ross that because she had not been notified of her tenure denial until the spring of her sixth year, she was entitled to a "terminal year" of employment after her second tenure denial.

On May 14, Gilbertson sent Bachand an email asking if he was sure that "all the i's were dotted and the t's crossed" with respect to Ross's tenure denial. On June 14, in another email discussing Ross's tenure denial, Gilbertson asked Bachand again if Ross had responded to the outside employment inquiry, and told him again that he should initiate discipline so that the contractual time limits would not expire.

On June 21, 2013, the Union filed a grievance with the GRC on Ross's behalf asserting that the contract had been violated when "the evaluation process and timeline for tenure review were not properly followed after the acceptance and completion of a correction plan."

On June 28, 2013, Bachand sent Ross two letters. The first advised her that since she had been denied tenure for the second time, her employment was being terminated effective June 30, 2013. This letter also told Ross to remove her belongings from her office no later than July 12, 2013, and return her keys and access ID. Finally, the letter stated that her insurance benefit coverage would be discontinued on June 30, 2013, and provided the name of the benefits manager to contact if she had questions. The second letter stated that Bachand had attempted to meet with Ross several months ago to discuss an issue of outside employment, that she failed to respond, and that the University had recently confirmed that she had been employed at Michigan State University as a full-time faculty member in violation of the collective bargaining agreement. The letter stated that Ross had until July 12, 2013, to respond in writing before the University initiated formal disciplinary action.

Ross was paid through June 15, 2013, and her last paycheck was issued on June 21, 2013 even though her grades for the spring semester were not due until July 1.When Ross complained to the Union that she had not been paid for her work, the Union requested her payroll history and told Ross that she had been paid her full salary for the academic year.

On August 5, 2013, the Union amended Ross's grievance to allege that Article 2.1.2 had been violated. The Union never asked Respondent to appoint a GRC, however, despite repeated inquiries from Bachand about what was happening with the grievance. Sometime after August 2013, the Union's Grievance Committee decided not to proceed on the matter. Its decision was upheld by the Union's Executive Committee. On May 19, 2014, the Union notified Respondent that it was withdrawing Ross' grievance.

Discussion and Conclusions of Law:

The elements of a prima facie case of unlawful discrimination under §10(1)(a) §10(1)(c) of 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. *Taylor Sch Dist*, 28 MPER 66 (2105); *Waterford Sch Dist*, 19 MPER 60 (2006); *Univ of Michigan*, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. 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 v Evart Pub Sch, supra.*

Ross engaged in union activity protected by §9 of PERA when she sought the Union's assistance in the fall of 2011 with her request to have a class removed from her schedule. She also engaged in union activity protected by the Act when she contacted the Union in May 2013 about filing a grievance over her tenure denial, an action which resulted in the Union filing a grievance on her behalf on June 21, 2013. Respondent's knowledge of Ross' protected activities is not disputed. Both Provost Bachand and Dean Wetmore had knowledge of Ross' protected activity in 2011. Bachand admitted that he learned that Ross had contacted the Union about filing a grievance over her tenure denial shortly after she did so on May 1, 2013.

In the fall of 2011, Dean Wetmore, Ross' supervisor, reacted angrily to Ross' August 2011 request to change her fall schedule to remove one of her assigned classes. Ross sought the Union's assistance. Although no grievance was filed, the Union's grievance chairperson did talk to Wetmore about the number of credit hours Ross had been assigned, and her request to have a class removed was eventually granted.

In both of the written evaluations Wetmore submitted as part of the tenure consideration process, Wetmore cited Ross' request as evidence of Ross' lack of commitment to teaching at the University. However, even if Wetmore's mention of the incident in these evaluations is considered evidence of animus toward Ross' exercise of her right to seek the Union's assistance in a contract dispute, there is no indication in the record that Wetmore had any role in either Respondent's decision to pursue disciplinary charges against Ross in June 2013 or its decision to terminate her effective June 30, 2013. Both Gilbertson and Bachand did have roles in these decisions, but there is no evidence in the record of anti-union animus by either these individuals or anyone else within Respondent's administration. I find that Wetmore's mention of the August 2011 incident in Ross' evaluations does not support an inference that Respondent decided to pursue disciplinary charges against Ross or that it decided to terminate her immediately because she filed or was considering filing a grievance over her tenure denial.

Ross argues that the suspicious timing of Respondent's adverse actions in relation to her protected activity is substantial evidence from which a reasonable inference of unlawful discrimination can be drawn. She points out that the day after she contacted the Union about filing a grievance, President Gilbertson sent an email to Provost Bachand about commencing a disciplinary action against her. Thereafter, according to Ross, Respondent undertook an investigation of her personal life to find grounds for disciplining her. On May 7, 2013, Ross met with Union representatives to discuss filing a grievance. The following day, May 8, Gilbertson sent Bachand another email about commencing the disciplinary action. On June 21, 2013, the Union filed a grievance on Ross' behalf. Exactly one week later, on June 28, Respondent sent her letters threatening to discipline her and also terminating her.

Ross argues that it is statistically impossible for it to be a coincidence that Gilbertson sent Bachand the email about commencing a disciplinary action against her the day after she contacted the Union about filing a grievance and statistically impossible for it to be a coincidence that Bachand sent her a letter threatening to discipline her one week after she filed a grievance. She maintains that an inference should therefore be drawn that Gilbertson and Bachand were motivated, at least in part, by anti-union animus.

Respondent, however, provided an alternative explanation for the timing of its actions. As Respondent points out, Respondent's investigation of Ross' possible outside employment began not in May 2013 after Ross inquired about filing a grievance, but in March 2013. On April 2, 2013, before Ross was denied tenure for the second time, Bachand sent Ross an email demanding that she answer whether she had been teaching courses at Michigan State University or other universities while employed by Respondent. Gilbertson's emails to Bachand after May 1, 2013 indicate that he knew of the April 2 email, and also knew that Ross had at least initially refused to respond. Gilbertson's email explicitly instructs Bachand to follow up so that the time limits for initiating discipline under the Union contract were not exceeded. According to Respondent, after Ross was denied tenure for a second time in April 2013, Respondent wanted to ensure that if Ross filed a grievance over her tenure denial and the grievance was upheld, Respondent did not lose its opportunity to discipline her for having outside employment. According to Respondent, Gilbertson's emails, and Bachand's June 28, 2013, letter giving Ross a deadline to respond to the disciplinary allegation, were in response to its concern that it might waive its right to discipline her.

Suspicious timing is not normally sufficient, by itself, to establish that the employee's union activity was a motivating factor in the employer's decision. *City of Detroit (Water & Sewerage Dep't)*, 1985 MERC Lab Op 777, 780; *Macomb Twp. (Fire Dep ' t.)*, 2002 MERC Lab Op 64, 73. There must normally be other circumstantial evidence to support a conclusion that the temporal relationship was not mere coincidence. *Mid-Michigan Cmty College*, 26 MPER 4 (2012) (no exceptions). In this case, Respondent has presented a plausible legitimate explanation for the timing of its actions. I conclude that Respondent has, therefore, rebutted Ross' argument that the timing of Respondent's decision to pursue discipline justified the inference that the decision was motivated by anti-union animus.

Ross also argues that the timing of Bachand's June 28, 2013, letter notifying her that she was being terminated effective June 30, 2013, was too close to the date that she filed her grievance to be unrelated to that grievance, and that the timing justifies an inference that the filing of the grievance caused Respondent to terminate her immediately instead of recognizing that she was entitled to a terminal year. However, Respondent also provided an alternate explanation for the timing of its termination letter. As indicated above, the collective bargaining agreement provides that after a faculty member has been denied tenure for the second time, he or she will be terminated. According to Bachand, Respondent assumed that it was understood that once a faculty member was denied tenure for the second time, the faculty member's employment would end when his or her contract expired at the end of that academic year. In fact, according to Bachand, no separate notice of termination was required even though he did send one to Ross.

Ross argues that Respondent clearly violated an explicit provision of the collective bargaining agreement by terminating her effective June 30, 2013. However, Article 2.1.2. was neither clear nor explicit regarding whether Respondent was required to notify Ross by November 1, 2012, that she would be denied tenure the second time. Article 2.1.2 was also neither clear nor explicit regarding whether Respondent was required to continue to employ Ross for another year if it did not meet this deadline. The Union's UniServ Director, at least, initially, read the language this way. However, there was no evidence that in terminating Ross immediately Respondent was acting contrary to a previous practice or agreed-upon interpretation of the disputed language. I find that Respondent provided a plausible explanation for the timing of Ross' termination, i.e. that it was acting in accord with what it believed the collective bargaining agreement permitted and required. I conclude that Respondent has also rebutted Ross' argument that the timing of her termination letter was suspicious and justified the inference that it was motivated by anti-union animus.

I conclude that Ross failed to meet her burden to present evidence that anti-union animus was a motivating cause of either Respondent's decision to pursue a disciplinary action against her or its decision to terminate her effective June 30, 2013. Based on the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 30, 2015