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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE STATE UNIVERSITY,
Public Employer-Respondent,

MERC Case No. C17 H-073

-and-

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
AFT, LOCAL 6075,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Amy Stirling Lammers, Office of the General Counsel, for Respondent

Gregory, Moore, Jeakle & Brooks, PC, by Gordon A. Gregory, for Charging Party

DECISION AND ORDER

On September 6, 2018, Administrative Law Judge Julia C. Stern (ALJ) issued a revised Decision and Recommended Order[1] in the above matter finding that Respondent violated § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Respondent's Associate Vice President Medley made a statement, in a meeting held on March 15, 2017, that constituted unlawful interference with unit employees' exercise of their § 9 rights and therefore violated § 10(1)(a) of PERA. The ALJ, however, also concluded that Respondent did not otherwise violate PERA by the actions set forth in the charge. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Respondent filed exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on September 27, 2018. Charging Party did not take exception to the ALJ's decision or file a brief in support of the decision. In its exceptions, Respondent argues that the ALJ erred in concluding that Associate Vice President Medley made a statement that constituted unlawful interference with unit employees' exercise of their § 9 rights.

We have reviewed the exceptions filed by Respondent and find that they have merit.

[1] MAHS Hearing Docket No. 17-017334

Factual Summary:

Wayne State University (Respondent or WSU) employs Admissions Counselors in its Office of University Admissions (Admissions) that are represented by the American Association of University Professors, AFT, Local 6075 (Charging Party or Local 6075). Admissions Counselors regularly attend recruiting events, such as high school college fairs, that are held outside their normal working hours (8:30 am to 5:00 pm, Monday through Friday). Attending these events is part of their job description.

Admissions Counselor Nick Doyle volunteered to cover a high school college fair scheduled for March 13, 2017 in Lansing, Michigan. On the morning of March 13, however, Doyle told his supervisor, Director of Undergraduate Admissions Ericka Jackson, that he would not drive to Lansing because he did not believe it was safe to drive as a result of a forecasted snowstorm. Jackson told Doyle that the event had not been canceled, and offered to let Doyle leave early, take a University vehicle, and stay overnight in Lansing. When Doyle continued to say that he would not go, Jackson drove to Lansing to cover the event herself.

As a result of this incident, Doyle was directed to attend a March 15, 2017 meeting with Jackson and her supervisor, Associate Vice President for Enrollment Management Dawn Medley. Charging Party's Executive Director, Michelle Fecteau, accompanied Doyle to the meeting. During the March 15 meeting, Doyle was handed a disciplinary reprimand citing him for insubordination based on his refusal to drive from Detroit to Lansing on March 13. Fecteau then objected to the reprimand because she felt it was unfair and argued that Doyle should receive, at most, a verbal warning that would not go in his file. Medley and Jackson caucused to discuss Fecteau's position. When they returned, Medley told Fecteau that the reprimand would not be rescinded.

According to Fecteau, Doyle asked what would happen now and who was going to know about the reprimand. Medley replied that the matter would remain between him and Jackson. Fecteau interjected that she would make sure Doyle's co-workers, Union President Parish, and the rest of the Union knew about it "so that they could be forewarned that if they were in a similar circumstance that they would understand the consequences that could happen." Fecteau further testified that she would "let people know when they volunteer for events that—that they could be held being insubordinate if—if the weather conditions were such that it was dangerous." According to Fecteau, Associate Vice President Medley then became agitated and said "well, I don't have to have them be voluntary anymore…I can change that…I can mandate that people go to those those—those things." Fecteau believed this was in direct response to "me saying that the Union would not just let this ride and be quiet about it, that we were going to grieve it, we were going to, you know, protest it."

Director of Undergraduate Admissions Jackson testified that Medley told Fecteau that "if she was going to let employees know not to volunteer to cover events, then we would then just have to assign them to cover those events."

On March 18, 2017, Charging Party President Charles Parrish sent an email to Respondent's Provost, Keith Whitfield, to complain about Doyle's reprimand. Parrish also

complained that, when Fecteau refused to keep the reprimand quiet, Medley asked if Fecteau was threatening her. Parrish told Whitfield that Medley needed to learn that "at this university the Union does not look kindly on an administrator who deals with a bargaining unit member in the manner that Mr. Doyle has been treated and will act to defend his/her rights to fair treatment."

Charging Party subsequently filed a grievance over Doyle's reprimand.

The Union filed the instant charge on August 21, 2017 and the ALJ issued an Order for a More Definite Statement on August 25, 2017. In its September 1, 2017 Response to the ALJ's Order for a More Definite Statement, Charging Party alleged that Respondent violated § 10(1)(a) and (e) of PERA by unilaterally altering long standing past practices relating to scheduling and employee evaluations for academic staff employed in Respondent's Office of Student Financial Aid and its Office of University Admissions. The Charging Party also alleged that, in a meeting held on March 15, 2017, to discuss an employee's disciplinary reprimand, Respondent violated § 10(1)(a) of PERA by threatening to "change the longstanding practice of covering weekend work with volunteers and instead mandate weekend hours." In addition, the charge alleged that Respondent unlawfully discriminated against certain bargaining unit employees by giving them unfairly low ratings in a review used to determine the amount of a salary increase they would receive.

A hearing was held on December 12, 2017 and, on September 6, 2018, the ALJ issued a Decision and Recommended Order in which she found that "Medley's statement constituted unlawful interference with unit employees' exercise of their Section 9 rights and therefore violated Section 10(1)(a) of PERA."[2] On this basis, the ALJ recommended that the Commission order Respondent to "cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 9 of PERA by threatening to retaliate against them if their union representative discussed with them the circumstances of a disciplinary reprimand issued by a supervisor in Respondent's Enrollment Management Division."[3]

Discussion and Conclusions of Law:

Under § 9 of PERA, employees have the right to file grievances, as well as engage in other protected concerted activities, free from employer threats. *MERC v. Reeths-Puffer School District*, 391 Mich 253, 265-66 (1974), *aff'g* 1970 MERC Lab Op 967. Employees also have the right to use the grievance procedure without fear of punishment or reprisal. *City of Lincoln Park*, 1983 MERC Lab Op 362. It is the chilling effect of a threat and not its subjective intent that PERA was created to address. *University of Michigan*, 1990 MERC Lab Op 272, *aff'd* Court of Appeals, Dkt. No. 128678 (7/16/92, unpublished); *City of Detroit (Fire Dept)*, 1982 MERC Lab Op 1220. Considerable latitude, however, is afforded to Employer communications that make a prediction as to the probable consequences of union activities. *NLRB v. Gissell Packing Co*, 395 US 575 (1969); *Jackson County*, 18 MPER 22 (2005); *Iosco County Medical Care Facility*, 1999 MERC Lab Op 299, 315; *Michigan State Univ*, 1976 MERC Lab Op 317; *Bangor Twp. Bd. of Ed.*, 1984 MERC Lab Op 274 (no exceptions).

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[2] Respondent, in its exceptions, relies upon the August 24, 2018 Decision and Recommended Order "originally issued" by the ALJ, which the ALJ indicated "was not the final draft of the decision".

[3] The ALJ concluded that Respondent did not otherwise violate PERA.

Additionally, an Employer's remarks must be analyzed in light of the context in which they occurred, as well as to their content, to determine whether they constitute an implied or express threat. *City of Inkster,* 26 MPER 5 (2012). In this regard, a number of prior decisions have addressed alleged threats made in the context of management-union meetings.

In *Flint Board of Education*, 1985 MERC Lab Op 1206, for example, the Employer proposed that certain roofers be transferred to the paint department due to a lack of work. When the Union objected to this proposal in a meeting with the Employer, the Employer warned the Union that, if a grievance were filed and used to successfully challenge the proposed transfer, the Employer would have no alternative but to reduce either the roofers' workweek or the number of weeks worked per year. Although the Union argued that the Employer made an unlawful threat in violation of § 10(1)(a), the Commission held that the Employer's statement was not an unlawful coercive threat but rather "a statement of alternative action" that the Employer believed it would be required to pursue if the grievance were successful.

In *City of Inkster*, 27 MPER 30 (2013) (no exceptions), the ALJ rejected the Union's contention that certain comments made by a representative of the Employer constituted a threat and noted that labor relations "is replete with lawful and appropriate harsh and tough talk, including the not-infrequent assertion by one side that the bargaining table, or litigation, tactics of the other side will inevitably result in a bad or worse outcome, often with specific predictions as to the likely bad outcome. The mere, and often rational, prediction of a bad outcome used to implore an opponent to compromise must be viewed in context to distinguish it from a threat of adverse action used to bludgeon an opponent."

In *Interurban Transit*, 31 MPER 10 (2017), *aff'd* Court of Appeals, Dkt. No. 339518 (9/27/18, unpublished), the Commission recognized that tempers may become heated and disorderly conduct occur in the course of grievance meetings and collective bargaining sessions and that the standard of conduct required of participants in these contexts is not the same as that applicable in other contexts, such as the general workplace. See also *City of Portage*, 1989 MERC Lab Op 318 (no exceptions) (greater latitude is allowed to both management and union representatives in management-union meetings); *City of Ferndale*, 1998 MERC Lab Op 274 (no exceptions) (Police Captain's "insipid and senseless" statements regarding grievance filing did not constitute unlawful threats where comments made in negotiations) and *Jolliff v. N.L.R.B.*, 513 F.3d 600, 613 (6th Cir. 2008) (labor disputes are heated affairs that may abound with rough language and intemperate, even inaccurate, statements).

In the present case, Charging Party alleged that WSU Associate Vice President Medley made a statement in the March 15, 2017 management-union meeting that constituted an unlawful threat in violation of § 10(1)(a) of PERA. Local 6075 Executive Director Michelle Fecteau testified that, during the March 15 meeting, she expressed her belief that the letter of reprimand assessed Counselor Doyle was unjust and that she would make sure Doyle's co-workers, Union President Parish, and the rest of the Union knew about it "so that they could be forewarned that if they were in a similar circumstance that they would understand the consequences that could happen." Fecteau further testified that she would "let people know when they volunteer for events that—that they could be held being insubordinate if—if the weather conditions were such

that it was dangerous." According to Fecteau, Assistant Vice President Medley then became agitated and said "well, I don't have to have them be voluntary anymore...I can change that...I can mandate that people go to those those—those things."

Director of Undergraduate Admissions Jackson testified that Medley told Fecteau that "if she was going to let employees know not to volunteer to cover events, then we would then just have to assign them to cover those events."

It does not appear that the ALJ discredited Jackson's testimony in her September 6, 2018 Decision. Regardless, even if one were to ignore Jackson's testimony, Fecteau's testimony establishes that, during the March 15 management-union meeting, she attempted to dissuade the Employer from assessing Doyle a letter of reprimand by pointing out the effect the discipline could have on the Employer's ability to get volunteers to cover events. In response, Medley merely expressed her belief that the contract allowed the Employer to force counselors to cover the events. Medley's statement, on its face, did not communicate an intent to inflict harm on anyone. At most, Medley implicitly predicted what the Employer would do as an alternative if no one volunteered to cover events. Given the context in which Medley's statement was made, the statement was not a threat but, as in *Flint Board of Education*, "a statement of alternative action" that the Employer would be required to pursue if no one volunteered.

Significantly, as noted in the ALJ's Decision, there is no dispute that the collective bargaining agreement allows the employer to assign an admissions counselor to cover an event when no counselor volunteers to cover the event.[4] See *Waldron Area Schools,* 1996 MERC Lab Op 441, 447 (no exceptions) (a statement that reflects an option legally available to the Employer is not an unlawful threat); *City of Portage*, 1989 MERC Lab Op 569 (no exceptions) (letters to shop steward delineating Employer's apparently correct interpretation of the Agreement were not threats); *Detroit Public Schools*, 1989 MERC Lab Op 569 (supervisor's memo not an unlawful threat because it merely informed the employee of what the supervisor believed the contract required him to do).

Additionally, Local 6075 President Parrish did not accuse Medley of threatening Fecteau when he complained about Medley's conduct during the meeting in his March 18, 2017, email to the Provost, an email on which Fecteau was copied. This suggests that Charging Party may not have perceived Medley's statement to be a threat at the time. Regardless of this, we do not believe that Medley's March 15 statement that she could require employees to attend events was a threat which interfered with the § 9 rights of employees. At most, it was a prediction of what would happen if employees chose not to volunteer for recruiting events. Consequently, Charging Party's contention that WSU Associate Vice President Medley made a statement in the March 15, 2017 management-union meeting that constituted an unlawful threat is not supported by substantial evidence on the record considered as a whole. See *Calhoun Intermediate Sch Dist v Calhoun Intermediate Ed Ass'n*, 314 Mich App 41, 46; 885 NW2d 310 (2016) and *City of Flint (Police Dept)*, 25 MPER 12 (2011).

[4] The ALJ's finding, with respect to this matter, is supported by the uncontradicted testimony of Director Jackson.

The Commission, therefore, finds that the ALJ erred by concluding that Respondent violated § 10(1)(a) of the Public Employment Relations Act and must reverse the ALJ's Decision and Recommended Order and dismiss the unfair labor practice charge.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: JUN 05 2019

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STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE STATE UNIVERSITY,
Public Employer-Respondent,

Case No. C17 H-073
-and- Docket No. 17-017334-MERC

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
AFT, LOCAL 6075,
Labor Organization-Charging Party.
/

APPEARANCES:

Amy Stirling Lammers, Office of the General Counsel, for Respondent

Gregory, Moore, Jeakle & Brooks, PC, by Gordon A. Gregory, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard on December 12, 2017, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by both parties on February 21, 2018, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

This unfair labor practice charge was filed on August 21, 2017, by the American Association of University Professors, AFT, Local 6075, against Wayne State University. Charging Party filed a more definite statement of its charge on September 1, 2017. The charge alleges that Respondent violated Section 10(1)(a) and (e) of PERA by unilaterally altering long standing past practices relating to scheduling and employee evaluations for academic staff employed in Respondent's Office of Student Financial Aid and its Office of University Admissions. It also alleges that in a meeting held on March 15, 2017, to discuss an employee's disciplinary reprimand, Respondent violated Section 10(1)(a) of PERA by threatening to alter Respondent's policies on the scheduling of weekend work if Charging Party representatives discussed the reprimand with persons outside the meeting, including other employees. In addition, the charge alleges that Respondent unlawfully discriminated against unit employees Barbara Jones and Daisy Cordero in

violation of Section 10(1)(a) and (c) of PERA by giving them unfairly low ratings in a review used to determine the amount of a salary increase they would receive. Charging Party claims that Jones and Cordero received these low ratings because they had objected to the process used in the review and asserted that it violated the collective bargaining agreement.

Charging Party's September 1, 2017, more definite statement of its charges also appears to allege that Respondent violated Section 10(1)(a) and (c) by: (1) on March 20, 2017, imposing stricter attendance requirements on unit employees because of statements made by Charging Party Executive Director Michelle Fecteau at the March 15, 2017, meeting; and (2) on May 22, 2017, implementing changes in the scheduling of weekend work as Respondent had threatened to do on March 15. However, Charging Party did not address either of these allegations in its post-hearing brief.

Findings of Fact:

Respondent's Office of Office of Student Financial Aid (OSFA) and its Office of University Admissions (Admissions) are both located within its Enrollment Management Division. Dawn Medley, Vice President for Enrollment Management, has headed the Enrollment Management Division since about July 2016. Director of Undergraduate Admissions Ericka Matthews-Jackson has been in charge of Admissions since February 2016 and Catherine Kay became the head of OFSA in about August 2016. Both Jackson and Kay report to Medley.

March 15, 2017, Meeting and Medley's Alleged Threat

Admissions counselors in Admissions regularly attend certain outside recruiting events, such as high school college fairs, held outside the admissions counselors' normal working hours of 8:30 am to 5:00 pm, Monday through Friday. According to Jackson, attending such events is part of their job description. Admissions counselors are normally assigned a specific territory and they are expected to attend recruitment events occurring within their territories. There are also large events occurring outside normal working hours which all the counselors are required to attend. In March 2017, if a counselor had two events scheduled for the same time in his or her territory, Admissions solicited volunteers from among its other admissions counselors to cover the other event. However, Jackson testified that sometime before the date of the hearing in December 2017, Admissions stopped soliciting volunteers when a counselor is double-booked and now simply assigns another admissions counselor to cover the event. This change in practice was not alleged by Charging Party to violate PERA and Jackson's testimony was the only mention in the record of the change.

Nick Doyle is an admissions counselor whose territory is in the Detroit area. Doyle volunteered to cover a mid-afternoon college fair in Lansing on March 13, 2017. On the morning of March 13, it was either snowing or a snowstorm had been forecast. Doyle told Jackson that he would not drive to Lansing because he did not believe it was safe to drive. Jackson told Doyle that the event had not been canceled, and offered to let Doyle leave early, take a University vehicle, and stay overnight in Lansing. When Doyle continued to say that he would not go, Jackson drove to and from Detroit and Lansing to cover the event herself.

On March 15, 2017, Doyle was directed to attend a meeting with Medley and Jackson. Charging Party's Executive Director, Michelle Fecteau, accompanied Doyle to the meeting. Doyle was handed a disciplinary reprimand citing him for insubordination based on his refusal to drive from Detroit to Lansing on March 13. Fecteau objected to the characterization of Doyle's action as insubordination and argued that Doyle should receive, at most, a verbal warning that would not go in his file. Medley and Jackson caucused. When they returned, Medley told Fecteau that the reprimand would not be rescinded. Fecteau, Medley and Jackson all had somewhat different versions of what occurred next. According to Fecteau, Doyle asked what would happen now and who was going to know about the reprimand, and Medley replied that the matter would remain between him and Jackson. The witnesses agree that Fecteau interjected that Charging Party was also involved, and that she would be discussing the matter with Charging Party President Charles Parrish and with the other employees. Medley asked her why anybody who was not in the room needed to know about the reprimand. According to Medley and Jackson, Fecteau said that she would make sure that Jackson's employees knew that she did not care about their safety. According to Fecteau, she said something to the effect that she would let Doyle's co-workers know that if they volunteered for an event and then refused to attend because the driving conditions were hazardous they might be held to be insubordinate.

Fecteau, Medley, and Jackson agree that Medley then asked if Fecteau was threatening her, and that Medley picked up a pen and pad and asked Fecteau to repeat her statement so that Medley could write it down. Fecteau next said something to the effect that when employees were treated unfairly, the Union had the duty to let other employees know. According to Fecteau, Medley replied, "Well, I don't have to have them be voluntary anymore... I can change that... and I can mandate that people go to these things." Jackson testified that Medley said that if Fecteau told employees not to volunteer for events, they (Admissions) would just have to assign them to go. Medley did not testify to saying anything about ordering employees to attend events. In Medley's version of the conversation, the meeting ended after Fecteau said, in a loud voice, that the Union had the duty to let other employees know when someone was treated unfairly.

On March 18, 2017, Charging Party President Charles Parrish sent an email to Respondent Provost Keith Whitfield complaining about Doyle's reprimand and setting out reasons why Doyle's refusal to go to Lansing on March 13 was not insubordination. Parrish also complained that when Fecteau refused to keep the reprimand quiet, Medley asked if Fecteau was threatening her. Parrish told Whitfield that Medley needed to learn that "at this university the Union does not look kindly on an administrator who deals with a bargaining unit member in the manner that Mr. Doyle has been treated and will act to defend his/her rights to fair treatment."

Charging Party filed a grievance over Doyle's reprimand. At the time of the hearing in December 2017 the parties had not yet held a step one meeting.

March 20, 2017, Memo to Staff

On March 20, 2017, Medley sent out a memo to all employees within her division, including members of Charging Party's unit, employees in other bargaining units, and unrepresented employees. The memo stated that, in order to have consistent policies across the division, employees in the future would be required to adhere to certain rules. Medley instructed

employees who utilized a daily time reporting system, which did not include any member of Charging Party's unit, to adhere to the rule of a one hour lunch and two 15 minutes breaks. She told these employees that they did not have to clock out for breaks but did have to do so for lunch. For staff who did not utilize a time clock, the memo reminded them that the normal working day was 8:30 am to 5:00 pm and that they were supposed to be at their stations during those hours unless they were traveling for work-related purposes or had been approved for an alternative work schedule. The memo also informed these employees that they were responsible for notifying their supervisors if they were going to be late or if the schedules for events they were to attend outside the office changed.

Barbara Jones is a financial aid officer (FAO) in OSFA. Jones also holds the office of contract implementation officer for the Charging Party and is a member of Charging Party's executive board. Jones testified that prior to Medley's memo, FAOs did not have to notify their supervisors unless they were going to be substantially late. Jones testified that she would notify her supervisor if she was going to be two hours late but would not do so if she was only going to be 20 minutes late.

According to Medley, after she became the head of the Enrollment Management Division in July 2016 she discovered that different offices within the division were adhering to different protocols for timekeeping and reporting. In addition, many new staff members had never been instructed on these issues. Medley testified that she sent out the memo because she was advised by Respondent's labor relations director that the division needed to be consistent in what they required of staff.

May 22 and June 1, 2017, Memos

OSFA regularly sends FAOs to represent it at summer orientation and other student outreach events. Some of these outreach events occur outside of the FAOs normal working hours, including Saturdays. OFSA maintains a calendar of outreach events and FAOs sign up for outreach events several months in advance.

A 2002 memorandum of understanding (MOU) to the collective bargaining agreement required all divisions and departments employing academic staff to maintain a policy for granting compensatory time and flexible work schedules. Soon thereafter, OFSA promulgated a written document which was admitted into the record in this case. The document was entitled "Compensatory Time and Flexible Time Policies." These policies state that full-time FAOs are entitled to compensatory time for work performed beyond the normal workweek, and that compensatory time during a typical workweek is accrued at the rate of one hour for one hour and time and a half on weekends or during University closures. They also provide for flexible work schedules when approved by the OSFA director. The document does not address under what circumstances an FAO may be compelled to perform work outside of the typically scheduled workweek.

Jones was the only member of Charging Party's bargaining unit from the Enrollment Management division to testify at the hearing. Jones came to work in OSFA in about 1992. Jones is the only FAO not considered part of OFSA's outreach and retention unit and the only one not

supervised by Louis Krause. Jones testified that as long as she has been at OSFA, it has always asked FOAs, on a voluntary basis, to sign up for outreach activities that occurred outside of normal working hours and that OFSA had never required FAOs to volunteer. She testified that if no FAO signed up for a particular event, an OSFA manager would attend in place of the FAO. She also testified that she was not aware of any problem getting enough FAOs to volunteer. Prior to May 2017, Jones had not signed up for an outreach event for some time because she was working on other projects.

As noted above, Catherine Kay became the director of OFSA in August 2016. She testified that although FAOs were allowed to choose their own dates to attend outreach events, it was an expectation of their job that they attend these events. Kay testified that although managers regularly attend outreach events, FAOs also need to be present to counsel students on financial aid matters because this is what FAOs regularly do. Kay did not dispute that between the time she became director and May 2017 there was no requirement that FOAs sign up for a certain number of outreach events. However, Kay explained that because there had been several instances where no FAO signed up for an event, she decided that there should be a policy in place to prevent this from happening. According to Kay, she was told by Krause that he discussed the issue with FAOs at a March 31, 2017, staff meeting and that a consensus was reached on a set of guidelines for signing up for outreach events.

On May 22, 2017, Krause sent an email to all FAOs giving them "an update as to where we are with the outreach events sign ups." The email said, "At our last FAO meeting we went over the sign up requirements..." but that "some people still need to sign up [for outreach events] and we still have events that need FAOs to staff." Krause went on to list "guidelines" for how many outreach events, including how many Saturday events, particular groups of FAOs were to cover.

On June 1, 2017, Kay sent an email to all FAOs thanking those who had signed up for outreach events after Krause's email. She reminded them that once they had signed up for an event they were expected to show up prepared and to find a replacement if they were unable to attend. Kay also noted that there was an event only one week away for which three FAOs were needed and for which no FAO had signed up. Her email stated, "For the FAOS who have not yet signed up as requested [in Krause's email], review the calendar and select the open times and dates. Please note that this is a directive and that you must select your dates no later than Friday, June 2, at 4:00 pm."

After receiving Krause's email, Jones had tried to sign up for outreach events but had had trouble with the computerized calendar. Late in the day on June 1, after Kay had sent out her email, Karen Fulford, Jones' immediate supervisor, sent Jones an email telling her to sign up for three outreach events, including at least one Saturday, by the close of the following day.

Selective Salary Increases

As set out in the collective bargaining agreement, a portion of Respondent's salary budget for faculty and academic staff is set aside each year for "selective" salary increases. In 2016-2017, the collective bargaining agreement required that for academic staff, this pool of money was distributed among academic staff based on job performance, professional accomplishments, and

service, with job performance given the most weight. The process for distributing this money is partially described in the collective bargaining agreement. However, each year the Assistant Provost for Academic Personnel also issues a memo and guidelines on the selective salary increase evaluation process for academic staff.

All academic staff are required to submit an "annual report' consisting of an updated professional record, a summary of the last three years of the academic staff members' activities, a list of their current activities, and the results they expected from these activities. These materials are then reviewed by a selective salary committee(s) consisting of a manager and academic staff elected by their peers.

The collective bargaining agreement, at Article XII(B)(5)(b), requires the establishment of divisional selective salary committees in any division, college or school with three or more academic staff. Although the collective bargaining agreement does not require them, individual departments or offices may also have selective salary committees. Both OSFA and Admissions within the Enrollment Management Division have office selective salary committees. In each office, the head of the office chairs the committee and three employee members are elected from among the academic staff in that office. After the committee discusses the submitted materials, each committee member, including the office head, gives each staff member separate scores for job performance, professional accomplishments, and service. Staff members receive scores of one, two, three or four for job performance, with one being the best score. For professional accomplishment and for service, the scores are one, two, or three. The scores from the committee members are given to a representative from Respondent's Human Resources department, who averages them and assigns each staff member a score for each of the three factors. These scores are shared with the committee members and then passed along to the Enrollment Management Division's selective salary committee.

In 2017, the OSFA committee was chaired by Kay and the elected members were Jones and two other FAOs, Cordero and Adam Zangerle. Kay testified that, to the best of her recollection, all OSFA staff members received scores of one in each of the three categories from the 2017 OSFA committee.

As noted above, the parties' collective bargaining requires the establishment of divisional selective salary committees. The agreement also discusses the factors to be considered by the divisional committee in recommending selective salary increases and describes the committee's makeup. The agreement states, "The dean/vice president (or his/her designee) shall chair the salary committee with a vote." The collective bargaining agreement does not specify to whom the divisional committee is to make its recommendation. However, Article XII(C) provides that the University President, "through the deans/directors" is to make selective salary adjustment decisions and that the salary committees are to be consulted prior to these decisions.

The Associate Provost's 2016-2017 guidelines for the selective salary evaluation process included these paragraphs:

> It is the policy of the University to obtain peer advice before making merit salary adjustments, and the 2013-2021 WSU/AAUP-AFT Agreement requires

consultation with salary committees prior to making recommendations. Chairs/Directors will make recommendations to the appropriate vice president or dean. If a salary committee exists in the department or office of the director, the chair or director shall chair the committee with a vote.

Each dean/vice president shall, in addition, consult with a college/division advisory committee prior to making recommendations on selective salary adjustments to the Provost. The committee shall consist of bargaining unit-academic staff members elected according to college/school/division by-laws.

The elected employee members for the Enrollment Management Division's selective salary committee consist of three academic staff from Admissions and three from OSFA. FAO Jones testified that prior to 2017, the Enrollment Management Division selective salary committee functioned the same way as the office committees. That is, the head of Enrollment Management either chaired the committee and participated in the committee' discussions or, more frequently, designated one of the office heads/directors to participate in his or her stead. As in the office committee, the scores submitted by all the divisional committee members were averaged and then shared with all the committee members. As per the Associate Provost's guidelines, each academic staff member was informed of their scores by the divisional committee within five days of the committee meeting. Then, according to Jones, the committee's scores were submitted directly to the Provost as the committee's recommendations.

According to Jackson, who was the designated chair of the Enrollment Management Division selective salary committee in 2016, the committee's scores that year were submitted to Interim Associate Vice President Ahmad Ezzedine, then the head of the division. Jackson did not know if Ezzedine changed any of the scores before submitting them to the Provost.

In 2017, the Enrollment Management division selective salary committee met for the first time on June 9, 2017. Jones and Cordero were two of the six elected employee members of the divisional committee. When the employee members arrived, they were told by Jackson and Kay that Medley had designated them both as chairs. Jackson was to meet with the employee members to discuss OFSA staff and Kay would then meet with them to discuss Admissions staff. The employee committee members objected to there being two designees. Jones made a call to Charging Party's grievance officer who told the committee to call John Vander Weg, the Associate Provost for Academic Personnel. Vander Weg told the committee to adjourn the meeting, and that he would speak with Medley.

After Jones reported what had occurred at the meeting to Parrish, he and Vander Weg had several discussions about Medley's instructions to the committee. On July 5, 2017, Medley sent the members of the Enrollment Management selective salary committee an email announcing another committee meeting on July 10 and outlining the procedures to be followed at the meeting. Per Medley's email, Jackson was to meet with the employee committee members to "gather feedback from them regarding the FAOs," before the committee members submitted their scores for the FAOs. Kay would then meet with the employee members and the same process would be followed for the admissions counselors. A representative from Respondent's Human Resources Department would take notes on the discussions. After the meeting, Medley would receive these

notes, the committee's scores, and the materials submitted by the individual staff members. Medley would then "weigh the recommendations of the committee as part of the process," as she stated in her July 5 email, before assigning scores and sending them to the Provost.

On July 6 and July 7, Parrish sent emails to Vander Weg and to Provost Whitfield arguing that the procedures established by Medley were inconsistent with Article XII(B)(5)(b) of the contract. Parrish asserted that under the contract, the role of the vice president was merely to be a voting participant in salary decisions made by the selective salary committee and that for Medley to make her own independent decisions about the scores after the committee had concluded its role defeated the purpose of the provision. Parrish also pointed out that Medley would be making her decisions without actually meeting with the committee members or participating in their discussions. Parrish asserted that in order to comply with the contract, Medley would have to chair the selective salary committee herself or appoint one person to serve in her place. He also asserted that the committee's scores should be sent directly to the Provost.

Parrish advised the employee members of the selective salary committee to attend the scheduled July 10 meeting and, if Respondent would not agree to follow the contractual procedure, to leave the meeting. On Parrish's advice, the employee members of the committee came to the July 10 meeting, but Jones announced that they would leave if contractual procedures were not followed. The employee members then left the meeting.

Medley did not schedule another meeting of the selective salary committee. On July 14, 2017, academic staff employees in the Enrollment Management division received letters from Medley informing them of their scores for job performance, professional achievement, and service. In her letters, Medley also included comments on the employee's "strengths" and "opportunities for growth." In prior years, the academic staff in the Enrollment Management had received only their scores.

Jones and Cordero both received twos for job performance, twos for professional accomplishment and ones for service. Jones testified that since 1992, when she returned to work as an FAO, she has always received ones in every selective salary adjustment category.

An exhibit was admitted at the hearing that consisted of a chart of the scores apparently received for each of the three categories by all thirteen academic staff in the Enrollment Management Division. The chart was compiled by Jones based on information she received from the Provost's office regarding the amount of the increase paid to each staff member. Jones extrapolated the scores from this information, although some staff members also told Jones what scores they had received. Medley testified that the chart was not entirely accurate. However, the only example she gave involved a staff member who received one score of 2.5, rather than 2 as indicated on Jones' chart. Jones' chart indicated that she and Cordero were the only academic staff employees who did not receive ones for job performance. According to the chart, most of the academic staff, including Jones and Cordero, were awarded scores of two for professional achievement; one staff member received a one for this category and one received a three. Jones and Cordero both received ones for service, as did all but three other staff members.

Medley explained at the hearing that in her view the divisional selective salary committee was an advisory committee under the guidelines and that its function under Article XII(B)(5)(b) was to make recommendations to her. It was then her responsibility, after considering the committee's recommendations, to make her own recommendations to the Provost. Vander Weg agreed with Medley's interpretation of the guidelines and contract. He also testified that there were other units on campus where the vice presidents or deans adjusted scores recommended by the salary committee upwards or downwards.

In this case, Medley explained that since the divisional committee did not meet, she reviewed and considered the scores reached by the two office selective salary committees. Medley admitted that Jones and Cordero both received scores of one for job performance from the OSFA committee. However, she testified that she also scored other employees differently from their office committees. Medley explained that Cordero received a two rating in job performance because of student complaints that she had provided inaccurate financial aid information and because other departments had complained about "the negative way she interacts with others." Medley testified that Jones received a two rating for job performance due to her lack of understanding of computer systems and calculations for different federal aid programs which required her to undergo retraining on several instances.

Discussion and Conclusions of Law:

Medley's Alleged Threat

An employer violates Section 10(1)(a) if its conduct "interfere[s] with, restrain[s], or coerce[s] public employees in the exercise of their rights guaranteed in Section 9." The issue of whether Section 10(1)(a) has been violated is not determined by the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions may reasonably be said to tend to interfere with the free exercise of protected employee rights. *City of Greenville* 2001 MERC Lab Op 55, 58; *Huron Valley Schs,* 26 MPER 16 (2012). In determining whether a statement made by an employer agent violates Section 10(1)(a), both the content and the context of the statement must be examined. *City of Inkster*, 26 MPER 5 (2012), citing *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47 and *New Haven Cmty Schs*, 1990 MERC Lab Op 167, 179. The test is whether a reasonable employee would interpret the statement as an express or implied threat. *Inkster; Eaton Co Transp Auth,* 21 MPER 35 (2008); *City of Greenville,* at 56; *New Buffalo Bd of Ed,* at 48.

Charging Party alleges that during the March 15, 2017, meeting to discuss Doyle's written reprimand, Medley threatened to "change the weekend work policy" if Fecteau discussed the reprimand with other employees or with anyone outside the meeting.[1] On March 13, 2017, Doyle, an admissions counselor, had volunteered to cover an event for another admissions counselor but

[1] I note that Medley's alleged threat did not involve weekend work, per se. According to the testimony, Medley allegedly threatened to begin assigning admissions counselors to cover events in other territories when needed instead of letting them volunteer. Some of the events may have been on weekends but some were not. In any case, there was no dispute that admissions counselors are and have been expected to work weekends when events within their territories are scheduled on weekends.

then refused to attend because of weather-related driving conditions. At the March 15 meeting, Doyle was given a written reprimand for his alleged insubordination on March 13. The dispute between Fecteau and Medley at that meeting was not whether Doyle was obligated to volunteer to cover events in other admissions officers' territories. Rather, it was whether, having volunteered to cover an event that required him to drive some distance, he should be reprimanded for refusing to attend based on his belief that the weather had made driving unsafe. According to Fecteau's testimony, during the course of the meeting Fecteau said something to the effect that she would let Doyle's co-workers know that if they volunteered for an event and then refused to attend because the driving conditions were hazardous they might be held to be insubordinate. Jackson and Medley recalled Fecteau stating that she would let employees know that Jackson did not care about their safety. Whatever Fecteau said, Medley reacted by angrily asking Fecteau if she was threatening her and demanding that Fecteau repeat her statement so that she could write it down. According to both Fecteau and Jackson, Medley also said something to the effect that she could require employees to attend these events.

I find that discussions between a union representative and members of his or her bargaining unit about what the union representative believes is the unfair discipline of a unit member are "lawful concerted activities for the purpose of collective negotiation or bargaining" as set out in Section 9 of PERA. I also find that a union representative's statement to an employer agent that he or she intends to engage employees in such discussions constitutes activity protected by that section. The question here is whether a reasonable individual would have interpreted Medley's statement about requiring employees to attend events as a threat to retaliate against admissions counselors if Fecteau insisted on discussing Doyle's reprimand with them. Respondent did not address this question in its post-hearing brief.

I find that Jackson evidently understood Fecteau to be threatening not only to talk to other admissions officers about the circumstances of Doyle's reprimand but to advise them to stop volunteering to cover events in others' territories. However, Medley did not testify that this was her understanding of Fecteau's statement. In any case, I find that a reasonable person in Fecteau's position would have interpreted Medley's statement about requiring admissions counselors to attend events to be a response to Fecteau's "threat" to discuss Doyle's reprimand with them. First, Medley had already voiced an objection to Fecteau's discussing the matter with others by stating that she did not see why anyone outside the meeting had to know about the reprimand. Second, Medley did not explicitly accuse Fecteau of threatening to tell employees to refuse to volunteer for assignments, even after Fecteau, when asked to repeat her threat so Medley could write it down, said that the union had a duty to let other employees know when an employee was treated unfairly. In sum, I conclude that given the context in which it was made, Fecteau reasonably interpreted Medley's March 15 statement that she could require employees to attend events as a threat by Medley to retaliate against admissions counselors by changing the existing practice of allowing them to volunteer for events in other counselors' territories, rather than being assigned to attend, if Fecteau persisted with her plan to talk to the other admissions counselors about the circumstances of Doyle's reprimand to tell them Fecteau believed the reprimand was unfair. I conclude, therefore, that Medley's statement constituted unlawful interference with unit employees' exercise of their Section 9 rights and therefore violated Section 10(1)(a) of PERA.

Alleged Unilateral Changes

An employer's unilateral change in a term and condition of employment without giving the union the opportunity to demand bargaining is a violation of its duty to bargain in good faith. A term or condition of employment may be established by being included in a collective bargaining agreement or through past practice. When language in the contract is unambiguous, the contract controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract. *Port Huron EA v Port Huron Area Sch Dist,* 452 Mich 309 (1996). Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be tacit agreement that the practice would continue. *Port Huron,* at 325.

As the Court said in *Amalgamated Transit Union, Local 1564, AFL-CIO* v *Southeast Michigan Transp Auth,* 437 Mich 441, 455 (1991):

> A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a term or condition of employment.

Charging Party alleges that Kay's June 1, 2017, email directing all FAOs to sign up for a fixed number of Saturday and other outreach events constituted a unilateral change in a term or condition of employment. It argues that Kay's email unilaterally changed OSFA's written compensatory time and flexible work schedule policy, or, in the alternative, that OSFA's existing practice of not mandating Saturday or other work outside of normal working hours had become a term or condition of employment that could not be unilaterally altered.

As noted above, whether a practice has become a term or condition of employment depends upon whether the parties agreed, either explicitly or implicitly, that the practice would continue. I find no evidence here of an agreement by OFSA to continue its practice of permitting FOAs not to sign up for outreach events on weekends or outside of normal working hours. As noted in my findings of fact, OSFA's written compensatory time and flexible work schedule policy does not address the issue of whether FAOs may be required to sign up for work outside of normal working hours. I credit Jones' essentially uncontradicted testimony that for at least the last 15 years OFSA has never required FAOs to work events held outside of normal working hours but instead relied on FAOs to volunteer for these events with managers covering if no one volunteered. By its nature, however, the viability of this practice depended on FAOs volunteering in sufficient numbers to ensure that the necessary number of FAOs were present at most outreach events. To accept Charging Party's argument that OSFA's practice of relying solely on volunteers had become a term or conditions of employment, I would have to find that OSFA implicitly agreed that FAOs would not be required to sign up for outreach events even if the volunteer system did not produce enough volunteers. I conclude that the evidence is not sufficient to support such a finding.

As to the alleged unilateral changes involving the selective salary committee, whether deans and division heads must follow the selective salary committee's recommendations is not explicitly addressed in either the collective bargaining agreement or the Associate Provost's guidelines. It is not the Commission's role to resolve disputes over the meaning of ambiguous contract language. Rather, when the parties have agreed to a separate arbitration agreement, disputes over interpretation of the contract are left to arbitration; the Commission' s role is ordinarily limited to determining whether the agreement covers the subject of the claim. *Port Huron*, at 321; *Macomb Co v AFSCME Council 25,* 494 Mich 65, 80 (2013).

I also conclude that the parties did not tacitly agree that the Enrollment Management Division's selective salary committee recommendations would be forwarded to the Provost without change. Divisional/School/College selective salary committees are used University-wide as part of the process of distributing money allocated for selected salary increases for academic staff. Jones testified that prior to 2016-2017 the recommendations of the Enrollment Management division elective salary committee were submitted directly to the Provost. However, Jackson testified that in 2015-2016 the interim division director reviewed the recommendations before they were sent to the Provost. As Director of Admissions, Jackson was in a better position than Jones to know whether this occurred, and I credit her testimony. I also credit Associate Provost Vander Weg's uncontradicted testimony that in other units on campus the vice presidents or deans adjust scores recommended by the salary committee upwards or downwards before submitting them to the Provost. I find that Charging Party did not establish that Respondent had a consistent past practice of forwarding the selective salary committee's recommendations directly to the Provost without change. I conclude, therefore, that Respondent did not unilaterally altered existing terms and conditions of employment when Medley informed the selective salary committee that she would not submit its recommendations to the Provost.

Whether Article XII(5)(b) prohibits the designation of co-chairs is also a question of contract interpretation to be decided by an arbitrator, not in this forum. While no evidence was presented as to whether this is or is not done in other units across campus. I find that Charging Party failed to establish the existence of a consistent past practice of appointing a single designee to chair a selective salary committee in the dean's or vice president's stead. I conclude that Charging Party failed to establish that Medley unilaterally altered existing terms or conditions of employment when she attempted to appoint two co-chairs, instead of a single designee, to serve on the selective salary committee.

Alleged Discrimination

The elements of a *prima facie* case of unlawful discrimination under PERA are well established. In addition to the existence of an adverse employment action, a charging party must show: (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 v Rhatigan*, 318 Mich App 617, 636 (2016) aff'g *Taylor Sch Dist,* 28 MPER 66 (2015); *Interurban Transit Partnership,* 31 MPER 10 (2017). Although anti-union animus may be proven by circumstantial 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); *Saginaw Valley State Univ,* 30 MPER 6 (2016); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707.

Charging Party alleges that Medley retaliated against Jones and Cordero for raising objections to her proposed selective salary committee process by giving them unfairly low scores on their selective salary review. As discussed at the beginning of this decision, Charging Party also appears to allege that, because of Fecteau's insistence on publicizing the details of Doyle's reprimand, Respondent retaliated against employees in the Enrollment Management Division by: (1) on March 20, 2017, imposing on them stricter attendance rules and enforcement of these rules; and (2) on May 22, 2017, and June 1, 2017, ordering FAOs to sign up to attend a certain number of outreach events after normal working hours and on Saturdays.

Because they received scores of two for job performance on their 2017 selected salary review, Jones and Cordero received smaller salary increases than they would have had they received scores of one. These lower scores, therefore, constituted adverse employment actions, as defined in *Taylor Sch Dist and Taylor Federation of Teachers, AFT Local 1085 v Nancy Rhatigan and Rebecca Metz,* 381 Mich App 617 (2016). Jones, Cordero and the other employee members of Enrollment Management Division's selective salary committee complained that the process Medley proposed for that committee violated the collective bargaining agreement and for that reason, refused to participate in the committee. There is no dispute these actions were protected by Section 9 of PERA and that Respondent knew of them. However, in order to establish a *prima facie* case of unlawful discrimination, Charging Party must show evidence of anti-union animus or hostility to Jones' and Cordero's exercise of their Section 9 rights. It also must also produce evidence that there was a causal link between this animus or hostility and adverse employment actions. The evidence on both these points may be entirely circumstantial but must be substantial enough to support an interference that Respondent's anti-union animus or hostility to the employees' exercise of their Section 9 rights was at least a motivating cause of its actions.

In support of its claim, Charging Party points to the fact that Jones and Cordero were the only academic staff in the Enrollment Management Division whose job performance scores, as recommended by their office selective salary committees, were lowered by Medley. It also points to the fact that, according to Charging Party, the scores Medley assigned to Jones and Cordero in 2017 were lower than any scores either Jones or Cordero had previously received in previous selective salary reviews. Charging Party asserts that Medley's anti-union animus is shown by Medley's insistence that the selective salary committee follow her process even after Charging Party objected. It also argues that the timing of Medley's actions is suspicious because it occurred shortly after Jones and Cordero again asserted their objections to Medley's process by refusing to participate in the July 10, 2017, committee meeting. These facts together, according to Charging Party, demonstrate that Medley's actions were discriminatory and violated Section 10(1)(c).

I conclude that the evidence as a whole does not support the conclusion that Jones' and Cordero's protected activity was even a motivating cause of their receiving lower job performance scores than the other academic staff members in the Enrollment Management Division. According to the chart admitted as an exhibit, Jones and Cordero were the only academic staff members who did not receive scores of one for job performance. However, Medley rated Jones and Cordero higher than some other staff members in professional achievement and service. Moreover, if Director May's recollection was correct that the OSFA selective salary committee awarded ones

to all the FAOs in all categories, Medley also lowered the scores of all the FAOs for professional achievement and the score of one FAO, not Jones or Cordero, for service. Thus, the evidence does not clearly indicate that Jones and Cordero were singled out to receive lower scores. While Jones testified that she had never received a score lower than one in any previous selective salary review, the 2017 review was the first one conducted after Medley became head of the Enrollment Management Division. Medley clearly made the decision to take an active role in the review process outside of the committee, and it was Medley's decision to give Cordero and Jones scores of two for job performance. Medley's assessment of Jones' and Cordero's job performance may or may not have been correct. Because she was not responsible for their previous ratings, however, the fact that her ratings may have been lower than their previous ones says nothing about Medley's reasons for rating them lower.

The fact Medley did not change her mind about the role she would play in the selective review process in response to Charging Party's objections is also not evidence that her scoring of Jones or Cordero was motivated by anti-union animus. In addition, I note that Jones and Cordero were only two of six academic staff members on the Enrollment Management Division's selective salary committee. Jones was the committee member who called Charging Party's grievance chairman during the June 9 meeting for advice and was also the member who announced at the July 10 meeting that the employee members would not participate if the contract was not followed. According to the record, however, all the committee members objected to Medley's procedure and all of them walked out of the meeting on July 10. However, only Jones and Cordero received job performance scores of two. Finally, Jones and Cordero refused to participate in the committee meeting on July 10, 2017 and were notified of their selective salary scores on July 14, 2017. However, mere temporal proximity between protected activity and an adverse employment action is not enough, by itself, to establish a causal relationship. *City of Detroit (Water & Sewerage Dep 't)*, 1985 MERC Lab Op 777, 780; *Macomb Twp. (Fire Dep't)*, 2002 MERC Lab Op 64, 73. Here, of course, the timing was explained by the fact that Medley was attempting to comply with the collective bargaining agreement by completing her reviews within five days of the date, July 10, that the selective salary committee was scheduled to meet.

As discussed above, Jones and Cordero engaged in activity protected by Section 9 of the Act by asserting that the process Medley proposed for their selective salary review violated the collective bargaining agreement. However, despite their and Charging Party's protests, Medley persisted. Shortly thereafter, Cordero and Jones received job performance ratings from Medley that were lower than their previous ratings and which they found unfair. These facts, I conclude, are not sufficient to support a finding that anti-union animus or hostility to Jones' and Cordero's exercise of their Section 9 rights was a motivating cause of Medley's scoring decisions. Because I find that Charging Party did not establish a *prima facie* case of unlawful discrimination under PERA, I conclude that the allegation that Medley violated Section 10(1)(a) and (c) by giving Jones and Cordero lower job performance scores than the other academic staff employees in her division should be dismissed.

Charging Party also alleged, but did not address in its post-hearing brief, that Medley's March 20, 2017, attendance and attendance reporting memo to employees constituted retaliation against academic staff in the Enrollment Management Division for Fecteau's insistence on discussing Doyle's March 15, 2017, reprimand with other employees. It also alleged, but did not address in its post-hearing brief, that the directive to FAOs to sign up to work a certain number

of events outside of normal working hours constituted retaliation against employees for Fecteau's conduct.

With respect to the March 20, 2017, memo, in *Taylor Federation of Teachers,* the Court of Appeals, citing *Wilcoxon v Minnesota Mining & Mfg Co,* 235 Mich App 347, 364, (1999) described an adverse employment action under Section 10(1)(c) of PERA as:

> . . . [a]an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities... typically it takes the form of an ultimate employment decision, such as a termination in employment, a demotion evidenced by a decrease in wages or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Jones' was the only testimony that Medley's March 20, 2017 memo changed existing practices anywhere within the Enrollment Management Division. Jones' testimony was that prior to the memo, she did not inform her supervisor unless if she was going to be more than about 20 minutes late to work. Jones apparently interprets the memo as requiring her now to notify her supervisor any time she expects to be late. I find that even if Jones' interpretation is correct, this change did not constitute an adverse employment action for purposes of establishing a violation of Section 10(1)(c). I conclude, therefore, that Charging Party's allegation that the March 20, 2018, memo violated Section 10(1)(a) and (c) of PERA should be dismissed.

I also find that Charging Party failed to establish a causal connection between OSFA's directive that FAOs sign up to work events outside of normal working hours and any activity protected by the Act. As I have found, at the March 15, 2017, meeting between Fecteau and Medley and Jackson Medley said something to the effect that she could order employees to attend events rather than allowing them to be voluntary. However, the discussion at that meeting was about admissions officers in Admissions. In March 2017, when the need arose for admissions officers to attend events outside their territories, Admissions asked for volunteers. However, admissions officers were already required to work outside of normal working hours. OSFA Director May's June 1, 2017, email directing employees to sign up to work a certain number of events outside of normal working hours applied only to FAOs in OSFA, not to admissions officers. There was no evidence that May's directive originated with Medley. I conclude that the evidence does not support a finding that May's June 1, 2017 directive was motivated by Fecteau's statements at the March 15, 2017, meeting. I conclude, therefore, that Charging Party's allegation that the June 1, 2017 email directive violated Section 10(1)(a) and (c) of PERA should be dismissed.

As discussed above, I find that on March 15, 2017, Medley threatened to end the existing practice of allowing admissions counselors to volunteer for events in other counselor's territories rather than being assigned to attend if Fecteau discussed the circumstances of Nick Doyle's reprimand with the other admissions counselors. I conclude, for the reasons set forth above, that Medley's threat violated Section 10(1)(a) of PERA. Based on the findings of fact and conclusions of law above, I conclude that Respondent did not otherwise violate PERA by the actions set forth in the charge. I recommend, therefore, that the Commission issue the following order.

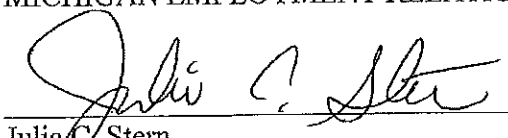
RECOMMENDED ORDER

Respondent Wayne State University, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 9 of PERA by threatening to retaliate against them if their union representative discussed with them the circumstances of a disciplinary reprimand issued by a supervisor in Respondent's Enrollment Management Division.

2. Post copies of the attached notice to employees at all places on the Respondent's premises where notices to employees in the bargaining unit represented by the American Association of University Professors, AFT, Local 6075, are customarily posted for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 6, 2018