STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURON VALLEY SCHOOLS,
Public Employer-Respondent,

Case No. C10 F-139

-and-

HURON VALLEY EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Lusk & Albertson, P.C., by William G. Albertson, for Respondent

Law Offices of Lee & Correll, by Michael K. Lee and Megan R. McGown, for Charging Party

DECISION AND ORDER

On June 27, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent, Huron Valley Schools (Employer), did not violate §10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) and (c). The ALJ recommended dismissal of the charge concluding that Charging Party, Huron Valley Education Association, MEA/NEA, failed to allege facts to support the contention that Respondent had interfered with the rights of employees to engage in protected concerted activity. Specifically, the ALJ found no indication of any anti-union animus or showing that Respondent had threatened or retaliated against one of Charging Party's members for invoking the grievance procedure on a work related dispute. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On July 20, 2011, Charging Party filed exceptions to the Decision and Recommended Order. After requesting and receiving an extension of time, Respondent filed its response to the exceptions on September 2, 2011. In its exceptions, Charging Party argues the ALJ erred in finding that there was no violation of PERA. Charging Party also excepts to the ALJ's conclusion that Respondent's actions were not motivated by anti-union animus and that there was no adverse employment action. Conversely, in its response, Respondent contends that Charging Party's exceptions are internally

inconsistent and not supported by any legal authority. Respondent also agrees with the ALJ's findings that the record does not support a conclusion that Respondent threatened to take reprisals against the employee in question. After careful consideration of Charging Party's exceptions, we find them to be without merit as discussed below.

Factual Summary:

We adopt the findings of facts and conclusions of law contained in the ALJ's Decision and Recommended Order and will not repeat them, except as necessary. Charging Party represents a group of teachers employed by Respondent. As part of a performance improvement plan, Respondent assigned a teacher to serve as "mentor" to another member of Charging Party's bargaining unit, Jennifer Javorsky, hoping to improve Javorsky's communications skills with students and other staff. Several months into the evaluation period, Respondent arranged a special discussion meeting between the mentor, building principal and other teachers to discuss any outstanding concerns that the teachers may have had involving Javorsky. When Javorsky learned of the special discussion meeting, she contacted her co-workers insisting that they not attend or a grievance would be filed. Upon hearing of Javorsky's reaction, the principal contacted her and attempted to reassure her that the special meeting would be beneficial rather than punitive. He also indicated that filing a grievance would be both unnecessary and without justification.

The special meeting took place as planned without Javorsky present. Later that same day, Javorsky contacted the principal and again expressed opposition to the special meeting. Their discussion concluded without resolution. The principal then contacted the union president for assistance in addressing Javorsky's concerns and growing tensions. The union president responded and met with Javorsky and the principal; however, no formal grievance action was taken. Subsequently, Charging Party filed a charge alleging that Respondent violated PERA by retaliating against Javorsky for engaging in protected concerted activity based on the principal's comments regarding the filing of a grievance over the special meeting.

Discussion and Conclusions of Law:

The crux of this case relates to whether Respondent's agent violated §10(1)(a) and §10(1)(c) of PERA by allegedly threatening Javorsky in retaliation for invoking the grievance procedure. In determining whether an employer has engaged in unlawful activity under either section, we must examine the "totality of the circumstances" surrounding the complained of actions. *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703, 707. Charging Party alleges that the principal's comments regarding the filing a grievance were motivated by anti-union animus and interfered with her exercise of rights protected under PERA. Conversely, the Employer asserts that the contacts by the principal with Javorsky over the contemplated grievance action were simply efforts to diffuse the situation and not made in retaliation to any protected concerted activity. The ALJ agreed with Respondent and recommended dismissal of the charge. We concur with the ALJ's recommendation.

As the ALJ indicates, in order to satisfy the base requirement of a discrimination claim under §10(1)(c) of PERA, a party must show that (1) the employee engaged in protected activity, (2) the employer knew of the protected activity, (3) the employer possessed anti-union animus and (4) the protected activity was the motivating factor underlying the discriminatory conduct. *Genesee Co Sheriff Dep't*, 18 MPER 4 (2005). The ALJ held that the intent by Javorsky to file a grievance constituted protected concerted activity under PERA. *MERC v. Reeths-Puffer School District*, 391 Mich 253, 265-66 (1974). However, he also concluded that the record does not support the existence of any anti-union animus by Respondent. Instead, the record indicates that the principal sought to gather information to assist in carrying out the performance plan pertaining to Javorsky. After learning of the upcoming meeting between her mentor and colleagues, Javorsky objected. She then tried to discourage her co-workers from attending the meeting and threatened to file grievance as part of her protest. In response, the principal attempted to lessen Javorsky's worries. While doing so, he also opined that filing a grievance was not necessary or prudent. Based on these facts, we find the complained of actions to be insufficient to reasonably conclude that the principal harbored any anti-union animus. At best, the allegations are merely conclusory statements of a PERA violation, which alone, cannot sustain an unfair labor practice charge. *Detroit Pub Sch*, 25 MPER 83 (2012). We, therefore, reject Charging Party's contention that the actions by Respondent's agent with Javorsky were motivated by anti-union animus and in violation of §10(1)(c).

We also find no basis for Charging Party's claim of a §10(1)(a) violation. While anti-union animus is not a required element to sustain a charge based on a §10(1)(a) violation, a party must still demonstrate that the complained of actions by an employer have "objectively" interfered with that party's exercise of protected concerted activity. *Macomb Academy, 25 MPER 56 (2012).* Charging Party asserts that Javorsky's discussions with the union president following her interaction with the principal substantiates the extent of the intrusion on her rights under PERA. However, based on the pleadings of both parties, we note that the principal, not Javorsky, requested assistance from the union president once the discussions began to breakdown. Furthermore, criticisms by a public employer to an employee regarding a grievance action do not violate PERA, so long as the statements do not expressly or impliedly threaten to penalize the employee for filing a grievance. *City of Lincoln Park*, 1983 MERC Lab Op 362. We find no such showing by Charging Party in the record here.

Charging Party also asserts that Javorsky suffered from an adverse employment action by Respondent. Even if true, PERA does not seek to remedy all types of alleged misconduct by public employers; only those acts that infringe or restrain an employee's rights under the Act. *Wayne Co*, 23 MPER 51 (2010). We conclude that the alleged comments by the principal could not have reasonably interfered with Javorsky's decision to undertake grievance action. As such, we reject Charging Party's claim of a §10(1)(a) violation or adverse employment action by Respondent that violates PERA.

Finally, we have carefully reviewed Charging Party's remaining arguments and find that they would not affect the outcome in this case. For all of the aforementioned reasons, this Commission dismisses the exceptions and adopts the Decision and Recommended Order of the Administrative Law Judge.

ORDER

The unfair labor practice charge against Respondent is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

HURON VALLEY SCHOOLS,
Respondent-Public Employer,

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HURON VALLEY EDUCATION ASSOCIATION, MEA/NEA,
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APPEARANCES:

Lusk & Albertson, P.C., by William G. Albertson, for the Public Employer

Law Offices of Lee & Correll, by Michael K. Lee, for the Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the Michigan Administrative Hearing System acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based on the entire record, including post-hearing briefs filed by the parties on January 13, 2011.

The Unfair Labor Practice Charge:

In a Charge filed on June 4, 2010, the Huron Valley Education Association (the Union) alleged that Huron Valley Schools (the Employer) violated PERA by threatening bargaining unit member Jennifer Javorsky in retaliation for her invoking the grievance procedure. The Employer denied that any threat had been made and affirmatively asserted that in fact, on the day of the events giving rise to the Charge, school principal Scott Lindberg initiated a call to the Union president to secure assistance for Javorsky.

Findings of Fact:

Javorsky is employed by Huron Valley as a "resource room" teacher. As such, she provides supplemental services to students who are assigned to regular classroom settings, but who also need special education services. Allegations of communication difficulties at her prior school, Muir Middle School, occurring in 2008, led to Javorsky

being placed on an "individualized development plan" (IDP) to secure improvement in her performance. The deficits apparently persisted and the IDP was continued with modifications after Javorsky was transferred to Oak Valley effective June 2009.[1] During the 2009-2010 school year, Javorsky was assigned to students drawn from the regular classes of two separate teams of Oak Valley seventh grade teachers (referred to as 7 North and 7 West). In order for Javorsky to successfully provide services to these students, it is necessary for her to effectively communicate with the multiple team teachers to determine individual student needs and progress, as well as to stay current with such things as lesson plans and assignments.

Fellow bargaining unit teacher Lisa Lie was assigned as a mentor for Javorsky at Oak Valley. Lindberg chose Lie due to her master teacher status and his belief that she had previously been successful with students and collaborative with other teaching staff. Despite the IDP and the assignment of Lie as mentor, Javorsky had ongoing problems during her first semester at Oak Valley with both the frequency and quality of her communication with parents and other teachers. Parents began seeking to have their children removed from Javorsky's resource room.

In December 2009, Lie proposed, and Lindberg approved, a plan for Lie, as Javorsky's mentor, to meet with the other team teachers to try and resolve their concerns regarding the communication problems with Javorsky. A meeting was set up with Lie and the 7 North team for the morning of Friday, December 4, 2009. One of the invited teachers mentioned the planned meeting to Javorsky, who had not been invited. Javorsky became concerned about what might be said in her absence, but Lie sought to reassure her that she would not be disadvantaged in any way.

By some means which he could not recall, Javorsky's concerns were brought to Lindberg's attention. Lindberg went to Javorsky to try to reassure her that the meeting was a good thing and Lindberg believed that he had succeeded in reassuring Javorsky, who agreed to not attend the meeting. The planned December 4 meeting with Lie and the teaching team apparently took place.

On arrival at work on Monday December 7, 2009, Lindberg was immediately confronted by two teachers from the 7 West teaching team. The two teachers asserted to Lindberg that Javorsky had approached them on arrival and told them not to meet with mentor Lie, or Javorsky would "grieve" them.

Javorsky testified that before Lindberg arrived that Monday, she had stopped by his office and told his secretary that she wanted to meet with Lindberg to discuss a grievance. Lindberg denied that his secretary had relayed any such message, and regardless, immediately after meeting with the two 7 West teachers, Lindberg sent for

[1] There were allusions in the hearing to a request by Javorsky for unspecified accommodations under the Americans with Disabilities Act (ADA), related to some unspecified disability. It was apparent that Javorsky had difficulty communicating with, and relating to, others and with accurately perceiving the expectations of others.

Javorsky. Lindberg described Javorsky as "very agitated" when she arrived at his office. They met for approximately ninety minutes.

While there are conflicts between their testimonies regarding the precise discussion at that meeting, the focus was on Javorsky's desire to have Lie removed as her mentor, and Lindberg's concern that Javorsky's communication problems with her peers had been exacerbated by Javorsky's response to Lie's efforts. Javorsky insists that she told Lindberg she intended to file a grievance against the District, although she never did pursue a grievance. Lindberg insists that she never mentioned filing a grievance in that meeting. It is clear that Lindberg was aware at the time of the meeting of the assertion by Javorsky's peers on 7 West that she had threatened to file a grievance against them for discussing her performance with Lie. Javorsky asserts, and Lindberg denies, that he said to her it "would be a mistake" for her to file a grievance, that "nothing good would come of it" and that Javorsky needed to "call off Mike MacGregor" the Union president. Lindberg did not recall saying anything to Javorsky about filing a grievance, but indicated that if he had said anything it would have been in reference to his understanding, from her colleagues, that Javorsky had threatened to "grieve" her fellow teachers.

Immediately following the meeting with Javorsky, Lindberg contacted the Union president MacGregor to advise him of the "bad situation" amongst Javorsky and her peers, and to ask MacGregor to come in to meet with Lindberg. MacGregor arrived within the hour, conferred briefly with Lindberg, and then sought out Javorsky. MacGregor and the MEA did not pursue a grievance on behalf of Javorsky, advising her that he could not see any contractual violation. Javorsky did not pursue the matter further within the MEA or with the Employer. MacGregor was present for the hearing, but was not called as a witness by the Union.

Also within minutes of the Javorsky meeting, Lie came to Lindberg's office to indicate that she was no longer willing to serve as Javorsky's mentor. Lie gave Lindberg no reason. She also called to advise MacGregor that she would no longer serve as Javorsky's mentor.

Discussion and Conclusions of Law:

The Charge asserts claims arising under PERA section 10(1)(a), the anti-interference clause, and under section 10(1)(c), the anti-retaliation clause. The elements of a prima facie case of unlawful discrimination under Section 10(1)(c) of PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; (4) adverse employment action taken by the employer such as discipline or a demotion in status or responsibilities; and (5) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Wayne County (Sheriff's Dept)*, 21 MPER 58 (2008), relying in part on *Burlington Northern v White*, 548 US 53, 71; 126 S Ct 2405, 2416 (2006); see also, *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. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. Once a prima facie case is met, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419. See also *MESPA v. Evart Public Schools*, 125 Mich App 71 (1983).

Proof of the Employer's intent or motivation, however, is necessary only for purposes of a Section 10(1)(c) violation. The test of whether Section 10(1)(a) of PERA has been violated does not turn on the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions tend to interfere with the free exercise of protected employee rights. Conduct which is inherently destructive of employee rights granted by Section 9 of PERA may violate Section 10(1)(a) of PERA irrespective of the Employer's motivation. See e.g., *Midland County Rd Comm*, 21 MPER 42 (2008); *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *City of Greenville*, 2001 MERC Lab Op 55; *City of Detroit (Water & Sewerage Dep't)*, 1988 MERC Lab Op 1039; *City of Detroit (Fire Dep't)*, 1982 MERC Lab Op 1220. Under Section 9 of PERA, employees of course have the right to file grievances free from employer threats and without fear of punishment or reprisal. *MERC v. Reeths-Puffer School District*, 391 Mich 253, 265-66 (1974), *aff'g* 1970 MERC Lab Op 967; *University of Michigan*, 1995 MERC Lab Op 81, 84. *City of Detroit (DOT)*, 1978 MERC Lab Op 1302. It is the chilling effect of a threat and not its subjective intent that would violate PERA. *University of Michigan*, 1990 MERC Lab Op 272, *aff'd* Court of Appeals, Dkt. No. 128678 (7/16/92, unpublished). Nonetheless, an Employer is entitled to criticize a grievance or question its merits without running afoul of PERA. *City of Lincoln Park*, 1983 MERC Lab Op 362. Moreover, the 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. *New Haven Community Schools*, 1990 MERC Lab Op 167, 179.

In the instant case, as to the 10(1)(c) retaliation claim, there was proof that Javorsky asserted an intent to file a grievance, perhaps against her coworkers or perhaps against her Employer, and that Lindberg was aware of that intent. However, there is no evidence of any anti-union animus on the part of Lindberg. There is no allegation, or proof, of an adverse employment action by Lindberg or any other Employer agent. To infer anti-union animus on these facts would be to inappropriately engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, *supra*. I find that there was no threat of retaliation, much less the carrying out of retaliation.

As to the 10(1)(a) interference claim, at most, Javorsky's testimony if entirely credited, suggests that her principal, in a non-threatening way, attempted to dissuade her from filing a grievance, by expressing his opinion that the grievance was meritless or that pursuing it would be a bad idea. Such conduct, alone, would not violate the Act. See,

City of Lincoln Park, supra. While principal Lindberg's testimony differed from Javorsky's, I find no reason to doubt his credibility; rather, I find any inconsistencies in Lindberg's testimony to be the result of honest uncertainty rather than fabrication. I am persuaded that he believed that Javorsky's intent was to pursue a claim against her fellow teachers and that Lindberg believed such a step would further, and pointlessly, exacerbate an already deteriorated relationship between Javorsky and the other teachers. I find it significant that his immediate reaction to his extended discussion with Javorsky was to himself call the Union president Mike MacGregor in and suggest that MacGregor meet with Javorsky. I find Lindberg's testimony credible and supportive of a conclusion that he sincerely thought that Javorsky had substantive difficulties which interfered in Javorsky performing the basic duties of her job. Lindberg's conduct in immediately calling in MacGregor firmly contradicts Javorsky's claim that Lindberg insisted that she "call off MacGregor". Far from inappropriate, Lindberg's action of calling in the Union president is precisely the appropriate response and was one to be encouraged under PERA, which both directs that employers should generally deal through an exclusive representative where one has been selected and seeks the good faith voluntary resolution of disputes. I further find it significant that, although he was present for the hearing in this matter, the Union did not introduce testimony by MacGregor.

In viewing the totality of the testimony, my factual conclusion is that Lindberg acted in good faith in an effort to assist a troubled teacher who was having, and seemingly causing, interpersonal problems with her colleagues. The structure of PERA seeks to promote good faith efforts by both sides of what can sometimes be difficult and contentious workplace issues. It is that good faith effort, not perfection, which is the goal of the Act. The Commission does not seek to impose hidden trip-wires or unduly formalistic obligations. Here, the principal sought to do right and, even if the Union later found fault with Lindberg's handling of the matter, I find no evidence of anti-union animus, nor of any intentional retaliation or threat, nor facts from which a reasonable person could objectively derive the existence of such a threat, as would be necessary to support a 10(1)(c) violation. Additionally, I find no facts from which a reasonable person could objectively derive an interference in the exercise of statutory rights, as prohibited by 10(1)(a), especially as it is undisputed that the complained of Employer representative took the appropriate step of himself immediately calling in the Union president to investigate and address Javorsky's concerns.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June ----, 2011