STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

MERC Case No. C13 B-028
-and- Hearing Docket No. 13-000175

HEATHER MILLER,
An Individual Charging Party.
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APPEARANCES:

Daryl Adams, Assistant Director of Labor Relations, for Respondent

Scheff & Washington PC, by George B. Washington, for Charging Party

DECISION AND ORDER

On April 21, 2015, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order in the above matter finding that Respondent Detroit Public Schools (Employer) violated § 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 determined that Respondent unlawfully discriminated against Charging Party Heather Miller for engaging in protected concerted activity. The ALJ also concluded that Respondent took actions against Miller that objectively tended to restrain, interfere, or coerce her in the exercise of her rights under § 9 of PERA. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Respondent requested and we granted two extensions of time to file exceptions to the ALJ's Decision and Recommended Order. In accordance with the time limit set by the final extension, Respondent filed its exceptions and supporting brief on June 30, 2015. Charging Party also requested and received two extensions of time. She filed a brief in support of the ALJ's Decision and Recommended Order on August 17, 2015, before the deadline set by the second extension.

In its exceptions, Respondent contends that the ALJ erred with respect to several of his findings of fact and his credibility findings. Further, Respondent asserts that the ALJ erred by relying on findings of fact made in *Detroit Pub Sch*, 22 MPER 89 (2009), our decision in an earlier unfair labor practice charge filed by Charging Party and her husband, Stephen Conn, against Respondent. Respondent also contends that the ALJ erred by applying the principle of collateral estoppel.

We have reviewed the exceptions filed by Respondent. We find them to be without merit.

Motion to Reopen the Record

On January 25, 2016, Charging Party filed a motion to reopen the record in this matter. Attached to the motion is a declaration of service signed by Charging Party's attorney, in which he asserts that he mailed and emailed the motion to Respondent's Office of the General Counsel on January 17, 2016. Respondent did not file a response to Charging Party's motion.

In her motion, Charging Party asserts that the record should be reopened to allow the Commission to accept five documents, including four from Respondent's official records and one comprised of excerpts from the transcript in this matter. As such, Charging Party does not seek a remand for purposes of establishing that the documents are from Respondent's official records. Inasmuch as Respondent has not replied to Charging Party's motion, it appears that Respondent does not contest the validity of the proffered documents.

In her motion, Charging Party contends that the ALJ appropriately found that testimony given by one of Respondent's witnesses, Hobbs, lacks credibility. According to Charging Party, the documents she wishes us to consider would provide evidence that testimony given by Hobbs was willfully false and would confirm the correctness of the ALJ's conclusion. However, in her motion, Charging Party admits that her counsel received the first two exhibits in a packet of documents provided to him shortly before Hobbs testified on March 26, 2014.[1] It appears that Charging Party received the third exhibit in January 2016, during the course of discovery in federal litigation involving a complaint that Miller filed against Respondent.[2] The fourth and fifth exhibits are already contained in the record in this matter. Therefore, the question before us is whether we should grant reopening to admit the first three exhibits.

Under Rule 166 of the General Rules of the Michigan Employment Relations Commission, 2014 AACS, R 423.166, to prevail on a motion to reopen the record, the moving party must establish:

[1] These two documents are each sets of emails between Hobbs and an employee of Respondent's Human Resources Division. The first exchange of emails starts with an August 8, 2012 email from the Human Resources employee to Hobbs in which the Human Resources employee asks Hobbs whether Brandon Graham should be included or removed from the teacher selection roster of the school Hobbs administered. Hobbs' response, later that day, exclaims that Graham should be removed from the roster because Graham had failed to contact her or respond to her email inquiring as to whether he would be accepting a position teaching math. The second exchange of emails includes an August 9, 2012 email from the same Human Resources employee to Hobbs. That email lists a revised teacher selection roster indicating a vacant slot for a science teacher. Later that day, Hobbs wrote to the Human Resources employee, informing her that the vacant position was not in science, but was in math.

[2] Exhibit 3 is a completed Detroit Public Schools Separation from Service form indicating that it was completed by Brandon Graham on August 20, 2012, for the purpose of informing Respondent that he was retiring as a math teacher for the Detroit Public Schools as of August 23, 2012.

(a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.

(b) The additional evidence itself, and not merely its materiality, is newly discovered.

(c) The additional evidence, if adduced and credited, would require a different result.

Inasmuch as Charging Party acknowledges that she received the first two exhibits on the day of the hearing in this matter, we find those exhibits cannot be considered newly discovered. The first two exhibits fail to meet the criteria of Rule 166(b). Therefore, we cannot reopen the record to admit those two exhibits. However, it appears that Exhibit 3 may be considered newly discovered.

The ALJ concluded that after Charging Party received an offer of employment from Hobbs to teach at one of Respondent's schools, Respondent required Hobbs to withdraw the offer of employment in retaliation for Miller's protected concerted activities. The ALJ found that Hobbs' testimony, that she withdrew the offer of employment to Miller because Brandon Graham had already been hired for the sole math teacher position, was not credible. It is evident from the ALJ's decision that if he had been able to review Exhibit 3, it would have provided further support for his credibility finding with respect to Hobbs. However, the proffered document merely provides cumulative evidence indicating that testimony given by Hobbs was not credible. For these reasons and those indicated below, we find that reopening the record to include Exhibit 3 would not change our decision affirming the ALJ. Thus, Charging Party's motion also fails to meet the criteria of Rule 166(c), that "the additional evidence, if adduced and credited, would require a different result." Therefore, Charging Party's motion to reopen the record is denied.

Factual Summary:

Following a *de novo* review of the record in this matter, we adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order. We will not repeat the facts, except as necessary.

Background

Charging Party Heather Miller is a middle school math and science teacher. She began working for the Detroit Public Schools in August of 2001. Initially, she was assigned to work at Marquette Elementary-Middle School (Marquette). Miller continued to work at Marquette during the entire time she was employed by Respondent. She is a member of a bargaining unit represented by the Detroit Federation of Teachers (DFT) and has been an active union member throughout her employment. Miller was laid off from her position effective August 24, 2012. She has not worked for Respondent since that date.

Miller ran for a DFT office every year from 2001 through 2007 and ran for president of the DFT on one occasion. She also ran to be elected as a delegate to state and national DFT conventions. Miller was also the union representative for her school one year and was typically in charge of organizing the teachers at Marquette. During a teachers' strike, Miller

worked to organize the teachers while they were picketing. She also debated Respondent's school board president on television. Miller also attended many school board meetings representing teachers.

Miller is married to Stephen Conn. Conn is also employed by Respondent as a teacher. He is a well-known union activist. On May 1, 2007, Miller and Conn participated in a demonstration protesting school closures planned by Respondent. During the demonstration, they were arrested by members of Respondent's in-house police department. Subsequently, Respondent's police released them. Both Miller and her husband resumed their teaching duties without interruption and completed the remainder of the 2006-2007 school year. In the interim, Miller and her husband continued to try to block the Respondent's plan to close a number of schools. Part of Miller and Conn's efforts included a lawsuit filed on June 5, 2007, to seek an injunction against the school closings. On June 29, 2007, Respondent placed both Miller and her husband on unpaid administrative leave, purportedly pending an investigation of potential charges against them stemming from the May 1, 2007 incident. See, *Detroit Pub Sch*, 22 MPER 89 (2009). The unpaid leave continued for the entire 2007-2008 school year and beyond.

On August 30, 2007, Miller and her husband filed unfair labor practice charges against Respondent asserting that Respondent's actions of placing them on unpaid administrative leave were motivated in whole or in part by their union activities. On June 12, 2008, the administrative law judge assigned to the case issued a decision and recommended order finding that Respondent unlawfully discriminated against Miller and Conn for engaging in protected concerted activities.[3] It is evident from the administrative law judge's decision and recommended order on the 2007 charge that in 2007, Miller and her husband were both well known as union activists and had raised the ire of Respondent's board president, Jimmy Womack. As the administrative law judge's decision in that case explained:[4]

> Conn is well known in the community as an outspoken DPS union activist. He has held office in the DFT since 1991 at Cass Tech High school, one of the DPS's largest and premier schools, and has run, unsuccessfully, for the DFT presidency. In response to the proposed school closings, Conn organized Union pickets at school board meetings and personally spoke out at those meetings against the closings. Conn worked with Miller to organize teacher involvement in such events including by using an email and fax system to contact fellow teachers at the many DPS locations to encourage participation in various meetings and pickets.
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> Like Conn, Miller is well known by the Employer, the media, and the public as a workplace and community advocate. Miller actively recruited other school employees to take part in meetings, pickets (including by leading a picket at the school board president's home), and the like, over the schools closing

[3] The decision was adopted by this Commission after Respondent withdrew its exceptions to the administrative law judge's decision and recommended order. *Detroit Pub Sch*, 22 MPER 89 (2009).
[4] *Detroit Pub Sch*, 22 MPER 89 (2009).

issue. Miller was of such sufficient notoriety or stature that local television station Channel 7 tapped her to represent teachers' views in an on-air debate with board president Womack. At that television appearance, Womack made pointed reference to Miller's association with Conn, their involvement in school related issues, and his personal antagonism toward them for that involvement. The local print media has followed this litigation involving Miller and Conn.

The Employer's actual awareness of Conn and Miller's decades of involvement in protected concerted activity was never seriously disputed. The pair were perennial activists in the DFT, and as found above, personally spoke at multiple school board meetings, arranged and participated in picket lines, and initiated and secured broader support for litigation against the school closings. Interim DPS superintendent Satchel acknowledged in testimony that he was personally aware of Conn's involvement. The individual DPS police officers, and even the police videographer, knew the pair on sight, were aware of their marital status, and considered them of sufficient interest to maintain pointed video surveillance of their movements throughout the demonstration on May 1st.

The evidence established that DPS board president Womack, as well as DPS board members Carter, Kinloch and Thornton, were all familiar with Conn and Miller and their roles as workplace advocates and opponents of certain DPS policies. Elected DPS school board member Marie Thornton testified that, in her presence, sometime shortly after the disputed events of May 1st, and apparently prior to any disciplinary charges being levied against the pair, DPS board president Jimmy Womack had asserted that Conn and Miller would not be returning to school in the fall, that he would personally see to it that:

> [B]ecause they were one household, two incomes, and he (Womack) was going to drag it out through the court system and he was going to starve them out . . . and that they were going to be on administrative leave without pay.

* * *

Likewise, Miller testified that Womack had directly threatened her job status following a joint appearance on a televised debate, which occurred long before the events of May 1st. Womack, agitated, pointed at Miller and yelled, "*You're going down. You're going down . . . I used to work with you and Steve (Conn), but no more. You're going down.*"

Shortly after the administrative law judge issued his decision and recommended order, Respondent's board voted to discharge Miller and Conn. Miller was discharged by then

superintendent of schools, Lamont Satchel, with the agreement of the president of the school board, Jimmy Womack.

On November 6, 2008, Miller and Conn obtained a preliminary injunction from the United States District Court ordering Respondent to return them to their teaching positions. Consequently, Miller resumed her position at Marquette Elementary-Middle School in November 2008.

Miller's Return to Work

After her return to work in November 2008, Miller resumed her union activities. During the period between her return to work and her subsequent layoff, Miller was very active in attempts to recruit her fellow teachers to participate in various DFT functions. In addition to sending faxes to various schools and emails to other teachers, Miller placed ads on YouTube for DFT members. Miller also sought election to a number of positions in the DFT. While campaigning for DFT office, Miller and others would fax flyers about the election to the schools, and send envelopes of flyers to the schools, so the flyers could be distributed to teachers as they entered the schools in the morning. She also distributed union election flyers at school board meetings and at a staff meeting at her school in the presence of both the principal and vice principal.

In 2009, Miller organized teachers to vote against a collective bargaining agreement negotiated between the DFT and Respondent. She was also one of the leaders in a successful campaign to recall the local union president. As part of the recall campaign, she faxed the recall petition to the schools; approximately 2,000 teachers signed the petition. During the recall campaign, Miller appeared on television and was interviewed by a couple of television stations. Additionally, she was a lead plaintiff in a lawsuit filed by teachers against the DFT concerning the Employer's "Termination Incentive Plan." She recruited other teachers to participate in the case by faxing sign-up sheets to the various schools, calling teachers, and sending out mass emails inviting teachers to participate as well. Miller conducted periodic meetings concerning the lawsuit's progress, was on television regarding the lawsuit, and participated in a press conference. Miller also distributed materials critical of Robert Bobb, the emergency manager of Detroit Public Schools from March 2009 through March 2011, and Roy Roberts, the emergency manager from May 2011 through April 2013. Additionally, when layoffs began, Miller organized teachers to protest and picket against the layoffs.

Miller was fairly well known throughout the district as one of the union activists and testified that she did not recall ever running into a management official who did not know who she was. The principal of the school at which Miller worked, Dwana Brown, was generally aware of her activities. Miller would go door-to-door at the school and encourage teachers to participate in union activities. It is undisputed that Miller occasionally passed out flyers for the union during staff meetings, with the approval of the school principal. Brown and Miller would casually discuss union activities during the three years that Brown was the principal of Marquette. Brown would occasionally caution Miller about her union activities by telling Miller that she was no longer protected because the union was not as strong as it used to be. Cassandra Washington, Respondent's executive director for human resources

information, admitted that she had heard that Miller was a union activist and that Miller's husband, Steve Conn, was known throughout the school district for his union activities.

Miller's Health Problems

During the 2010-11 and 2011-12 school years, Miller had serious medical problems. During those two years, her health problems required Miller to undergo four surgical operations and to miss a significant number of school days. Miller had an operation during the spring semester of 2012 and was hospitalized on two separate occasions. In addition to the time off due to her health problems, Miller took a personal leave day and was absent one day for jury duty.

Each time Miller was absent from work, she followed the Employer's procedure for reporting absences by calling SubFinder, the Employer's districtwide computerized call-in number that teachers were to utilize when they were going to be absent. She also informed the school secretary of the reason for her absences, the date that she anticipated returning to work, and the lesson plans for the substitute teacher. Miller testified that she was never informed by Respondent that her days off due to illness were not approved absences.

In February 2012, Miller was hospitalized for a week and a half. At that time, Miller requested information on applying for a leave of absence under the Family and Medical Leave Act (FMLA), 29 USC 2601 et seq. The school secretary sent Miller a copy of Respondent's FMLA leave request form, which Miller had her physician complete. Miller filed the form at the Employer's office, in accordance with directions given to her by her school's principal, Brown. Miller was hospitalized once more in late May 2012. Again, she notified Brown of her need to be absent and submitted a request for FMLA leave as she had done previously. Her second request covered the period of May 30, 2012, through June 8, 2012. Miller did not receive any communication from the Employer with respect to either of her FMLA leave requests. On June 13, 2012, the Employer sent a letter to Miller granting her second request for FMLA leave. The letter was sent to a Detroit address that was not Miller's address of record and had never been her address. Miller testified that she never saw the document until she and her attorney were reviewing the records in preparation for the hearing in this case.

Teacher Evaluations

Respondent implemented a new teacher evaluation process during the 2011-2012 school year. The new evaluation process required school principals to provide an evaluation of teachers based on pedagogical skills, classroom management, student growth, educator responsibilities, and development/special training. The evaluation of the teacher with respect to those five factors constituted the "performance" component, which comprised 60% of the overall evaluation score. The performance component of the evaluation included a mandatory classroom observation of each teacher. Each teacher was to be graded as ineffective, minimally effective, effective, or highly effective and assigned a numerical performance rating. The numerical rating would then be converted to a percentage score for the performance portion of the evaluation. The other 40% of the evaluation was based on discipline (20%), attendance (15%), and significant or special accomplishments and other contributions (5%).

Of the 46 teachers evaluated at Marquette during the 2011-2012 school year, the highest evaluation score given out was 90%. Only four teachers at Marquette received that score. The lowest teacher evaluation score given out at Marquette that year was 62%. Scores for the performance component of the evaluation, which in theory could be as high as 60%, ranged from 30% to 50%. Based on classroom observations, three teachers were rated ineffective and eight were rated minimally effective.

Miller received an overall evaluation score of 64%. Her score was made up of 40 out of a possible 60 points for the performance component, 20 out of a possible 20 points for the discipline component, four out of a possible five points for the significant or special accomplishments component and zero out of a possible 15 points for attendance.

Respondent's assistant director of labor relations, Joline Davis, explained the code used in the Employer's records to distinguish between absences due to personal emergency, jury duty, paid sick days, and unpaid days off. Respondent's records indicate that Miller was absent 33 days during the school year including one day for jury duty and one personal leave day. Respondent's records indicated that the remaining 31 days were counted as paid sick days or unpaid days off. Those days were October 20 and 21, and December 12, 2011, January 19, January 23 and 24, February 27 through March 9 (10 business days), April 26, May 1, May 14 and 15, May 21, and May 29 through June 11, 2012 (10 business days).

Teachers were allowed 12 paid sick days for the 2011-2012 school year. If teachers were absent more than 12 days, they would not be paid for the additional days off. With respect to the evaluations, teachers who took 12 sick days would earn only five attendance points on their evaluation. Teachers who were absent 13 or more days received no points for attendance. Davis initially explained that the attendance score was based on the number of absences without regard to whether the absences were paid or approved unless the time off was granted under the FMLA. There is nothing in the record to indicate that employees were warned prior to the 2012 evaluations, that absences due to illness could be counted against them in their evaluations.

Subsequently, Davis testified that days attributable to FMLA leave should not have been counted in Miller's evaluation score. Based on Respondent's approval of FMLA leave for Miller's absences from May 30 through June 8, 2012, Davis found that Miller would have had eight days of FMLA leave and, therefore, would have had 23 days of unapproved absence. Since Miller would still have had more than 12 sick days, her attendance score would not have changed. Davis contended that Miller had only applied for one FMLA leave because there was only record of one leave request in the Employee Health Services Department. On cross-examination, Davis adamantly denied the assertion that "DPS records are terribly inaccurate." However, she could not explain why the Employer's letter to Miller approving FMLA leave for May 30 through June 8, 2012 was sent to an address at which Miller had never resided and was not her address of record.

Davis also acknowledged that during the 2011-2012 academic year teachers were not required to submit medical documentation of illness unless their absence was going to be five days or more. However, there is nothing in the record to indicate that employees were warned prior to the 2012 evaluations, that unless absences due to illness were supported by medical

documentation those absences could be counted against them in their performance evaluations. The Employer's "Teacher Tenure Act Retention Scoring" document provides that approved medical leave and FMLA leave are not to be included in calculating the attendance portion of the evaluation score. However, there is no evidence in the record that employees were informed of this policy prior to the period for which they were to be evaluated.

Respondent contended that Miller's school principal, Brown, observed Miller's classroom performance on June 11, 2012. Miller denied that Brown had observed her classroom performance on June 11, 2012, or at any other time during that school year.[5] Miller testified that she was on FMLA leave on June 11. The Employer's payroll records establish that Miller was not at work from May 28, 2012, through June 11, 2012. Miller also testified that she did not see the evaluation report prepared by Brown until the hearing in this matter. Respondent did not call Brown to testify.

Miller testified that she was not aware of the new evaluations until she was evaluated by the assistant principal in the spring of 2012. Miller's classroom performance was separately evaluated by a Marquette assistant principal, Michael Barclay, on April 20, 2012, through April 24, 2012, and by assistant principal Nancy Ross, a retired principal, on May 18, 2012, through May 21, 2012. Each of them gave Miller entirely positive evaluations.

Although the evaluation report prepared by Barclay listed different questions from those on the evaluation reports prepared by Ross and Brown, it consistently gave Miller positive ratings with comments supporting those ratings. The evaluation report prepared by Ross used the same format and questions as the one used by Brown. There were five core elements, each of which contained two or three questions/standards that were considered in determining the rating for that element. Ross rated Miller effective for all five elements and indicated that Miller's performance with respect to one of the standards considered for each of two elements was highly effective. Like Barclay, Ross supported each of the ratings with comments explaining the basis for her evaluation.

The evaluation report prepared by Brown indicates that it took from 3:15 p.m. until 3:21 p.m. on June 11, 2012. Brown gave Miller an overall effective rating, indicating that Miller was effective on four of the five core elements and minimally effective on one core element. The element for which Brown rated Miller as minimally effective was Core Element IV "Relevant Special Training." For that core element, Brown rated Miller effective on one of the two standards but minimally effective on the other standard. Unlike Barclay and Ross, Brown provided very few comments to support her evaluation. As a result of Brown's evaluation, Miller received a performance ranking of 1.9, the lowest score given to teachers with an "effective" ranking. Miller and one other teacher were the only ones with an "effective" ranking who received a performance ranking of 1.9.

The Employer's executive director for human resources information, Cassandra Washington, was responsible for teacher staffing, layoffs, and recalls. She testified that in

[5] We note that the Employer did not call Brown to testify to rebut Miller's testimony denying that the alleged classroom observation occurred.

order for a teacher to receive 50 points on the performance component of the evaluation, the teacher's classroom observation score must be at least 2.0. She acknowledged that if Miller's ranking had been 2.0 instead of 1.9, her performance score would have gone from 40 to 50 points, her overall score would have increased from 64 to 74, and she would have been eligible for recall. According to Respondent's records, of those math teachers who were recalled, whose evaluation scores were not expunged, 10 had evaluation scores of 74 or less. Of the math teachers still laid off as of June 18, 2013, two had scores of 74 or higher.

Despite the critical significance of the performance evaluation score, Washington was unable to explain the differences in the numerical performance scores for teachers with an "effective" ranking. Davis testified that the numerical score was based on the numbers put into the evaluation report by the principal. However, she was not sure how the numbers were determined. The evaluation report prepared by Miller's principal, Brown, did not list any numerical scores.

Teacher Layoffs at the End of the 2011-2012 School Year

Following the completion of the teacher evaluation process in 2012, Respondent determined that teacher layoffs were necessary for the following school year and all district teachers were laid off. Miller was notified on April 10, 2012, that she would be laid off effective August 24, 2012. At that point, she expected to be recalled, because she had been laid off several times in the past and was recalled to her position each time. On this occasion, however, Miller was not recalled.

After learning of her layoff, Miller heard rumors that only teachers who had received overall performance evaluation scores of 70% or higher would be recalled. Around August 28, 2012, Miller sent an email to the Employer's chief human resources officer, Vicki Hall. Miller noted in the email to Hall that she had received excellent evaluations from her supervisors and asked Hall to let her know her evaluation score and the basis of the score. By letter dated October 19, 2012, Hall informed Miller that her overall evaluation score was 64% and provided a summary of the evaluation components. However, Hall provided no details as to Miller's score with respect to those components and did not provide a copy of the evaluation report prepared by Brown.

Hall's letter indicated that the Employer would have an appeals process that would be posted on the Employer's website by October 22, 2012. Miller testified that she did not remember there being an appeals process for the evaluation. Further, at that point, she did not know what to appeal because she did not know what her scores were and did not know how to get that information. Respondent did not provide Miller with her scores on the components of the evaluation until Miller sent another email to Hall on January 11, 2013. In that email, she specifically requested a detailed breakdown of her evaluation score. Hall responded with an email listing the point score for each component of the evaluation score and noting that the zero point score for attendance was based on 31 absences. It was not until that point that Miller learned that the Employer had treated 31 of her absences as unapproved and did not credit her with any points for attendance.

The Recall Process

Washington initially testified that the performance evaluation scores were used as criteria for teacher selection and layoff. Later, Washington testified that every teacher was laid off at the end of the 2011-2012 school year irrespective of his or her evaluation score. According to Washington, when the initial decisions on recalls were made for the fall of 2012, the evaluation score was not considered. She testified that during the summer of 2012, every teacher had the opportunity to select up to three schools with which he or she wanted to interview at the job fairs conducted by Respondent. Washington testified that Talent Acquisition would take into account the teacher's school preferences, schedule the interviews, and notify the teacher of the date and time for the interviews for the schools chosen by the teacher.

According to Washington, initial recalls for the 2012-2013 school year were based upon these interviews and selection by the respective school principals. At that point, the principals did not have access to information regarding the teacher's performance evaluation score. When the principal determined which teacher to hire, the principal would send the recommendation to Human Resources Talent Acquisitions for review of the candidate's eligibility. According to Washington, at that point the evaluation score was not a factor in determining eligibility.

Miller was not offered the opportunity to select schools at which to interview. However, she did receive an email from Derek Knight of Detroit Public Schools listing two schools for which she could interview. The email, which was dated May 21, 2012, at 5:31 p.m., directed her to appear for interviews at the Detroit School of Arts and Osborne College Preparatory at 5:40 and 6:00 on May 22, 2012. (The email did not indicate whether the times for the interviews were a.m. or p.m.) The email did not indicate Knight's position and, other than a Detroit Public Schools email address, did not indicate any means by which he could be contacted.

Miller assumed that Knight was employed in Respondent's Human Resources Division. Less than 20 minutes after the time of Knight's email, Miller sent an email to him in reply. In her email, Miller pointed out that her certification was for sixth grade through eighth grade mathematics and science, but the schools for which she was told to interview were both high schools. Miller testified that no one responded to her email and Knight's email did not list his telephone number. Miller testified that she was never told that she had the right to pick a middle school for which she wanted to interview. She took no further action to follow up on the email from Knight because she was hospitalized again shortly thereafter.

Washington failed to explain why Miller was not given the opportunity to interview for positions at three different schools as the other teachers were. Washington testified that the evaluation score was not taken into consideration until January 2013. At that point, decisions for staffing the schools for the 2012-2013 school year were based on interviews conducted by the school principals and the principal's selection. However only those teachers with evaluation ratings of 70% or higher were eligible for recall. Washington testified that

Miller was not recalled during the 2012-2013 school year due to her performance evaluation score and the number of available math positions.

Subsequent to Washington's testimony, Charging Party's counsel pointed to an August 7, 2013 affidavit by Washington, which Respondent had submitted in support of an earlier filing in this matter. That document indicates that on July 1, 2012 Respondent issued a teacher staffing policy that required all staffing decisions, including layoffs and recalls, to be based on retaining effective teachers. The affidavit further indicates that in 2012, Respondent developed and implemented a teacher evaluation tool based on the requirements of Michigan Teacher Tenure Act and the Revised School Code. According to the affidavit, teachers were evaluated according to the new teacher evaluation tool in 2012. The affidavit further states, "[A]ll layoffs and recalls are based on teacher overall evaluation scores." This is inconsistent with testimony given by Washington that the evaluations were not considered in the layoffs and the initial recalls. The affidavit further states, "In 2012, teachers were recalled to the District on the basis of his/her evaluation score, position availability and applicable content area for which the individual is certified and/or qualified." This sentence is also inconsistent with Washington's testimony that it was not until January 2013 that the evaluation score was used to determine whether a teacher would be recalled.

Miller's Efforts to Obtain Employment at Golightly Educational Center

Before Miller's lay off, she applied to transfer to Golightly Educational Center (Golightly). At that time, the principal of Golightly, Sherrell Hobbs, indicated that while she was interested in hiring Miller she could not do so due to a freeze on transfers. On August 11, 2012, Miller contacted Hobbs again about a possible teaching position. Hobbs quickly responded that she would be happy to interview Miller. There are significant differences between the testimony given by Miller and that given by Hobbs regarding the interview and subsequent events.

Miller testified that the interview occurred on Friday, August 17, 2012. She further testified that when they met, Hobbs commented that Miller was Steve Conn's wife and stated that she respected Miller and Conn for being "fighters." They then proceeded with the interview, which included a series of prepared questions provided by the Employer. According to Miller, at some point during the interview, Hobbs told Miller, "You're going to be teaching at Golightly." Hobbs showed Miller a spreadsheet listing the names of teachers assigned to Golightly and the positions in which they were to teach. The spreadsheet included Miller's name as a middle school math teacher. Miller further testified that Hobbs said she wanted Miller to attend an upcoming back-to-school parade as a Golightly representative. Subsequently, Hobbs instructed the assistant principal, Alan Cosma, to show Miller around the building. During the tour of the building Cosma showed Miller the third floor classroom in which she would be teaching. He told Miller that he was excited to have another math teacher and wanted to know if she would be interested in organizing an afterschool math club for the students. Miller testified that she was at Golightly between one and two hours.

Hobbs' Version of the Golightly Interview

On direct examination, after being shown an email message from Miller dated August 11, 2012, at 4:05 p.m., to which Miller had attached her resume and other documents, Hobbs testified that the interview took place sometime prior to her receipt of that email. During cross-examination, Hobbs was shown an email message from Miller, dated August 11, 2012, at 3:34 p.m. in which Miller asked to be considered for a middle school math or science position at Golightly. After seeing that email message, Hobbs conceded that the interview must have occurred sometime after August 15. Hobbs then conceded that the interview could have been on Friday, August 17, but admitted she did not know.

Hobbs testified that she originally interviewed Miller the previous year but was unable to hire her because Hobbs's superiors had not given approval for the transfer. Hobbs testified that she did not know Miller was married to Stephen Conn and did not know that Miller was involved in union activity. Hobbs testified that when she first started with Detroit Public Schools, she did not want to get into the union and is "not a union person." She explained that for that reason she did not keep up with union matters. She testified that she did not recall asking Miller if she was married to Stephen Conn. Hobbs testified that she has heard Conn's name and knew of him, but did not know him personally. She admitted that she knew he was active with the DFT and had run for president of the DFT. Hobbs testified that during a job interview she would not ask the candidate about their marital status, age, or medical condition.

On cross-examination, Hobbs testified that her 2012 interview with Miller was probably in her office area, in the conference room. She did not remember whether they had moved from the conference room into her office area. She testified that the interview was probably 15 to 20 minutes but was unsure as to its length. She acknowledged that it could have been as long as an hour but doubted that it was. Hobbs testified that she did not recall having a spreadsheet that listed Miller as a math teacher during the interview. Hobbs testified that generally she conducted interviews with the assistant principal present. She testified that she thought that was what happened when she interviewed Miller, because it was her usual procedure, but she was not sure. She testified that it was also her regular practice to give job candidates a tour of the building and to have the assistant principal, Alan Cosma, take candidates for teaching positions to the classroom in which the position would be located. Hobbs testified that when Miller was interviewed, she or Cosma would have taken Miller to see the classroom, but she was not sure which of them did so. She subsequently conceded that the interview had occurred on August 17.

The Golightly Job Offer

Hobbs testified that at the time of the interview she believed she had a math vacancy and offered Miller the job. Hobbs told Miller that she wanted to offer her a position at Golightly for the 2012-2013 school year. Hobbs testified that she would have indicated to Miller, that she wanted Miller to work at Golightly, and when Miller said she wanted the job, Hobbs would have told her that she would "work to see how we can make that happen." However, any job offer she made would have to be approved by the Human Resources Division. Hobbs only had the authority to recommend an individual for a teaching position;

Human Resources had the authority to hire. However, Hobbs testified that after the interview with Miller, she sent an email to either Edwina Dortch or Robin Diamond in Human Resources indicating that she wished to hire Miller to teach at Golightly. Hobbs did not recall anyone from Human Resources responding to the email.

Hobbs testified that the number of teachers allocated to a given school is constantly being updated. She testified that they get a written document showing the allocation before the school year begins based on the demographer's projection of the student population. Hobbs said she was not provided with written updates regarding her teacher allocation number.

Hobbs initially testified that she was first told by Edwina Dortch, a Human Resources employee, and later, by Assistant Superintendent Wilma Taylor-Costen, that she would only be allotted one math teacher. Subsequently, Hobbs testified that it was Taylor-Costen who told her that she did not have enough full-time equivalencies (FTEs). According to Hobbs, after she submitted the email recommending that Miller be hired, she was informed by the assistant superintendent, Wilma Taylor-Costen, that there were not enough FTEs available for the number of teachers Hobbs wanted. Hobbs initially testified that she was not sure when she spoke with Taylor-Costen about the lack of FTEs, but she was certain it was sometime after the day that she interviewed Miller. However, on cross-examination, Hobbs admitted that her conversation with Taylor-Costen occurred just hours after her interview with Miller. She admitted that she sent the letter to central administration asking that Miller be hired, and suddenly, she no longer had a vacancy for which she could hire Miller. Hobbs denied that Miller's name came up in her conversation with Taylor-Costen, but could not recall the details of the conversation beyond being told that she did not have sufficient vacancies to hire a math teacher. She made these admissions after being shown the August 17, 2012 email that she sent to Human Resources at 6:41 p.m., which instructed them not to send a letter offering Miller a teaching position. According to Hobbs, based on her conversation with Taylor-Costen, she realized that she could only hire one math teacher, and she had already hired Brandon Graham, so she had to withdraw the offer to Miller. Hobbs expressly denied that anyone in Human Resources or elsewhere told her that she could not hire Miller because Miller was a union activist.

Hobbs testified that she had really wanted to hire Miller, that she had wanted to hire her in 2011, and she had wanted to hire her in 2012. Hobbs testified that she sent the email to Human Resources telling them not to send the letter offering the job to Miller because she did not want Miller to believe she had the position in case Miller wanted to apply for employment at another school. However, Hobbs did not inform Miller that she would not be hired at Golightly until Miller called her several days later.

About five days after the interview, Miller called Hobbs for information about math materials that she planned to look at before she started work and about the arrangements for the parade that Hobbs had asked her to participate in on behalf of Golightly. Miller testified that Hobbs' demeanor had changed, and that she was unfriendly and cold. Miller recalled that Hobbs told her that she would not be working at Golightly but did not say much else. Hobbs testified that she did not recall that conversation with Miller. Miller did not learn until the day

of the hearing that Respondent had subsequently hired someone else for the teaching position previously offered to her.

The Math Teaching Position

Hobbs testified that she regularly prepared a roster listing the teachers for Golightly and likened the document to Excel spreadsheet; however, the document in question was handwritten on a form and not computer-generated. Offered into evidence by Respondent was a roster dated June 27, 2012, that Hobbs had prepared for the 2012-2013 academic year. Hobbs testified that the roster included the names of teachers that she anticipated would be at Golightly for the 2012-2013 school year. However, no math teachers were listed on that roster. Hobbs testified that the roster was changed often.

Hobbs testified that subsequently, the individuals listed on that roster included Brandon Graham and Heather Miller. According to Hobbs, Graham had accepted the offer to teach math at Golightly before Hobbs' interview with Miller. According to Hobbs, she thought she was going to be allocated two math teaching positions. Hobbs testified that she had two reasons for continuing to interview teachers for the math position after hiring Graham. First, she hoped to get approval to hire a second math teacher and she wanted to ensure that a candidate was available for the position for which she had hired Graham, in case he decided to accept another offer. Hobbs also testified that Human Resources encouraged them to continue interviewing and not to settle on a single person.

Hobbs testified that she learned in late August or early September that Graham had taken another teaching position, so there was an available position for a math teacher at Golightly for the 2012-2013 school year. Nevertheless, Hobbs did not contact Miller to determine if Miller was willing to take the vacant position. When questioned regarding her failure to contact Miller about the vacant position, Hobbs testified that she really had wanted to hire Miller, but two weeks later, when she found out that she did have a math vacancy, she forgot all about Miller and did not think about anyone she had already interviewed for the math position. According to Hobbs, Edwina Dortch, the placement administrator assigned to Golightly, suggested that she interview Carolyn Perry for the vacant math position. Perry sent an email to Hobbs at 10:09 p.m. on August 30, 2012, applying for the position teaching math at Golightly. Hobbs responded at 11:46 p.m. the same night inviting Perry to an interview the next day at 9:15 a.m. Of those recalled math teachers whose evaluation scores were not expunged, Perry's evaluation score of 70 was the lowest.

Teachers who had not been selected for recall by particular principals, were recalled based on vacancies in the area in which they taught and their overall evaluation scores. Miller, as well as other math teachers, some having higher evaluation scores than Miller and some having lower evaluation scores, continued on layoff.

Charging Party's Request for Expungement of Evaluation and Priority Recall

On November 14, 2012, the DFT filed a civil action on behalf of its members including Miller. The suit, filed in federal district court challenged Respondent's use of its

performance evaluation system and its implementation during the 2011-2012 school year. The suit was settled by Respondent and the DFT.

The settlement provided that teachers could have their performance evaluations expunged and receive rights to priority recall. Notice of those settlement terms was provided to teachers by mail. For teachers to take advantage of the opportunity to have their evaluation expunged and exercise the right to priority recall, the teacher had to respond to the notice regarding the expungement within seven business days and indicate the desire to take advantage of the priority recall. The notice included a response form for the teacher to return to Respondent to indicate the desire to have his or her evaluation expunged. The form included space for the teacher to list the address and phone number at which the teacher could be reached. According to Respondent's records, 24 math teachers whose evaluations were expunged were recalled. Of that group, the record only reveals the evaluation score of one teacher. That teacher had an evaluation score of 62, two points lower than Miller's score.

Miller received notice of the opportunity to have her evaluation expunged and to receive a priority right to recall in a letter dated April 12, 2013. Miller submitted the response form to Respondent on April 18, 2013. Miller put her address and her cell phone number on the form. With the expungement request form, Miller submitted a letter requesting priority recall. She listed her cell phone number on that document as well. Miller did not receive any phone calls from Respondent regarding possible recall after she submitted the priority recall request.

Washington acknowledged that Respondent received Miller's form exercising her right to expunge the record and her right to a priority recall. Washington sent a letter to Miller dated August 23, 2013, acknowledging receipt of Miller's request for the priority right to recall and expungement of her evaluation rating on April 18, 2013. Although by August 23, Miller had moved from the address that she had previously provided to the Employer 2013, she did receive the August 23, 2013 letter. While Miller's home address changed after she submitted the expungement request, her telephone number did not.

On September 25, 2013, Respondent sent a letter to Miller at her former address stating that she had been removed from the priority right to recall list due to Respondent's inability to contact her at her phone number of record. Miller did not receive the September 25, 2013 letter notifying her that she had been removed from the priority right to recall list.

Washington testified that Human Resources utilized a spreadsheet to track individuals eligible for recall. According to Washington, she received a notation on that spreadsheet indicating that around August 21, Eleanor Hoag, one of her human resources managers, attempted to contact Miller by telephone at 6:14 p.m., but the phone was disconnected. Hoag was not called as a witness, and, therefore, did not testify about where she obtained the phone number, her efforts, if any to verify the correctness of the phone number, or the number of times she attempted to call.

The telephone number listed on the spreadsheet as the number that Hoag called to reach Miller is different from the telephone number that Miller supplied to the Employer on the form exercising her right to expunge her evaluation rating and the letter to the Employer

requesting to exercise her right to priority recall. We also note that the Employer had previously corresponded with Miller by email and had her current email address, yet did not attempt to contact her by email to notify her of the possible recall. According to Washington, the phone number called by Hoag came from Respondent's personnel records. She testified in order for that number to be changed, the employee has to submit a request for updated information to the Human Resources Certification and Records Department. She did not know whether Miller had ever submitted such a request.

Miller testified that she had obtained her cell phone the second year after she started teaching at Detroit Public Schools and within a year or two of obtaining the cell phone, she canceled her landline and completed a form at Human Resources changing the number to ensure that the cell phone number would be in her personnel file. She further testified that the Employer regularly contacted her on her cell phone. Miller testified that her cell phone number was the phone number listed on the SubFinder. From 2005 on, she only used her cell phone and not a landline. Since then, she had always provided that number to the Employer. In addition to taking steps to ensure that Respondent's personnel records were updated with her cell phone number, Miller repeatedly provided her cell phone number to the Employer for contact purposes. She provided her telephone number on the expungement request form and on the April 18 letter requesting priority recall. Moreover, in other correspondence she provided the Employer with both her telephone number and her email address, including the May 21, 2012 email to Knight regarding potential job interviews, the August 28, 2012 email to Respondent asking for an explanation of why she had not been recalled, and the January 11, 2013 email to Hall asking for her evaluation score. The ALJ concluded that "Miller testified credibly and without contradiction that it was her cell phone number which was consistently used by the school district to contact her in the event of weather and other emergencies."

Miller had not returned to work as of the time of the hearing in this matter. As of June 2013, nine math teachers, including Miller, were still laid off. Of those nine math teachers, two had scores of 74% or higher, the score Miller would have received if she had received 1/10 of a point more on the classroom observation part of her evaluation. Six had higher overall scores than the 64% given to Miller.

Discussion and Conclusions of Law:

The ALJ concluded that Respondent discriminated against Charging Party for engaging in protected concerted activity in violation of § 10(1)(c) and that Respondent interfered with, restrained, or coerced Charging Party in the exercise of her rights in violation of § 10(1)(a).

In order to establish a *prima facie* case of discrimination under § 10(1)(c) of PERA, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a *prima facie* case is established, the burden shifts to the

employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *NLRB v Wright Line, a Division of Wright Line, Inc,* 662 F2d 899 (CA 1, 1981). Ultimately, however, the charging party bears the burden of proof. See *Waterford Sch Dist*, 19 MPER 60 (2006); *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

It is not necessary for a charging party to show antiunion animus by the respondent or to establish the other elements of discrimination to show a violation of § 10(1)(a). However, the charging party must show that the respondent's actions objectively interfered with the charging party's exercise of protected concerted activity. *City of Saline*, 29 MPER 53 (2016). The test of whether a respondent violated § 10(1)(a) is whether the employer's actions tend to interfere with the free exercise of protected employee rights. *City of Inkster*, 29 MPER 29 (2015) (no exceptions).

Respondent states 43 exceptions to the ALJ's decision, most of which express disagreement with the ALJ's findings of fact and related credibility findings. Respondent sorted its exceptions into three groups: exceptions numbered 1, 7, 8, 9, 11, 13, 19, and 36 address Respondent's contention that the ALJ erred by giving collateral estoppel effect to findings in *Detroit Pub Sch*, 22 MPER 89 (2009); exceptions numbered 2, 6, 10, and 35 address Respondent's argument that the ALJ erred when he found that two of Respondent's administrators, Washington and Hobbs, were aware of Miller's protected activities or that she was a prominent union activist; and exceptions numbered 2, 11, 14, 18, 21, 24-32, 38, 39, and 41 address Respondent's assertion that the ALJ erred in concluding that Respondent's actions in not recalling Charging Party to work were motivated by Miller's protected activity. Respondent excepts to the ALJ's finding that there is sufficient evidence in the record to establish that Respondent's motivation was unlawful, even though there was no "open articulation of antiunion hostility toward employees' protected activities as in the prior case."

Collateral Estoppel

Respondent asserts that the ALJ erred by relying on findings of fact made in *Detroit Pub Sch*, 22 MPER 89 (2009), our decision on an earlier unfair labor practice charge filed by Charging Party and her husband against Respondent. Respondent also contends that the ALJ erred by applying the principle of collateral estoppel.

In *Conn v Bd of Ed of City of Detroit*, 586 F Supp 2d 852, 862-65 (ED Mich 2008), the court addressed the issue of collateral estoppel stating:

> In Michigan, collateral estoppel applies when questions of fact essential to an earlier judgment have been actually litigated and determined by a valid and final judgment between the same parties or those in privity with parties. *Storey v Meijer, Inc*, 431 Mich 368, 373 n. 3, 429 NW2d 169 (1988). The parties must have had a full opportunity to litigate the issues and there must be "mutuality of estoppel." *Id.*

Finding that collateral estoppel barred relitigation of the issues presented in *Detroit Pub Sch*, 22 MPER 89 (2009), the US District Court judge in *Conn v Bd of Ed of City of Detroit,* adopted factual findings of our ALJ.

Respondent argues that collateral estoppel does not apply in this case because this matter does not involve all of the same parties who were involved in *Detroit Pub Sch*. Respondent contends that because Miller's husband is not involved in this case, the parties are not the same. However, the absence of Miller's husband as a party in this case is immaterial. Miller's interest and her husband's interest in the previous case were the same. There is no question that the parties had a full opportunity to litigate the issues. Moreover, there is mutuality of estoppel. That is, in the previous case, if the decision had gone against the party seeking to apply collateral estoppel, that party would have been bound by the decision. *Monat v State Farm Ins Co*, 469 Mich 679, 682-85; 677 NW2d 843, 845-47 (2004). Clearly, if our decision in *Detroit Pub Sch* had gone against Miller, she would have been bound by it.

Moreover, in cases in which the respondent is charged with discrimination, prior decisions establishing discrimination by that respondent may be used, at least in part, to support a finding of animus. *Success Village Apartments, Inc*, 348 NLRB 579 n. 4 (2006).[6] See also, *Operating Engineers Local 12* (*Associated Engineers*), 270 NLRB 1172, 1173 (1984).

Our 2009 decision establishes that, as of 2007, Miller was well known to Respondent for her union activities and that Respondent discriminated against Miller in 2007 due to antiunion animus. That decision indicates that the animus that motivated Respondent's unlawful suspension of both Miller and her husband in 2007, pervaded Respondent's board of directors and upper administration; at that time Respondent's antiunion animus even affected the actions of frontline members of Respondent's police department in their dealings with Miller and her husband. That decision establishes Respondent's history of unlawful retaliation and discrimination against Miller for her protected activities. To the extent that the ALJ relies on the aforementioned findings made in *Detroit Pub Sch*, we find no error in his application of the doctrine of collateral estoppel.

Knowledge of Charging Party's Protected Activities

Respondent does not deny that Miller engaged in extensive protected activities after she was reinstated to her employment in November 2008. However, Respondent seeks to dispute its knowledge of Miller's protected activity. Respondent contends that the ALJ erred when he found that Cassandra Washington, Respondent's executive director for human resources information, and Sherrell Hobbs, the principal of the Golightly Educational Center, were aware of Miller's protected activities or knew that she was a prominent union activist. We find no merit to Respondent's contention on this issue as the testimony of Washington establishes that she knew Miller was a union activist. As noted above, Cassandra Washington

[6] Board precedent is often given great weight in interpreting PERA in those cases where PERA's language is analogous to that of the NLRA. *Oakland Co*, 2001 MERC Lab Op 385, 389. See also *Gibraltar Sch Dist* v *Gibraltar MESPA-Transp*, 443 Mich 326, 335 (1993); *St Clair Intermediate Sch Dist* v *Intermediate Ed Ass'n*, 458 Mich 540, 559, (1998).

testified that she had heard that Miller was a union activist and that Miller's husband, Steve Conn, was known throughout the school district for his union activities.

Although Hobbs testified that she did not know of Miller's union activities, Miller testified that when she met Hobbs for the job interview, Hobbs remarked that Miller was married to Steve Conn and that she respected Miller and her husband as "fighters." Hobbs was a key witness for the Employer and in its exceptions, the Employer urges us to accept Hobbs' denial of her awareness of Miller's union activities. The ALJ concluded that Miller was a highly credible witness, and Hobbs was not. In explaining his basis for finding Hobbs' testimony to be lacking in credibility, the ALJ stated:

> I found Hobbs' manner to be evasive and her testimony replete with contradictions. She seemed intent on tailoring her version of the fact[s] to fit within the framework of Respondent's theory of the case. It was apparent that Hobbs was caught in the middle between her unbiased, and in fact enthusiastic, admiration for Charging Party and pressure from management to rescind the job offer which she had just proffered to Miller in good faith. I conclude that it was Hobbs' desire to show institutional loyalty which hampered her ability or willingness to testify forthrightly in this matter.

We agree with the ALJ's basis for doubting the credibility of Hobbs' testimony. Moreover, the ALJ is in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. This Commission will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary. See *City of Inkster*, 26 MPER 5 (2012); *Redford Union Sch Dist*, 23 MPER 32 (2010); *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499, 507; 9 MPER 27097. Moreover, we have been cautioned in prior cases by the Michigan Supreme Court[7] and the Michigan Court of Appeals[8] to give due regard to credibility findings of the administrative law judge hearing the case. Particularly applicable in this case is the statement of the court majority in *Warren Ed Ass'n v Warren Consolidated Sch*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2007 (Docket No. 265643), "In a case such as this, where discriminatory motivation is a key issue, credibility determinations of the decision-maker who hears and observes the witnesses firsthand are critical."

Brown, the principal of Marquette who prepared the report that the Employer relied upon for determining Miller's performance rating, was also aware of Miller's union activities. It is not disputed that Brown permitted Miller to pass out flyers for the union during a staff meeting. Brown also cautioned Miller that her union activities were no longer protected due to a decline in the union's strength.

Moreover, at the time of the incidents that led to our decision in *Detroit Pub Sch*, 22 MPER 89 (2009), Miller was well known throughout the school district as a union activist. Upon her return to work in November 2008, she resumed her union activities. Since she was

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[7] *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 288-289 (1974).

[8] *City of Detroit v Detroit Fire Fighters Ass'n, Local 344*, 204 Mich App 541, 554-557 (1994); *Warren Ed Ass'n v Warren Consolidated Sch*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2007 (Docket No. 265643).

no less active with the union upon her return to work, there is no basis for us to assume that her notoriety within the school district had lessened.

Respondent contends that there is no evidence that Wilma Taylor-Costen was aware of Miller's protected activity. According to Hobbs, Taylor-Costen informed her that she could not hire a math teacher to fill the spot for which Hobbs wanted to hire Miller. However, direct evidence of Taylor-Costen's knowledge of Miller's union activities is not necessary to establish that Respondent was aware of those activities. Brown, who was Miller's supervisor at Marquette, Washington, Respondent's executive director for human resources information, and Hobbs, the principal at Golightly, each knew of Miller's protected activities. The knowledge of any one of the three would be sufficient to impute that knowledge to the Employer. See *State Plaza, Inc*, 347 NLRB 755, 756-757 (2006); *Dobbs Int'l Services, Inc*, 335 NLRB 972, 973 (2001); *Dr Phillip Megdal, DDS, Inc*, 267 NLRB 82 (1983)[9] We also note Miller's credible testimony that she did not recall ever running into a management official who did not know who she was.

Antiunion Animus

Respondent contends that there is insufficient evidence in the record to find that its repeated failures to recall Miller were motivated by antiunion animus. In this case, unlike the circumstances that led to our decision in *Detroit Pub Sch*, 22 MPER 89 (2009), there was no evidence of statements by members of Respondent's administration openly expressing hostility towards Miller's protected concerted activities. However, in this case, there is substantial circumstantial evidence of Respondent's antiunion animus and its motivation for terminating the employment relationship with Miller.

Antiunion animus can be established by direct evidence or circumstantial evidence. It is well settled that when a respondent's purported motives for its actions are found to be without merit or credibility, we may properly infer from the totality of the circumstances that the respondent was motivated by antiunion animus, even in the absence of direct evidence. *Wayne Co*, 21 MPER 58 (2008). See also, *Macatawa Area Express Transp Auth*, 28 MPER 53 (2014) (no exceptions); *Mason Co Rd Comm*, 22 MPER 22 (2009). Here, the reasons given by Respondent for many of the actions that denied Miller opportunities to return to work are either without merit or without credibility or both. The most significant examples of that are Respondent's decision to deny the Golightly position to Miller and Respondent's removal of Miller from the priority recall list. Other examples include: the failure to give Miller the opportunity to choose three schools for job fair interviews, like all other teachers were given; reducing her evaluation score based absences that should not have been counted for those purposes, since those absences were due to two family medical leaves; giving her a downgraded performance evaluation that was not based on an actual observance of her performance; and failing to take into account the very positive performance evaluation by Ross.

[9] Given the similarity between the language of §§ 9 and 10(1)(a) of PERA and §§ 7 and 8(a)(1) of the National Labor Relations Act (NLRA), the Commission is often guided by Federal cases interpreting the NLRA. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 260 (1974), *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44; 214 NW2d 803 (1974) and *Univ of Michigan Regents v MERC*, 95 Mich App 482, 489 (1980).

Denial of the Golightly Position

Hobbs' testimony varied considerably regarding her interview with Miller, the reason for not offering the position to Miller, and the timing of these events. As noted above, her testimony changed several times about when the interview occurred, she was unsure of where the interview occurred within the school building, she was not sure whether the assistant principal was present, and, more importantly, she changed her testimony about who told her that she could not hire Miller for a math teacher position.

It is undisputed that Hobbs told Miller that she wanted Miller to work at Golightly for the 2012-2013 school year. It is also undisputed that shortly after her interview with Miller, Hobbs notified Human Resources that she would like them to send a letter to Miller officially offering her the position of math teacher. Hobbs initially testified that someone from Human Resources informed her that she would only be allotted one math teacher. She subsequently testified that soon after she notified Human Resources of her desire to hire Miller, she was contacted by Assistant Superintendent Wilma Taylor-Costen, and suddenly, she no longer had a vacancy for which she could hire Miller. Therefore, Hobbs quickly notified Human Resources that they should not send a letter to Miller offering her the job. We note that the reason Hobbs gave for not hiring Miller had nothing to do with Miller's evaluation score, Hobbs claimed that the only reason was the number of math teachers she was allotted.

Hobbs claimed that she rushed to inform Human Resources not to send a letter to Miller offering her the teaching position because she did not want Miller to forego other opportunities. However, Hobbs did not notify Miller that she was not going to be hired at Golightly until Miller called her several days later. According to Miller, Hobbs did not give an explanation for the decision not to hire her. Hobbs testified that she did not recall the conversation.

According to Hobbs, the one math teaching position that she did have available had been filled by Brandon Graham prior to Miller's August 17, 2012 interview. Hobbs claimed that it was not until a couple weeks after that interview that she learned Graham was not going to take the position. Hobbs testified that she really wanted to hire Miller. We do not doubt that statement was true prior to Hobbs' August 17 conversation with Assistant Superintendent Taylor-Costen. However, according to Hobbs, when she learned Graham was not going to take the position, Hobbs did not contact Miller. Instead, Hobbs hired someone who had been referred by Human Resources. According to Hobbs, she forgot about Miller. Like the ALJ, we find that statement unbelievable.

The timing of Hobbs' discussion with Taylor-Costen, the timing of Hobbs' learning that Graham was not going to take the math position, and the timing of Hobbs' subsequent offer of the math position to someone she had not previously interviewed, causes us to question Hobbs' claimed reasons for not hiring Miller. We agree with the ALJ that the reasons given by Respondent for not hiring Miller for the math position at Golightly are not credible.

Removal from the Priority Recall List

As with other DPS teachers, Miller was provided with notice of the settlement between Respondent and the DFT allowing teachers the opportunity to have their evaluation expunged and to exercise the right to priority recall. Although the teachers were given only seven business days to respond to the notice, Miller submitted a timely response. She completed the form supplied by Respondent listing among other things, her cell phone number. Respondent acknowledged receipt of Miller's request for expungement of the evaluation and her right to priority recall. However, Respondent contends that it removed Miller from the priority recall list because a Human Resources employee attempted to telephone Miller and received a message that the phone had been disconnected. The telephone number the Human Resources employee claimed to have called is not Miller's telephone number.

We note Miller's credible testimony, that she completed the Human Resources form necessary to ensure that her cell phone number was in her personnel record several years earlier and that the Employer consistently used her cell phone number to contact her in the event of weather and other emergencies. Additionally, there is considerable evidence in the record that Miller provided both her cell phone number and her email address to persons in Human Resources on numerous occasions, including the May 21, 2012 email to Knight regarding potential job interviews, the August 28, 2012 email to Hall asking for her teacher ranking and seeking an explanation as to why she had not been recalled to work, and the January 11, 2013 email to Hall asking for her score. Her phone number, though not the email address, was also on the expungement request form, and on the April 18, 2013 letter to Respondent requesting priority recall.

We note that the person who Respondent asserts made the phone call did not testify. There is no evidence in the record that this person took reasonable steps to verify that she was calling the correct phone number. Although Washington testified that the number called came from Respondent's personnel records, we question why that number would have been in the Miller's personnel records since Miller had provided her cell phone number several years before in accordance with Respondent's procedures and, after Miller did so, Respondent used Miller's cell phone number on other occasions. Indeed, there is credible evidence in the record that the phone number Respondent claims was called was not Miller's phone number of record. Moreover, in light of evidence that Human Resources used email to communicate with Miller regarding job fair interviews, we must also question why, in this case, the Human Resources employee did not use that means to attempt to contact Miller when her alleged attempt to telephone Miller was unsuccessful.

Denial of the Opportunity to Participate in Job Fair Interviews

Even before the denial of the job at Golightly and the removal from the priority recall list, Respondent did not give Miller the same opportunities to return to work that were given to all other laid off teachers. According to testimony from Respondent's witnesses, all teachers were laid off and had to reapply for employment. Respondent's witnesses also testified that all the laid off teachers were given the opportunity to select three schools at which to interview during a job fair. Human Resources would schedule the three interviews

for each teacher taking into account the teacher's school preferences. However, Miller was not given the opportunity to select the schools for which she wanted to interview. Instead, she was notified by email that she was to interview for positions with two high schools on the day after the email was sent. Miller immediately responded that her teaching certificate did not qualify her to teach at the high school level, since she was only qualified to teach middle school math and science. She received no response to her email and no opportunity to interview at a middle school in accordance with the procedures Respondent made available to the other laid off teachers. Miller did not have the opportunity to interview for a job until she took the initiative to contact Hobbs regarding the math position at Golightly.

Washington testified that evaluation scores were not used to determine which teachers would be hired during this job fair process. No evidence of any reason was given by Respondent for excluding Miller from the opportunity to participate in the job fair interviews and depriving her of an opportunity that Respondent claims was supposed to have been granted to all laid off teachers.

The Evaluation

Although Hobbs testified that principals were required to provide a performance evaluation for each one of their teachers, she did not testify that the evaluation had to be personally prepared by the principal. Nor did she explain why an evaluation report prepared in May 2012 by Nancy Ross, a retired principal and an assistant principal at Marquette, could not have served as the report used in Miller's evaluation. Indeed, none of Respondent's witnesses or exhibits explain why Respondent would have Assistant Principal Barclay prepare an evaluation report about Miller in April 2012, then have Nancy Ross prepare an evaluation report about Miller in May 2012 using the new evaluation format and questions, and then in June 2012, have Brown prepare an evaluation report on Miller using the same format and questions used in the report by Ross.

Respondent contends that Brown conducted a classroom observation of Miller and prepared her evaluation report based on that observation. Miller, whom the ALJ found highly credible, denied that Brown conducted a classroom observation on the date indicated on Brown's report or at any other time during that school year. Moreover, the report indicates that it was prepared from 3:15 p.m. through 3:21 p.m. on June 11, 2012. We question how Brown could have adequately observed Miller in her classroom, carefully evaluated Miller on each of the core elements, and prepared the report in such a short time.

We note, as did the ALJ, that Respondent failed to call Brown as a witness to rebut Miller's testimony that Brown did not conduct a classroom observation of her in 2012 or to explain why Brown's report of her evaluation of Miller indicated that Miller's performance was less effective than the assessments given by Ross and Barclay. Like the ALJ, we draw an adverse inference from Respondent's failure to call Brown as a witness. As we stated in *Ionia Co*, 1999 MERC Lab Op 523; 13 MPER 31014: "An adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if she 'may reasonably be assumed to be favorably disposed to the party.'" citing *Ready Mixed Concrete Co v NLRB*, 81 F3d 1546, 1552 (CA 10, 1996). See also, *Wayne Co*, 21 MPER 58 (2008). Accordingly, based on Respondent's failure to call

Brown as a witness, we conclude that if Brown had been called, her testimony would not have supported the contention that she conducted a classroom observation of Miller in 2012 and would not have supported the assertions that Miller's teaching performance was less effective than indicated by the assessments given in the reports prepared by Ross and Barclay.

At the hearing, Respondent's counsel urged Miller to compare the performance evaluation report prepared by Nancy Ross with the performance evaluation report prepared by Dwana Brown. He tried to get Miller to agree that the ratings given by Ross and Brown were "the same." Miller, not having previously reviewed Brown's report, declined to do so. Indeed, the reports were not the same. Although both reports used the same format and questions, Ross rated Miller effective on all five core elements and indicated that her performance was highly effective with respect to one of the standards considered in determining the ratings for each of two elements. Ross also made comments explaining the basis for her findings. Brown's report, on the other hand, rated Miller effective for only four of the five core elements and indicated that her performance was minimally effective with respect to one of standards considered in determining the rating for one of the five core elements. Moreover, Brown provided very few comments to support her ratings. Had Miller's rating been based on the report by Ross, her score would undoubtedly have been significantly higher. Since Ross rated Miller as effective for each of the five core elements, based on Respondent's Teacher Tenure Act Retention Scoring document and Respondent's Annual Rating Form, Miller's rating would have been at least 2.0 instead of 1.9. That would have increased her performance score from 40 points to 50 points and increased her overall score from 64 to 74, raising it above the Employer's minimum evaluation score for recall. That would also have raised her score over those of six math teachers, including Carolyn Perry, who were recalled and whose scores were not expunged.

Miller asked Respondent to let her know what her teacher ranking was and the basis of the ranking score in an August 28, 2012 email, but it took the Employer until October 19, 2012, almost 2 months later, to respond. That response listed Miller's evaluation score and a summary of the evaluation components without any explanation of the reasons for Miller's particular score. In describing the performance component of the evaluation in her October 19, 2012 letter to Miller, Hall explained that the performance component of was based on scores generated from observations of Miller's classroom performance. The letter does not indicate that the observations of Miller's classroom performance were by Miller's school principal. The letter did not include a copy of the evaluation report prepared by Brown, and failed to notify Miller that an evaluation report prepared by Brown was part of the basis for the score. There is no evidence in the record indicating that Miller was ever informed by Respondent prior to the filing of the unfair labor practice charge in this matter that an evaluation report prepared by Brown was considered in calculating the evaluation score.

It took until January 11, 2013, over four months after Miller's request for the basis of her score and a second request asking for a detailed breakdown of her evaluation score, before Respondent provided her with her scores on each component of the evaluation. It was not until that point that Miller was informed that Respondent had reduced her score by 15 points because it considered her to have had 31 days of unapproved absences.

Charging Party's Attendance Score

The days off that Respondent counted as paid sick days or unpaid days off were October 20 and 21, and December 12, 2011, January 19, January 23 and 24, February 27 through March 9, April 26, May 1, May 14 and 15, May 21, and May 29 through June 11, 2012. Miller testified that she applied for FMLA leave in February and again in May. Miller's 20 sick days from February 27 through March 9 and from May 29 through June 11, 2012 support her testimony of extended absences for health reasons during those two periods, as well as her testimony that she requested two FMLA leaves. The remaining days off, October 20 and 21, December 12, January 19, January 23 and 24, April 26, May 1, May 14 and 15, and May 21, total 11 sick days. If Respondent had only considered those 11 sick days in determining the attendance component of Miller's evaluation score, she would have received five additional points. Moreover, there is no evidence in the record that Respondent informed Miller, or any other teachers, that in evaluating teacher performance it would consider absences due to illness that were not specifically supported by medical documentation. If Miller had been credited with five additional attendance points as well as 10 more points for an effective rating based on the Ross performance evaluation, her score would have been 79, higher than any of the other math teachers currently laid off and higher than several math teachers who were recalled without having their evaluations expunged.

Conclusion

As indicated above, the record shows numerous occasions in which unexplained or inadequately explained actions by Respondent denied Miller opportunities to return to work. Those actions are too numerous and too inconsistent with Respondent's purported procedures to be accidental or, as argued by Respondent, to be merely due to the ineptness of its staff. With respect to that argument by Respondent's counsel, we must particularly consider the testimony of Respondent's assistant director of labor relations, Joline Davis. On cross-examination, Davis adamantly denied the assertion that "DPS records are terribly inaccurate." Unless Respondent's records are generally inaccurate, and Respondent's Human Resources staff is generally inept, there is no explanation for the last-minute rescission of the Golightly offer of employment, the failure to provide Miller with the opportunity to participate in job fair interviews, the failure to consider Miller's FMLA leaves in calculating her attendance credits in her evaluation, the failure to send the letter granting her FMLA leave to her address of record, the failure to call her at her phone number of record for the priority recall, or her removal from the priority recall list. Contrary to Respondent's arguments of ineptness, we have the testimony of Respondent's witness Davis and the lack of evidence that there were any victims of this purported ineptness other than Miller. We conclude, therefore, that Respondent's claims of ineptness are not credible nor are the other reasons given by Respondent for the adverse actions taken against Miller that prevented her from being recalled to work.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, and the reasons stated by the Administrative Law Judge, we find Respondent's exceptions to be without merit and agree with the Administrative Law Judge that Respondent violated § 10(1)(a) and (c) of PERA.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: May 18, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Respondent-Public Employer,

Case No. C13 B-028
-and- Docket No. 13-000175-MERC

HEATHER MILLER,
An Individual Charging Party.
_____/

APPEARANCES:

Daryl Adams, Assistant Director of Labor Relations, for the Respondent

Scheff Washington & Driver P.C., by George B. Washington, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

Heather Miller is a tenured teacher who was employed for many years by the Detroit Public Schools (DPS) and is a member of the Detroit Federation of Teachers (DFT), the exclusive bargaining representative of the school district's teaching staff and other instructional personnel. Miller was laid off from her position as a math teacher at Marquette Elementary-Middle School effective August 24, 2012, and she has not worked for the school district in any capacity since that date.

On February 2, 2013, Miller filed this charge against the DPS. The charge, as amended on June 21, 2013, alleges that Miller's layoff was discriminatorily motivated and that Respondent further retaliated against Miller by systematically ensuring that she had no

opportunity for recall during subsequent school years. In particular, Miller asserts that Respondent's refusal to place her in a position as a middle school math teacher at Golightly Educational Center for the 2012-2013 school year was in retaliation for her concerted activities which are protected under Sections 10(1)(a) and 10(1)(c) of PERA.

On April 8, 2013, Respondent filed a motion for summary disposition asserting that the charge should be dismissed because there was no evidence that protected activity was a motivating factor in the school district's decision not to recall Miller following her 2012 layoff. The DPS further asserted that dismissal of the charge was warranted because, pursuant to state law and district policy, all layoff and recall decisions are based strictly upon performance evaluation scores which do not take into account union membership or activity. In an order issued on April 12, 2013, I denied the motion for summary disposition on the ground that there were genuine issues of material fact which must be resolved at an evidentiary hearing. At the same time, I ordered Miller to file a more definite statement of the charge. In response to that order, Miller filed an amended charge on June 21, 2013.

Respondent filed a second motion for summary disposition on August 2, 2013. The school district argued that because the unfair labor practice charge involves a challenge to Miller's 2012 performance evaluation, the claim is barred by a prior settlement agreement entered into between Respondent and the DFT in March of 2013 concerning the evaluation process. In addition, Respondent asserted that Charging Party could not establish that her layoff was discriminatorily motivated since there were other math teachers who were laid off at or around the same time as Miller who had higher overall performance evaluation scores.

As directed by the undersigned, Charging Party filed a response to the school district's second motion for summary disposition on October 30, 2013, and the DPS filed a reply brief on November 25, 2013. Following the submission of briefs, I convened a telephone conference call with the parties to discuss the issues raised by Respondent in its motion. At the conclusion of the conference, I indicated to the parties that there were still unresolved questions of fact with respect to the allegations set forth by Miller and that the matter would therefore proceed to an evidentiary hearing. In addition, I held that the agreement reached between the school district and the Union concerning the evaluation process did not qualify as a waiver of Miller's right to bring a discrimination claim under PERA.[10] An evidentiary hearing was subsequently held in Detroit, Michigan on March 26, 2014. The parties filed post-hearing briefs in this matter on or before July 2, 2014.

[10] Although Respondent referenced the settlement agreement in its post-hearing brief, it did not specifically argue that the agreement precluded Miller from pursuing the instant charge. Rather, Respondent asserted that Miller's remedies in this case are moot because she purportedly failed to pursue the rights afforded to her by that settlement agreement. For this reason, I find that Respondent has not properly preserved its argument that the settlement agreement itself constitutes a bar on Miller's right to bring this charge. In any event, I note that waivers of statutory rights will not be given effect unless they are clear and unmistakable and Respondent has made no showing that the agreement between the school district and the DFT was intended to preclude individual teachers from bringing claims alleging discrimination in violation of Section 10(1)(a) and (c) of PERA. See *Amalgamated Transit Union, Local 1564 v SEMTA*, 437 Mich 441, 460-466 (1991); *Port Huron Ed Ass' n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 312 (1996).

Findings of Fact:

I. Background

Charging Party was hired as a teacher by the Detroit Public Schools in August of 2001 and has been a member of the Detroit Federation of Teachers ever since that time. She is certified to teach math and science at the middle school level. Prior to the events giving rise to the instant charge, Miller was assigned to Marquette Elementary-Middle School, primarily teaching middle school math. Miller is married to Stephen Conn, a math teacher at Cass Tech High School and a well-known Union activist.[11]

Like her husband, Charging Party has a long history of Union activity. Miller ran for Union office every year from 2001 to 2007, including one campaign in which she ran for the position of DFT president. Miller also sought election as a delegate at various state and national Union conventions. Miller was previously the DFT representative at Marquette Elementary-Middle School and she played an active role in organizing her fellow teachers, including organizing picketing during a teacher strike and attending school board meetings on behalf of other teachers. In fact, when discussing her status as a Union activist, Miller testified that she could not recall ever having encountered a DPS official who was unaware of her identity.

In 2007, Conn and Miller were placed on administrative leave for their role in a demonstration over planned school closures. They filed an unfair labor practice charge against the school district, alleging that the DPS violated Sections 10(1)(a), (b) and (c) of PERA by removing them from teaching duties and charging them with misconduct. On June 12, 2008, Administrative Law Judge Doyle O'Connor issued a Decision and Recommended Order finding that the district unlawfully discriminated against the charging parties for engaging in lawful protected concerted activities. That decision was later adopted by the Commission as its own after exceptions were withdrawn. *Detroit Public Schools*, 22 MPER 89 (2009). The Commission's findings of fact, to which I give collateral estoppel effect, are set forth below. Significantly, the Commission's findings were also relied upon by a federal district court judge in a collateral case involving Miller. See *Conn v Detroit Bd of Education*, 586 F Supp 2d 852 (E.D. Mich 2008), as discussed more fully later in this decision.

II. Conn/Miller Case

In 2007, the DPS announced a plan to close 38 schools in response to a multi-million dollar deficit. On May 1, 2007, a march and rally were planned, in part, to protest the school closings. Conn and Miller were off work with the permission of the DPS and they, along with their ten-year old daughter, attended both the march and rally. Their role in the demonstration was as mere participants only. Neither Conn nor Miller were involved in organizing the march or even in leading the chants. Nevertheless, prior to the start of the demonstration, the DPS police chief approached the principal of Northern High School, the location at which the

[11] It was widely reported in the press that Conn was elected president of the DFT during the pendency of this dispute.

march was scheduled to conclude, and informed him of Conn and Miller's identities. In addition, DPS police technicians who were on the scene videotaping the events devoted considerable footage to the activities of the two Union activists.

Although the march began peacefully, things became mildly chaotic as the assembled group, which included some DPS students, reached Northern High School. After some of the participants ran up to the school building and banged on doors and windows, pepper spray, or some other irritating aerosol, was released. The highest ranking DPS officer on the scene, Corporal Wallace, motioned over to Conn and exhorted him to get the kids out of the area. Conn responded by indicating that he had no control over the situation. After returning to his earlier placement on the sidewalk, Conn attempted to draw the students into an organized picket line within the area which had previously been approved by police. Meanwhile, Miller was standing further away on a public sidewalk with her daughter. At that point, one of the students tossed an open water bottle through the air, splashing participants and police officers alike. Wallace responded by summoning his officers and loudly commanding, "You see Steve Conn, you lock him up."

Conn was immediately arrested. Shortly thereafter, two DPS police officers converged on Miller, seized her, pried her daughter out of her hands, placed her in handcuffs and shoved her out into traffic on busy Woodward Avenue. When Miller expressed concern for the fate of her now unaccompanied ten-year-old daughter, the arresting officer suggested that he could arrest the child as well. Conn and Miller were later released without charges and they subsequently returned to their respective schools and continued teaching through the conclusion of the 2006-2007 school year. During that time, neither Conn nor Miller were questioned or advised that they were facing discipline for their role in the demonstration.

On June 29, 2007, the DPS placed Conn and Miller on administrative leave pending an investigation into charges of disorderly conduct and violation of a school ordinance stemming from the events of May 1st. In connection with the charges, the DPS asserted that Miller had exhorted the students to resist arrest and encouraged them to offer assistance to her for that same purpose. In addition, the DPS alleged that both Conn and Miller had endangered students by allowing them to march into the street. Shortly before August 27, 2007, the date that DPS teachers were required to report back to work for the new school year, management advised Conn and Miller that they would remain on unpaid administrative leave indefinitely. Although teachers who are facing discipline normally have investigative meetings with DPS officials, with Union representatives in attendance, no such meetings were held with respect to Conn and Miller. In fact, no investigation was ever conducted.

On August 30, 2007, Conn and Miller filed a charge with the Commission asserting that the DPS violated Sections 10(1)(a), (b) and (c) of PERA by removing them from teaching duties and charging them with misconduct based, in whole or in part, on their protected concerted activities. The DPS alleged that the charging parties were not terminated because of their protected activity, but rather due to their off-duty misconduct at the demonstration which occurred, in part, on school premises, and which involved school students and personnel. Following twelve days of hearing, Judge O'Connor issued his decision finding that the DPS had engaged in "extraordinary retaliation" against Conn and Miller for having participated in

lawful union activity and that the district's pursuit of disciplinary charges against the two teachers interfered with the exercise of their rights protected under PERA.

ALJ O'Connor began his decision by concluding that the charging parties had readily established that Conn and Miller had engaged in protected activities of which the DPS was aware. The ALJ described Conn and Miller as "perennial activists in the DFT" who "personally spoke at multiple board meetings, arranged and participated in picket lines, and initiated and secured broader support for litigation against the school closings." According to Judge O'Connor, the "entire DPS hierarchy" was well aware of the leadership role on workplace issues played by Conn and Miller in the past, including interim DPS Superintendent Lamont Satchel, board president Jimmy Womack, and other board members, as well as individual DPS police officers. In fact, the ALJ held that the school district's awareness of Conn and Miller's decades of involvement in protected activity was never disputed. With respect to Miller's reputation as an activist specifically, ALJ O'Connor found:

> Miller is well known by the Employer, the media, and the public as a workplace and community advocate. Miller actively recruited other school employees to take part in meetings, pickets (including by leading a picket at the school board president's home), and the like, over the schools closing issue. Miller was of such sufficient notoriety or stature that local television station Channel 7 tapped her to represent teachers' views in an on-air debate with board president Womack. At that television appearance, Womack made pointed reference to Miller's association with Conn, their involvement in school related issues, and his personal antagonism toward them for that involvement. The local print media has followed this litigation involving Miller and Conn.

Next, ALJ O'Connor determined that Conn and Miller had met their burden of establishing that the DPS harbored anti-union animus or hostility toward their protected activity and that such activity was a motivating cause of the school district's pursuit of disciplinary charges against them. In reaching this conclusion, the ALJ relied upon undisputed testimony establishing that shortly after the events of May 1, 2007, Womack, the school board president, told other school board members that he intended to get rid of Conn and Miller because of their public opposition to the planned school closures. In addition, the ALJ cited the testimony of school board member Marie Thornton, who recalled that, in her presence, Womack vowed to personally see to it that Conn and Miller would not be returning to school in the fall. According to Thornton, whose testimony was undisputed, Womack indicated that he was going to see to it that Conn and Miller were placed on administrative leave without pay and then "drag it out through the court system" and "starve them out." ALJ O'Connor also credited Miller's testimony that Womack had directly threatened her job status following a joint appearance on a televised debate. As described by the ALJ, an agitated Womack pointed at Miller and yelled, "You're going down . . . I used to work with you and Steve [Conn], but no more. You're going down." Based upon these threats, ALJ O'Connor concluded that the events which occurred during the May 1st demonstration were merely an excuse, rather than the reason, for the imposition of discipline on Conn and Miller.

In determining that Conn and Miller had established animus on the part of the school district which was the motivating cause of the employment action, the ALJ found that the titular CEO of the DPS at the time, Connie Calloway, displayed callous indifference toward the treatment of the two teachers. Calloway, who was appointed as DPS superintendent in July of 2007 following Satchel's departure, insisted at hearing that she did not become involved in the matter because she had been advised by unnamed board members, or the board president, that the case against Conn and Miller was none of her business. The ALJ found that Calloway's apathy constituted further evidence that the discipline of Conn and Miller was unlawfully motivated. Judge O'Connor described Calloway's "institutional indifference" to the treatment of Conn and Miller as "troubling and unacceptable."

In addition to finding direct evidence of unlawful animus, the ALJ drew an inference of animus and discriminatory motive from circumstantial evidence, including the pretextual nature of the reasons offered by the school district in support of the discipline of Conn and Miller. In particular, the ALJ emphasized the fact that Conn and Miller were given an unpaid leave of absence, an action for which no DPS manager was willing to take credit as having ordered and for which no explanation was offered at hearing. The ALJ described the leave of absence as "unprecedented" and found that it was "so far out of the norm for this Employer that the imposition of that unpaid leave, standing alone, persuasively supports a conclusion that the disciplinary leave supposedly imposed because of misconduct on May 1st was instead imposed as a pretext to punish Conn and Miller for their advocacy efforts on school issues." According to the ALJ, "the only other possible explanation is that, as to Conn and Miller, the entire DPS hierarchy suddenly forgot the normal rules and acted irrationally." The ALJ noted that the long delay in bringing the initial disciplinary charges further supported a finding that "the final, and temporally proximate, trigger for the discipline was the initiation by Conn of the early June lawsuit seeking an injunction to block the school closings."

With respect to the events of May 1, 2007, ALJ O'Connor concluded that the school district's stated rationale for the discipline was implausible and that the explanation offered by the Employer was contradicted by DPS police videos of the demonstration which the ALJ described as "compelling." Specifically, the ALJ wrote:

> The exhaustive courtroom review of the video images of the events of May 1st established no wrongdoing on the part of Conn or Miller. Miller is consistently located on the public sidewalk, where the police had indicated picketing would be tolerated, shepherding her daughter. Conn is frequently at their side or otherwise on the periphery of the crowd. Neither Conn nor Miller is seen exhibiting any leadership role in the demonstration, until very near the end when Conn, unsuccessfully, attempts to gather the children on the sidewalk to organize a more disciplined picket. There was no evidence that Conn or Miller brought students to the rally from their respective schools. There was no basis for the DPS to assert that Conn or Miller had any greater obligation, or ability, to control the rally than did any of the other adults on the scene.

> Based on the entire record, I find the Employer's rationale pretextual. Conn and Miller were not removed from the workplace because of their conduct on May 1st, but rather that the events of May 1st were seized upon as an opportunity to be rid of disfavored workplace activists, or as put in the uncontested words of Board President Womack, to "starve them out". In fact, the arrests of Conn and Miller appear to have been ordered pursuant to a desire to facilitate their removal from the workplace, rather than by any legitimate law enforcement concern based on their individual conduct on the scene that day.

In addition to finding that the DPS had engaged in unlawful retaliation against Conn and Miller in violation of Section 10(1)(c) of PERA, the ALJ concluded that the conduct of the DPS was so inherently destructive of employee interests that it constituted unlawful interference with protected activity in violation of Sections 10(1)(a) and (b) of the Act. In so holding, the ALJ rejected the school district's assertion that the behavior of Conn and Miller during the demonstration was sufficiently out of line as to remove them from the protection of PERA. According to the ALJ, the evidence, including the police videotapes, established that, at the time Miller was arrested, she was peacefully picketing on a public sidewalk with her daughter in an area which the DPS police had earlier indicated was appropriate for participants in the demonstration. The ALJ noted that the arrest was accomplished with "considerable force, by two officers both of whom were larger than Miller" and rather than resist arrest, Miller merely pled that consideration be given to the fate of her ten-year old, who was instead left by the officers in a traffic lane on Woodward Avenue." The ALJ concluded that the district's conduct in disciplining Miller because she engaged in protected activity "not only interferes with the conduct of that employee, but deters other employees who might, but for the employer's adverse reaction, likewise engage in such lawful and protected conduct."

For the above reasons, ALJ O'Connor recommended that the Commission issue a "compensatory and prophylactic order, providing direct relief to Charging Parties and broad notice to other potentially effected employees." The ALJ also took the highly unusual step of recommending that the Commission grant injunctive relief immediately restoring Conn and Miller to active employment pending the final outcome of the litigation. Given what he described as the "extraordinary record" before him and the "specious and flagrantly pretextual charges of misconduct", as well as the First Amendment concerns at stake, the ALJ concluded that the traditional make-whole remedy was inadequate to reasonably deter future unlawful conduct, to rectify the chilling effect of the school district's conduct on other employees, and to further effectuate the policies of the Act. Judge O'Connor held:

> Where the recognized impact of the removal of known activists from the workplace is to broadly chill the exercise by other employees of protected rights, it appears that the purposes of the Act would be served by the issuance of injunctive relief pending the final outcome of this litigation, as was recognized in *AFSCME Local 207 v Detroit* [unpublished opinion of the Michigan Court of Appeals, issued October 18, 2007 (Docket No. 27321] and *Detroit v Salaried Physicians* [165 Mich App 142 (1987)] especially where the issuance of a decision at this level in the proceedings makes clear that

> Charging Parties have a high likelihood of ultimate success on the merits, even in the event of the filing of exceptions to this Decision. Regardless of any relief ultimately secured by Conn and Miller individually, their continued and notorious absence from the workplace would serve to underscore the Employer's powerful ability to disadvantage employees for exercising their statutory rights, and would thereby continue and exacerbate the chilling effect seen as harm warranting injunctive relief in *AFSCME Local 207*, *supra*, and in *Salaried Physicians, supra*.
>
> I further find that this dispute involves a large and experienced Employer that can be presumed to have a sophisticated understanding of its duties under the Act, with both in-house and outside counsel involved in the matter. The unlawful conduct was ordered, committed, and ratified by, the highest-ranking officials of DPS, including the head of its elected board. The adverse employment actions were premised on allegations solidly refuted by the Employer's own videotaped record of the disputed events. Beyond mere adverse employment action, this Employer has chillingly misused the extraordinary power and force available to it through its in-house police department. The continued pursuit of the adverse employment actions was further premised on sworn testimony which I have found to be willfully untruthful. The delays in the ordinary investigation and processing of the underlying disciplinary matters, and the extraordinary and open-ended delays repeatedly sought in the present proceeding, are consistent with the stated intent of the school board president to improperly use the legal process to "starve out" these two teachers whose lawful advocacy so annoyed him. [Citations added.]

Mere days after ALJ O'Connor issued his Decision and Recommended Order on June 12, 2008, the DPS Board voted to terminate Conn and Miller based upon their role in the demonstration. The two teachers remained on administrative leave pending a decision by the Commission on the school district's exceptions to the ALJ's recommended order. On July 16, 2008, Conn and Miller filed an action in federal district court seeking an injunction ordering the DPS to immediately place them back in their classrooms. Their complaint asserted a claim based on the First Amendment, arguing that the Board's actions in first placing them on administrative leave and then firing them violated their rights of free speech and assembly.

On November 6, 2008, U.S. District Court Judge Stephen J. Murphy, III, issued a decision granting a preliminary injunction and ordering the DPS to return Conn and Miller to the teaching positions they held prior to their removal from the school. *Conn v Detroit Bd of Education, supra*. In granting injunctive relief, the judge concluded that the teachers had engaged in conduct protected by the First Amendment, including giving speeches at school board meetings, attendance at the student demonstration and participation in a lawsuit against the school closings. The judge further held that both Conn and Miller suffered adverse consequences when they were first suspended from their jobs without pay and later terminated by the DPS. Finally, and most significantly, the judge held that the teachers had met their burden of showing that the adverse action was motivated, at least in part, by their protected

conduct. In so holding, the judge applied the principal of collateral estoppel and looked to Judge O'Connor's Decision and Recommended Order as "reliable and persuasive evidence" that the plaintiffs were suspended in retaliation for protected conduct. *Id*. at 863-864.

As noted, the DPS filed exceptions to ALJ O'Connor's Decision and Recommended Order. On August 12, 2009, after the matter had been fully briefed, the Commission received a letter from the school district indicating that the dispute underlying the charge had been settled and requesting leave to withdraw its exceptions. In an order issued on September 23, 2009, the Commission approved the district's request, dismissed the exceptions and adopted the ALJ's Decision and Recommended Order as its judgment in the matter.

III. Return to Work

Following the issuance of the injunction by the federal court, Respondent returned Charging Party to her position at Marquette Elementary-Middle School. Thereafter, Miller resumed her Union activities. During the course of the 2008-2009 school year, Miller ran for office in the DFT and for a position as a Union delegate. That same year, she organized teachers to vote against a collective bargaining agreement which had been negotiated by Respondent and the DFT. Following the ratification vote, Charging Party participated in a campaign to recall Union president Keith Johnson, including soliciting signatures of other teachers on a recall petition. Approximately 2000 teachers signed the petition and, as a result of that effort, Johnson was ultimately recalled as Union president.

Both Conn and Miller won delegate elections in the spring of 2010, with Conn receiving the most number of votes in the election and Miller receiving the second-most votes. Miller also ran for recording secretary of the DFT. That same year, Charging Party was a lead plaintiff in a lawsuit filed by teachers against the Union concerning the school district's "Termination Incentive Plan." She recruited other teachers to participate in the case by circulating sign-up sheets, making phone calls and sending out emails. Charging Party also held periodic meetings concerning the progress of the lawsuit.

Charging Party routinely engaged in organizational activities while employed at Marquette Elementary-Middle School, including going "door-to-door" in an attempt to encourage her fellow teachers to participate in various DFT functions. Charging Party occasionally passed out Union flyers during staff meetings with the approval of her principal, Dwana Brown. Although Brown told Charging Party that she believed in union activity, she would sometimes caution Miller that she was not "protected anymore" because the Union had lost strength. Cassandra Washington, the school district's Executive Director for Human Resources Information, testified that she was aware that Miller was a union activist and that she was married to Steve Conn. Washington further testified that Conn's activities on behalf of the Union were generally known throughout the district.

IV. Health Problems

Sometime after her return from suspension, Charging Party began having serious health problems. The issues worsened significantly during the 2010-2011 and 2011-2012

school years, ultimately resulting in Miller having to undergo four surgical operations. Miller missed a significant number of school days in 2011-2012 due to issues with her health. She also took two personal leave days and one day off for jury duty during that period. However, Miller testified emphatically that there was not a single day that she missed in 2011-2012 for which her absence was not approved by the school district. Miller explained that each time she needed to miss work, she followed the mandated DPS procedure for reporting absences by entering her leave information in Sub-Finder, a district-wide computerized call-in system. She also routinely communicated with Patricia Parks, the secretary at Marquette, with whom Miller discussed the reason for her frequent absences and her expected return dates.

After missing ten days of school in February of 2012, Miller contacted Parks for assistance in completing a request for leave under the Family and Medical Leave Act (FMLA), 29 USC 2601 et seq., as amended. By email dated March 8, 2012, Parks sent Miller a copy of the school district's FMLA leave request form, along with a note stating, "Hope you feel better don't rush back to work." Miller had her physician fill out the form and then attempted to deliver it to Principal Brown. However, Brown refused to accept the document, instead directing Miller to submit the form to Respondent's "Welcome Center" located in the school district's office in the New Center Building. Miller testified that she followed Brown's instructions and that a district representative accepted her FMLA leave paperwork. There is nothing in the record indicating whether the school district ever provided notice to Miller that her request had been accepted or rejected.

Miller was once again hospitalized for a period beginning in late May of 2012. She personally notified Principal Brown that she would likely be off work until near the end of the school year. As she had earlier, Miller filled out the appropriate FMLA paperwork and turned the documentation in to a DPS representative at the New Center Building. By letter dated June 13, 2012, the school district approved Miller's request for eight days of FMLA leave for the period May 30, 2012, to June 8, 2012, without pay. However, the letter approving the leave request was not sent to Miller's address of record; instead, the document was mailed to an address on Outer Drive in Detroit. Miller testified that the first time she saw the letter was when she was shown a copy by her attorney while preparing for trial.

V. 2011-2012 Performance Evaluation

During the 2011-2012 school year, the DPS implemented a new teacher evaluation process which requires principals to rate teachers based upon a rubric of five core elements: pedagogical skills, classroom management, student growth, educator responsibilities and development/special training. Those factors are considered the "performance" component of the review, which constitutes 60 percent of the overall composite evaluation score of 100 points. Included within the performance component is a mandatory classroom observation of each teacher. Based upon that observation, teachers are categorized as ineffective, minimally effective, effective or highly effective and assigned a "performance rating" score from 0 to 2.5. At hearing, Joline Davis, Respondent's assistant director of labor relations, testified that the "performance rating" is factored into the overall composite evaluation score. The remaining components of the composite performance evaluation are student conduct and

discipline (20 percent), attendance (15 percent) and social accomplishments and other contributions (5 percent).

Charging Party introduced into evidence a spreadsheet listing the performance evaluation scores for 46 teachers employed at Marquette Elementary-Middle School who were evaluated during the 2011-2012 school year. The spreadsheet was produced by the DPS based upon information contained within its PeopleSoft computer system. According to that spreadsheet, four teachers received a composite evaluation score of 90 percent, which was the highest score received by any teacher at Marquette that year. The lowest composite score given out was 62 percent. The scores for the performance component of the evaluation ranged from 30 percent to 50 percent. Three teachers were rated "ineffective" based upon classroom observations, while eight teachers were classified as "minimally effective."

For her 2011-2012 performance review, Charging Party received an overall composite evaluation score of 64 percent which was comprised of 40 points on the performance component of the evaluation, 20 points for student conduct and discipline, four points for social accomplishments, and zero points for attendance. For the latter, Miller is listed as having missed 31 days of work during the 2011-2012 school year, with all of those absences categorized as "unexcused." At hearing, the DPS introduced into evidence an internal audit report purportedly documenting Miller's attendance record for the period July 1, 2011, to June 30, 2012. The computerized report, which was based on payroll earnings, indicates that Miller was absent 33 days total during that school year, including one day for jury duty and one personal leave day.

Davis testified that DPS teachers were allowed 12 paid sick days for the 2011-2012 school year, along with time off for jury duty and personal emergencies, and that any additional time off was considered unexcused, unpaid time off. According to a DPS document entitled "Teacher Tenure Act Retention Scoring," teachers who missed 0 to 3 days during the school year received a full 15 percent for the attendance portion of the performance evaluation, while 4 to 6 days of missed work resulted in a score of 12 percent. 7 to 9 absences during the school year meant an attendance score of 10 percent, with the score dropping an additional five percent for 10 to 12 days work days missed. Teachers who were absent 13 days or more received zero points on the evaluation. Davis asserted that for purposes of computing the attendance score on the performance evaluations, all sick days counted against teachers regardless of whether those absences were paid or approved, but that approved time off under the FMLA would not count against teachers on the evaluation. However, the DPS "Teacher Tenure Act Retention Scoring" document explicitly states that both approved medical leave and FMLA leave were to be excluded when calculating the performance evaluation score.

Despite Miller's testimony that she requested FMLA leave in February and again in the spring of 2012, the internal audit report introduced into evidence by Respondent did not indicate that any of Miller's absences during the 2011-2012 school year were covered by the FMLA. At hearing, Davis admitted that the report was erroneous in that regard and that it should have reflected the fact that Miller had been approved for eight days of FMLA in 2012 for her absences in May and early June of that year. Davis testified that she discovered the

error in the report while preparing for the hearing in this matter. Davis further testified that she had no knowledge of any other FMLA time requested by Miller during the 2011-2012 school year.

With respect to the performance component of Charging Party's 2011-2012 teacher evaluation, the school district introduced into evidence a report indicating that Miller was observed in her classroom by Principal Brown on June 11, 2012. However, Miller testified that Brown was not in her classroom that day or on any other date during that school year. In fact, Miller asserted that she was still on FMLA leave on June 11, 2012. Her testimony was corroborated by the school district's own payroll records, which list Miller as having been off work from May 28, 2012, through June 11, 2012. Notably, Miller testified that she had never seen the Brown observation report until she was shown a copy at the hearing in this matter.

On the classroom observation report, Brown assessed Miller as "effective" on all of the core elements, with the only blemish being a remark that Miller is a "good teacher when she is here." Curiously, with the exception of the brief reference to an alleged attendance issue, there is little in the way of actual feedback provided on the report. The very few personal comments that are included are short generic remarks such as "Developmentally appropriate instructional stratifies [sic] used." Despite the dearth of negative feedback, Miller received a performance ranking of only 1.9, which was tied for the lowest score given to any Marquette teacher who received an "effective ranking." In contrast, 33 teachers who were categorized as "effective" by Respondent received performance ratings ranging from 2.0 to 2.5.

Washington testified that a teacher's classroom observation score needed to be at least 2.0 in order for a teacher to receive 50 points on the performance component of the evaluation. As noted, Miller's performance score was 1.9. Thus, Washington conceded that if Miller had received even a fraction of a point higher on her observation, her performance score would have gone up from 40 to 50 and her overall composite score would have increased by ten points to 74 percent. No explanation was provided by Respondent to explain the differences in the numerical performance ranking scores amongst teachers who received "effective" ratings. In fact, none of the school district's witnesses were able to provide any clarification for how the classroom observations were converted into numerical scores. Brown did not testify in this matter.[12]

It is undisputed that Charging Party was observed in her classroom during the 2011-2012 school year by assistant principal Nancy Ross, a retired principal, and by Michael Barclay, an assistant principal. However, the spreadsheet introduced into evidence in this matter indicates that only the Brown observation was utilized by Respondent in calculating

[12] The case file includes a March 20, 2014, letter from Charging Party's attorney, George Washington, requesting a subpoena for Brown, along with assurance that Washington would then forward the signed subpoena to Daryl Adams, counsel for the school district. However, there is nothing in the record to explain why Brown was never called to the stand in this matter. Given that Brown was a DPS principal and, therefore, presumably at the disposal of the Employer, I draw a negative inference from Respondent's failure to call Brown to the stand to explain the scoring of the performance rating and disprove Miller's claim that the classroom observation never occurred.

Miller's performance rating. In any event, it should be noted that on the observation form which Ross completed in May of 2012, Miller's classroom performance was rated as "highly effective" with respect to two components of the evaluation, "Knowledge of Subject" and "Creating an Atmosphere of Mutual Respect" and "effective" for the remaining ten categories. Ross made extensive written comments on the observation form, none of which were in any way negative or critical about Miller's job performance. Ross noted that the tone of Miller's classroom was "warm and caring" and that most of her students were "actively engaged in the lesson, even those who tried not to be were drawn into active participation." Ross also described Miller's management of instructional groups and her handling of materials as "consistently successful" and noted that she made good use of technology. Barclay, who conducted his classroom evaluation in late April of 2012, similarly offered only positive feedback about Miller's performance.

VI. Layoff from Marquette

On April 10, 2012, the school district provided Charging Party with written notice that she was being laid off effective August 24, 2012. Miller testified that this was not an uncommon occurrence; teachers at Marquette Elementary-Middle School routinely received such notices each school year. In fact, this was the seventh or eighth time that Miller had received a layoff notice and on each occasion, she was ultimately recalled to her position at Marquette. Accordingly, Miller anticipated that she would return to work for the 2012-2013 school year. However, that did not occur and Miller found herself without a job in the late summer of 2012.

Subsequent to the announcement of the layoffs, Miller began hearing rumors that only teachers who had received an overall composite score of 70 percent or higher would be recalled. At that time, however, Miller had not yet received a copy of her performance evaluation and she did not know her score. On or about August 28, 2012, Miller contacted Respondent's chief human resources officer, Vicki Hall, by email and asked to see a copy of her evaluation. In a letter dated October 19, 2012, Hall notified Miller that her overall composite score was 64 percent and offered a general summary of the various components of the evaluation. Although Hall instructed Miller to contact human resources if she believed there was an error in her score, the letter did not provide Miller with a breakdown of her evaluation score by component. It was not until January 11, 2013, that Respondent finally supplied Miller with specific details concerning the evaluation, including the fact that she had received zero points for attendance based upon 31 unapproved absences.

At hearing, Cassandra Washington, the school district's executive director for human resources information, testified that the teacher evaluation scores played absolutely no role in the decision-making process regarding the 2012 layoffs and that, at least initially, the evaluations were not a factor with respect to the recall process. According to Washington, all DPS teachers received layoff notices for the 2012-2013 school year regardless of evaluation score. Washington testified that after the layoffs were announced, teachers were notified that they would be given the opportunity to interview for reemployment at one of several DPS job fairs which were scheduled to occur throughout the spring and summer. Washington asserted that every DPS teacher had the opportunity to select three schools at which to interview and

that the principal of each school ultimately decided which teachers to hire. Washington testified that the principals had no access to performance evaluations and that the human resources department would approve the principal's selections as long as the candidates met eligibility requirements. According to Washington, the criteria for recall to available vacant budgeted positions changed in December of 2012 or January of 2013. From that point forward, only candidates with composite evaluation scores of 70 percent or higher were eligible for employment with the district.

Charging Party testified that she was only allowed to interview at two schools, not three, as part of the DPS job fair program and that, despite Washington's assertions to the contrary, Respondent selected the schools without providing her any input into the process. In support of this assertion, Miller introduced into evidence an email from Respondent's human resources department dated May 21, 2012. In the email, Miller is instructed to attend a job fair scheduled for the following day at the Michigan State University Center in Detroit. According to the message, Miller was to interview for positions at two high schools: Detroit School of Arts and Osborn College Preparatory. Because Miller was not certified to teach high school courses, she immediately replied to the DPS email and questioned the selections made for her by Respondent. Charging Party testified credibly and without contradiction that nobody from the school district ever responded to her concerns. It is also undisputed that Miller was never recalled prior to or during the 2012-2013 school year.

Washington's assertion that the performance evaluation scores were not considered in the initial layoff/recall process was contradicted by her own affidavit which was offered by the school district in support of its second motion for summary disposition. In that affidavit, dated August 2, 2013, Washington claims that pursuant to district policy and state law, performance evaluations were the basis for all layoff and recall decisions made by the DPS.[13] Specifically, the affidavit states, in pertinent part:

> 4. As the District's Executive Director of Human Resources Information Systems/Administrative Services & Consulting, I am responsible for, among other things, determining the employees, including teachers, whom the District, in collaboration with the Academics and the Finance Division, will lay off at a given time due to the District's need to rectify its continuing financial emergency.

[13] In 2011, the Michigan Legislature enacted a series of amendments to the Teacher Tenure Act, the School Code, and PERA which effectively prohibit school districts from making layoff and recall decisions on the basis of seniority. Section 1249 of the School Code, MCL 380.1249, requires that public school employers adopt a "performance evaluation system" that assesses teacher effectiveness and performance. Section 1248, MCL 380.1248, requires that all policies regarding personnel decisions when conducting a "staffing or program reduction" or a recall therefrom must be conducted on the basis of the "performance evaluation system" which the school district was required to develop in compliance with Section 1249 and on other specific factors listed in Section 1248. Pursuant to the amendments, length of service or "tenure status" cannot be a factor in making layoff or recall decisions except when all other factors distinguishing two employees from each other are equal, then length of service or tenure status may be considered as a tiebreaker. MCL 380.1248(1)(c).

5. In accordance with the 2011 amendments to the Michigan Teacher Tenure Act ("MTTA") and the Revised School Code, the District issued a Teacher Staffing Policy in July 1, 2012 which required that **all staffing decisions, including layoffs and recalls, [be] based upon retaining effective teachers**.

* * *

7. In 2012, the District developed and implemented a Teacher Evaluation tool based on the requirements of the MTTA and the Revised School Code, which is Exhibit C of the District [sic] Second Motion for Summary Disposition.

* * *

18. In 2012, the District determined that teacher layoffs were necessary for the 2012-2013 school year due to its financial condition. In accordance with the MTTA, the Revised School Code and the District Policy, **Human Resources retained the District's higher rated teachers** in accordance with the assigned applicable subject area and certification.

* * *

22. **In 2012, teachers were recalled to the District on the basis of his/her evaluation score**, position availability and applicable content area for which the individual is certified and/or qualified.
23. I declare under penalty of perjury under the laws of the United States of America and the State of Michigan and upon personal knowledge that the information contained in this affidavit is true and correct. [Emphasis supplied.]

VII. Golightly Educational Center

In August of 2012, Charging Party sent an email to Sherrell Hobbs, the principal of Golightly Educational Center, about a possible teaching position at the school. Miller had sought a transfer there the previous year and Hobbs had indicated at the time that she was interested in hiring Miller, but that she could not offer her a position that year due to a freeze on transfers. This time, however, Hobbs responded quickly, indicating that she would be happy to set up an interview with Miller. Charging Party's testimony about the interview and its aftermath differed significantly from the account provided at hearing by Hobbs.

Charging Party testified that the interview at Golightly Educational Center occurred in the morning on Friday, August 17, 2012. Miller testified that immediately upon meeting Hobbs, the principal stated, "You're Steve Conn's wife." Miller testified that she was initially concerned about the implications of this remark, but that the principal assured her that she respected Miller and her husband for being "fighters." Hobbs then asked Miller a series of prepared questions from a rubric provided by the DPS and she took notes throughout the interview.

Charging Party testified that at some point during the process, Hobbs stated to Miller, "You're going to be teaching at Golightly." Hobbs then showed Charging Party a computerized Excel-type spreadsheet listing the names of the various teachers who were assigned to the school and the positions they were scheduled to teach. Miller's name was listed on the spreadsheet as a middle school math teacher. According to Miller, Hobbs pointed to the spreadsheet and lightheartedly told her not to take another job before the start of the new school year. Before concluding the interview, Hobbs advised Miller that she wanted her to attend an upcoming back to-school parade as a Golightly representative.

When the interview was over, Hobbs instructed Golightly's assistant principal, Alan Cosma, to take Charging Party on a tour of the building. While walking Miller around the building, Cosma told Charging Party that he was excited about having another "math person" around and he asked Miller if she would be interested in organizing an after school math club for Golightly students. Cosma took Miller to Room M305, the third-floor classroom to which she would be assigned in the fall. Miller testified that when the tour concluded, she went home and, later that evening, had a celebratory dinner with her husband.

Charging Party did not hear back from Hobbs. Approximately five days after the interview, Miller called Hobbs to talk about preparations for the upcoming school year. According to Miller, Hobbs demeanor was completely different than it had been when they met the prior week. Miller described Hobbs as very unfriendly and cold. Hobbs told Miller that she would not be teaching at Golightly Educational Center. When Miller asked for an explanation for the sudden withdrawal of the job offer, Hobbs simply stated that there was no longer a position for her at the school.

When Hobbs was called to the stand and questioned about her meeting with Charging Party, she initially could not recall the exact date upon which the interview had occurred. However, Hobbs testified that she believed the interview took place sometime prior to August 11, 2012, and regardless, well before the August 17th date alleged by Miller. However, during cross-examination, Hobbs was shown a copy of an email message from Charging Party dated August 11, 2012, in which Miller wrote:

> I was wondering if you still have middle school math and/or science openings at Golightly? I am still interested in teaching at Golightly and am sorry it didn't work out last year. I am attaching an updated copy of my resume. Thank you for your consideration and I hope you are enjoying your summer.

Hobbs confirmed that she must have responded to Charging Party's email immediately because, within the hour, she received a follow-up message from Miller, attached to which were copies of performance evaluations and references. In the follow-up email, Miller indicated that she would get back in touch with Hobbs again on Wednesday, August 15, 2012. After having been shown copies of these documents, Hobbs admitted that her interview with Miller could not have happened on or before August 11th, but rather must have occurred sometime after August 15th.

Hobbs testified that she did not recall having asked Miller during the interview if she was married to Steve Conn. In fact, Hobbs asserted that when she first met Charging Party, she did not even know that Miller was married to Conn or that Miller herself was a union activist. Hobbs testified, "I'm not a union person; that's just not me, right? So I don't even keep up with things like that. That's just not me." On cross-examination, Hobbs was asked if she knew of Steve Conn. She responded, "Not really, to be honest with you." However, she then continued, "I've heard his name and I do know of him so to speak, but not personally or anything like that." Although Hobbs denied knowledge that Conn was a union activist, she later acknowledged awareness that he was active within the DFT and that he had even once run for president of that labor organization.

Hobbs testified that prior to the interview with Charging Party, another teacher, Brandon Graham, had already accepted an offer to teach math at Golightly Educational Center. Hobbs asserted that she continued to interview teachers for the position because she hoped to convince the administration to approve a second math teacher for the 2012-2013 school year and because she wanted to ensure that a candidate was available in case Graham decided to accept another job offer.

Hobbs admitted that she offered Charging Party a math teacher position at Golightly during the interview, but she denied that the offer was unconditional. Hobbs testified that she did not have independent hiring authority and that any offer would have to be approved by the human resources department following a background check and other vetting. Hobbs testified that at most, she would likely have told Miller, "I will work to see how we can make that happen." Hobbs did not recall having any spreadsheet or roster during the interview listing Miller's name as a math teacher at Golightly for the 2012-2013 school year. Hobbs asserted that after the interview was over, she sent an email to human resources indicating her desire to hire Miller. However, no such email was produced at hearing or entered into the record in this matter.

Hobbs claimed that at some point after the interview, she received word from assistant superintendent Wilma Taylor-Costen that there were not enough Full Time Equivalencies (FTE's) available for the amount of staff Hobbs wanted to employ for the 2012-2013 school year. Hobbs claims that she went back and forth with Taylor-Costen on the issue, but that her attempts to convince the administration to approve an additional position were unsuccessful. Hobbs testified that she then realized she only had room for Graham and that she would have to withdraw the offer to Miller. Hobbs initially testified that she could not recall exactly when Taylor-Costen had contacted her about the lack of FTEs, but that she was "absolutely" certain it was not the same day that the interview with Miller had occurred. However, on cross-examination, Hobbs was shown a copy of an email which she sent to the human resources department at 6:51 p.m. on August 17, 2012, the same day she interviewed Miller at Golightly. In the email, which is marked with the subject, "URGENT!" Hobbs wrote:

> I am working with my Assistant Superintendent and I have over projected the number of teachers. Therefore, please do NOT provide a letter and please remove Heather Miller (File Number: 371785) from my teacher selection list

> as I am over my allocation for my teacher services based upon FTEs. There will probably be an additional teacher to remove but I will keep you updated."

After having been shown the email message, Hobbs conceded that the call from Taylor-Costen occurred within hours of the Miller interview. Hobbs claims that she sent the urgent email to human resources out of concern for Charging Party. Hobbs testified, "I did not want . . . Ms. Miller to get a letter [from human resources] that she had a position knowing that she did not. That was my way of trying to protect her, in case she wanted to select another school." It is undisputed, however, that Hobbs made no attempt to notify Miller of the fact that there was no longer a position available for her at Golightly.

Hobbs testified that sometime in late August or early September, she learned that Brandon Graham had taken a teaching position in Chicago and, thus, there was once again an opening for a math teacher at Golightly Educational Center for the 2012-2013 school year. It is undisputed that Hobbs did not contact Charging Party for the vacant position. When asked to explain why she did not seek Miller out, Hobbs asserted that she was so busy preparing for the school year that Miller's name never crossed her mind. Hobbs testified, "You're trying to fill your building. You're trying to make sure that facilities and everything is going together at the same time." According to Hobbs, human resources recommended that she get in contact with Carolyn Perry, a math teacher who had not yet received a placement for the upcoming school year. Perry sent Hobbs an application for the math teacher position on August 30, 2012. Hobbs responded almost immediately and set up an interview for the following day. Perry was hired as a math teacher at Golightly and assigned to Room M305, the same room that Miller had earlier been told would be her classroom. As previously noted, Miller was not recalled by the DPS for any position that school year.

Charging Party impressed me as a highly credible witness. She had a confident demeanor, was direct and straightforward in her testimony and she had an excellent recollection of the facts. Her account of the events giving rise to this dispute was internally consistent and corroborated by the available documentary evidence. In contrast, I found Hobbs' manner to be evasive and her testimony replete with contradictions. She seemed intent on tailoring her version of the fact to fit within the framework of Respondent's theory of the case. It was apparent that Hobbs was caught in the middle between her unbiased, and in fact enthusiastic, admiration for Charging Party and pressure from management to rescind the job offer which she had just proffered to Miller in good faith. I conclude that it was Hobbs' desire to show institutional loyalty which hampered her ability or willingness to testify forthrightly in this matter. For these reasons, I fully credit Miller's version of what occurred during and immediately after the 2012 interview at Golightly.

VIII. Expungement and Priority Recall

In March of 2013, Respondent entered into a comprehensive settlement agreement with the DFT and several individual DPS employees (not including Charging Party) resolving civil litigation and a grievance filed over the school district's development and implementation of its teacher evaluation procedure for the 2011-2012 school year. As part of that agreement, the district pledged to give all teachers who had received performance

evaluations for that school year the option of expunging their scores from DPS records. According to the agreement, any teacher who elected expungement was to have thirty days in which to notify the DPS of that election, with the stipulation that, upon receipt of timely notice, the expungement "shall be granted freely and without condition." In addition, Respondent agreed to give all teachers who were still on layoff as a result of the 2011-2012 evaluations "priority for recall" into an available position. The priority recall provision of the settlement agreement provided, in pertinent part:

> Right to Recall. Within thirty (30) days of the execution of this Settlement Agreement, the District shall send a written notice by regular mail to all teachers presently on layoff as a result of their 2011-2012 performance evaluations. The notice shall provide that such teachers will have priority for recall and placement into an available position for which the teacher is certified and/or qualified. The District shall allow the teacher to respond in writing within seven (7) business days from the mailing date of the notice that the teacher desires to return to the District for the start of the 2013-2014 school year. The notice sent by the District shall advise teachers of the requirement that they respond to the District within the seven (7) business-day time period. If a teacher fails to respond to the notice identified in this paragraph within the time specified, the teacher shall be terminated without further obligation on the part of the District.
>
> * * *
>
> Except as otherwise specified in this Settlement Agreement, the District shall have the sole discretion in determining the contents of the notice(s) it will provide under this Section, including whether the notice of expungement opportunity and the notice of recall may be combined in the mailing.

In a letter dated April 12, 2013, Washington advised Charging Party of her right to expungement and priority recall. The letter instructed Miller to respond in writing within seven business days if she wished to return to the DPS for the start of the 2013-2014 school year and cautioned her that a failure to respond within the stated time period would result in forfeiture of her right to recall. In the letter, Washington referenced Miller's 2011-2012 performance evaluation score of 64 percent and stated, "If you are recalled and placed into an assignment during the 2012-2013 school year or the first semester of the 2013-2014 school year, you will have the right to request Expungement of your performance evaluation scores and/or ratings." A copy of the expungement request form was enclosed.

Charging Party completed the expungement form and submitted it, along with a request for priority recall, to Respondent on or about April 18, 2013. On the expungement form, Miller listed her cell phone number, the same number which she had used since around 2005 -- her second year of teaching with the school district. Sometime around 2005, Miller had gotten rid of her landline and notified human resources of her new contact information. Miller testified credibly and without contradiction that it was her cell phone number which was consistently used by the school district to contact her in the event of weather and other

emergencies. At hearing, Charging Party introduced into evidence extensive documentation establishing that she repeatedly gave out her cell phone number for contact purposes relating to her employment with the DPS. These documents include (1) the May 21, 2012, email to Respondent concerning job fair interviews; (2) an August 11, 2012, email to Principal Hobbs regarding a possible teaching position at Golightly; (3) an August 28, 2012, email from Miller to the school district seeking an explanation as to why she had not been recalled; and (4) the November 11, 2013, email from Miller to Respondent requesting a detailed breakdown of her performance evaluation score. Miller's cell phone number was also included on her resume and on many of the flyers which Charging Party prepared and disseminated on behalf of the Union.

During the summer of 2013, Charging Party moved from a home on Harvard Street to a new address. Her cell phone number did not change as a result of the move. Miller testified that she was unable to notify Respondent of her new mailing address because, as a result of her layoff, she no longer had an account on the district's PeopleSoft computer system. On or about August 23, 2013, a letter from Washington addressed to Miller at the Harvard Street address was forwarded to Miller's new residence. In the letter, Washington confirmed that the school district had received her request for priority recall and expungement of her performance evaluation. The letter advised Miller that human resources would contact her if a vacant position became available for which she was certified and qualified for the first semester of the 2013-2014 school year. At the conclusion of the letter, Washington cautioned Miller to ensure that her contact information with the school district remained current.

Charging Party introduced into evidence a letter dated September 25, 2013, addressed to Miller from Washington. The letter asserts that the school district had tried to contact Miller "via the phone number(s) on record for a teaching assignment" and that the attempt had been unsuccessful. The letter indicated that Miller was being removed from the "Priority Right to Recall" list and that the district had no further obligation with respect to her employment. Miller testified credibly that she did not receive a copy of the letter at that time and that she did not become aware of its existence until just prior to the hearing in this matter.

Washington testified that the human resources department attempted to call Charging Party at 6:45 p.m. on August 21, 2013, two days before the DPS sent its letter acknowledging receipt of Miller's request for expungement and priority recall. According to Washington, the school district was unable to reach Miller because her telephone had been disconnected. Respondent introduced into evidence a spreadsheet which, according to Washington, was used by employees of her office for the purpose of contacting teachers on the priority recall list. The document listed Charging Party's Harvard Street address and a telephone number that was different than Miller's cell phone number. Washington testified that the telephone number utilized by her office came from information listed in the school district's PeopleSoft system. However, Washington was not aware of whether Miller ever submitted a formal change of record for her phone number and no printouts from the PeopleSoft system or other records were offered into evidence to establish what contact information the school district actually had on file at that time. The individual who purportedly tried to call Miller was not identified at hearing or called as a witness by Respondent.

Charging Party was still out of work at the time of the hearing in this matter. Respondent introduced into evidence a list of teachers in critical shortage positions who similarly remained on layoff as of June 18, 2013. According to that document, 12 math teachers were still laid off at that time, including Charging Party. Two of those teachers had cumulative performance evaluation scores lower than Miller's score of 64 percent. Of the nine teachers who scored higher than Miller, all but two had cumulative performance evaluation scores under 74 percent, the score which Miller would have received had she been rated one-tenth of a point higher on the classroom observation portion of her evaluation.

Discussion and Conclusions of Law:

Charging Party contends that the DPS took advantage of cutbacks at Marquette Elementary-Middle School, as well as the Legislature's elimination of recalls by seniority, to end the employment of one of its most vocal opponents. According to Charging Party, there is no question that Miller engaged in a wide array of protected activity both before and after issuance of the Commission's decision in *Detroit Public Schools*, 22 MPER 89 (2009), and that her actions as a Union activist were well known throughout the school district. Charging Party asserts that there was direct evidence of anti-union animus by high-level DPS officials in the prior case, and that such evidence, along with the rampant contradictions in Respondent's explanation for its failure to recall Miller, confirm that the anti-union hostility against Miller has continued. For example, Charging Party argues that the testimony proffered by the school district in support of the rescission of Miller's job offer at Golightly Educational Center was so riddled with contradictions and discrepancies as to leave no question of animus and causation. Miller further alleges that she was laid off because of an evaluation which patently misrepresented both her attendance record and her teaching performance and that the school district used that deceptive evaluation as justification for failing to offer her another position within the district. As a remedy for Respondent's actions, Charging Party seeks an order requiring the DPS to reinstate her with full back pay, benefits and seniority. Charging Party further requests that the Commission award her attorney fees and costs on the basis that this is the district's second attempt to terminate Miller.[14]

Respondent asserts that Miller failed to establish a prima facie case of discrimination based upon her protected activities. The school district argues that the prior Commission decision involving Miller should not be given collateral estoppel effect. According to Respondent, the first element of estoppel, substantial identity of the parties, was not satisfied since the individual school board members who were found to have discriminated against Miller in the earlier case were not alleged to have been involved in the present dispute. Respondent further contends that there was no proof that any of the individuals who were responsible for the adverse employment actions had knowledge that Miller was a union activist. Even assuming that Miller could establish that DPS decision makers knew of her protected activities, Respondent alleges that there was insufficient evidence to prove that those activities were a motivating factor in the district's decision to lay her off, or in its subsequent failure to recall her to a teaching position. With respect to Miller's attempt to secure a position at Golightly, Respondent contends that the job offer was rescinded for the

[14] The Commission has refused to authorize an award of attorney fees and costs. See e.g. *Pontiac Sch Dist*, 28 MPER 34 (2014).

sole reason that the school was not allocated a second math teacher position. Respondent asserts that the reason Miller was not subsequently recalled was her performance evaluation score. In support of that contention, the school district cites the fact that there were other math teachers with higher evaluation scores than Miller who are similarly still without a job. Finally, the DPS alleges that any potential remedies in this matter are moot because the school district attempted to recall Charging Party in 2013, but could not do so because Miller failed to keep her contact information up-to-date.

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

Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. Analysis of whether an employer's action against employees violates Section 10(1)(c) of the Act is governed by the test first enunciated by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Line, Inc*, 251 NLRB 1083 (1980), enf'd 662 F2d 899 (CA 1, 1981) and approved by the United States Supreme Court in *NLRB v Transportation Management Corp*, 462 US 393 (1983). Under the *Wright Line* test, as adopted by the Commission in *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983), the charging party has the initial burden of establishing that union activity was a motivating factor in the adverse employment action by proving: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Huron Valley Sch*, *supra; Univ of Michigan*, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA*, *supra*. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419.

A charging party may meet the *Wright Line* burden with evidence short of direct proof of motivation. In other words, the employer's actual state of mind need not be established. See e.g. *Macomb County (Juvenile Justice Center)*, 28 MPER 4 (2014); *City of Royal Oak*, 22 MPER 67 (2009); *Stadium Mgmt Co*, 1977 MERC Lab Op 458; *St. Lawrence Hospital*, 1971 MERC Lab Op 1173. Inferences of animus and discriminatory motive may be drawn from competent circumstantial evidence, including, but not limited to, the timing of the adverse employment action in relation to the protected activity, indications that the respondent gave false or pretextual reasons for its actions, and the commitment of other unfair labor practices by the employer during the same period of time. *Keego Harbor*, 28 MPER 42 (2014); *Inkster Housing & Redevelopment Auth*, 23 MPER 21 (2010) (no exceptions). See also *Volair*

Contractors, Inc, 341 NLRB 673 (2004); *Tubular Corp of America*, 337 NLRB 99 (2001); *Shattuck Mining Corp v. NLRB*, 362 Fd 466, 470 (CA 9, 1966). If it is found that the employer's actions are pretextual, the employer fails by definition to show that it would have taken the same action in the absence of the protected conduct and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp*, 255 NLRB 722 (1981), enf'd 705 F.2d 799 (CA 6, 1982); *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *NLRB v IBEW, Local 429*, 514 F3d 646 (2007).

In the instant case, there can be no serious disagreement that Charging Party was engaged in protected activity of which DPS management was aware. Miller was an outspoken critic of Respondent's plan to close 38 schools and her role in the 2007 rally and demonstration protesting the planned school closures was the subject of Judge O'Connor's extensive decision in *Detroit Public Schools*, 22 MPER 89 (2009). In that decision, which was subsequently adopted by the Commission as its own after the Employer withdrew its exceptions, Miller and her husband, Stephen Conn, were described as "perennial" Union activists who had personally spoken at school board meetings, participated in picket lines and openly sought to garner support for litigation relating to certain policies of the Employer, including filing suit to seek injunctive relief to block the school closings. The Commission recognized the couple's notoriety, concluding that the entire DPS hierarchy, as well as the media and the general public, were well aware of the leadership role played by Miller and her husband on workplace issues in the past and of their participation in the 2007 rally and demonstration. In fact, the Commission noted that Conn and Miller's decades of involvement in protected activities was not disputed during the course of that proceeding. The prior case was brought by Miller against the DPS and both parties are bound by these findings pursuant to the doctrine of collateral estoppel.[15] See e.g. *Police Officers Labor Council*, 25 MPER 578 (2012); *City of Pontiac*, 23 MPER 7 (2010) (no exceptions); *Senior Accountants v Detroit*, 399 Mich 449, 459 (1976). In fact, the application of the principle of collateral estoppel here is unremarkable, as evidenced by the prior federal district court decision referenced above.

Even if I were to give no weight to the Commission's findings in the prior matter, I would nevertheless conclude, based solely upon the record in the instant case, that Charging Party established the first two elements of a prima facie case of discrimination under Section 10(1)(c) of PERA. The evidence demonstrates that Charging Party continued her protected activities after she returned to work following the issuance of the injunction by U.S. District Court Judge Murphy. Charging Party and her husband campaigned for Union delegate positions in 2008-2009 and both were elected as delegates the following school year. Miller also twice ran for office in the DFT following her return to work. In 2008-2009, Miller organized teachers to vote against a tentative contract that had been negotiated between Respondent and the Union and she participated in a successful effort to recall the DFT president. In 2010, Miller was the lead plaintiff in a lawsuit concerning the school district's

[15] The doctrine of collateral estoppel bars relitigation of an issue in a new action arising between the same parties when the earlier proceeding results in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. *Leahy v Orion Twp*, 269 Mich App 527, 530 (2006); *People v Gates*, 434 Mich 146 (1990). The doctrine is intended to relieve parties of multiple litigation, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. See *Detroit v Quails*, 434 Mich 340 (1990).

"Termination Incentive Plan." At hearing, Charging Party introduced copies of numerous flyers, handouts and emails which Miller drafted and/or disseminated for the purpose of publicizing her organizational and other protected activities. Many of these documents identify Miller by name and include her phone number and other contact information.

As in the prior case involving Charging Party, the record in this matter overwhelmingly establishes that Miller was widely known throughout the school district as a Union activist. Miller testified credibly that she had never met a management official who did not know of her identity, an assertion which was certainly borne out by the administration witnesses who testified on behalf of the school district. Cassandra Washington, the school district's Executive Director for Human Resources Information, testified that not only did she know that Charging Party was married to Steve Conn, but also that Miller herself was an activist with respect to Union matters. When Sherrell Hobbs, the principal of Golightly Educational Center, met Miller, she immediately recognized her as Conn's wife and praised the couple for being "fighters." She also admitted on cross-examination that she knew Conn was active in the Union and that he had previously run for DFT president. The record further indicates that Miller's protected activities sometimes became the subject of discussion during staff meetings at Marquette Elementary-Middle School which were presided over by the school's principal, Dwana Brown. For all of the above reasons, I conclude that Charging Party readily established that she engaged in protected activity of which Respondent was aware.

I also find the evidence sufficient to establish that Charging Party was never recalled by the DPS because of her Union activities. In so holding, I rely, in part, on the finding of anti-union animus by the Commission in the prior case involving Conn and Miller. As noted, that matter involved the same type of union activity by Miller as in the instant case. The Commission determined that the DPS harbored hostility toward Miller and her husband's protected activity and concluded that such animus was a motivating cause of the school district's pursuit of disciplinary charges against them. The Commission found direct evidence of animus based upon threatening remarks made by the school board president, Jimmy Womack, including a statement he made to Miller following a joint appearance on a televised debate. As described in the ALJ's decision, Womack pointed at Miller and yelled, "You're going down . . . I used to work with you and Steve [Conn], but no more." The Commission also cited unrefuted testimony that Womack told other school board members that he intended to get rid of both Conn and Miller and "starve them out" by placing them on administrative leave and then dragging the matter through the court system. In a discrimination case, the commission of other unfair labor practices by an employer may be relied upon as evidence of the employer's anti-union motive. *Detroit Public Schools*, 25 MPER 84 (2012). See also *NLRB v Hale Container Line*, 943 F2d 394, 398-399 (CA 4, 1991); *Electrical Workers, Local 98 (TRI-M Group, LLC)*, 350 NLRB No 83 (2007); *Five Star Mfg*, 348 NLRB 1301 (2006).

Respondent argues that it would be improper for me to give any weight to the Commission's findings in the prior case because the specific individuals who were responsible for discriminating against Miller and her husband in the prior matter were "not involved" in the events giving rise to the instant charge. Although counsel for the school district attempted to elicit testimony at hearing establishing that Womack and Satchel were no longer employed by the DPS at the time Miller was laid off, there is nothing in the record to

support that contention, nor is there evidence which would suggest that there was a substantial change in the administration of the school district following the events of 2007 and 2008. It should also be noted that the Commission's determination that the school district intentionally retaliated against Conn and Miller was not based solely on the threatening statements attributed to Womack. The Commission also found proof that the discipline of Conn and Miller was unlawfully motivated in the "institutional indifference" demonstrated by Calloway. In addition, the Commission drew an inference of animus and discriminatory motive from circumstantial evidence adduced at the hearing, including the pretextual nature of the reasons offered by the school district in support of its treatment of the two teachers.

The treatment of Conn and Miller, as described by both the Commission and Judge Murphy, was particularly egregious. The school board president openly expressed his intent to drive Conn and Miller from their teaching jobs and "starve them out." Even before the start of the demonstration protesting the school closures, the DPS police chief contacted the principal of Northern High School to apprise him of Conn and Miller's identities. Once the rally began, the police video technicians paid special attention to Conn and Miller and, at the first sign of trouble, the highest-ranking officer on the scene instructed his subordinates to find Conn and "lock him up." Although Miller was standing on the public sidewalk where the police had indicated picketing would be tolerated and was not exhibiting any leadership role in the demonstration, the police pried her away from her daughter and, with considerable force, handcuffed her and shoved her out into traffic. When Miller expressed concern for the fate of her daughter, the officer suggested arresting the child as well.

The two teachers were subsequently placed on unpaid administrative leave under circumstances that Judge O'Connor described as "unprecedented." When asked to intervene on the couple's behalf, the superintendent remained callously indifferent to their plight. In finding overwhelming evidence of unlawful retaliation, the ALJ characterized the charges of misconduct levied against Conn and Miller as "specious and fragrantly pretextual" and he described the conduct of the school district's superintendent as "troubling and unacceptable." In fact, O'Connor found the record so "extraordinary" that he not only issued a standard make whole remedy and notice posting, he took the unusual step of recommending that the Commission grant injunctive relief immediately restoring the charging parties to active employment pending the final outcome of the litigation.[16] Mere days after the issuance of the Decision and Recommended Order, the school board voted to terminate Conn and Miller for their role in the demonstration, and it was not until the federal court issued an injunction that Conn and Miller were finally returned to work. For these reasons, I conclude that the finding of institution-wide misconduct by Respondent against Miller in the prior case retains significant probative value in judging the school district's motivation here.

In any event, I find that Charging Party presented sufficient proof at hearing to establish, independently of any prior findings of animus, that the DPS engaged in a purposeful effort to rid itself of one of its most outspoken critics. While there was no open articulation of anti-union hostility toward employees' protected activities as in the prior case, the

[16] While the Commission did not ultimately exercise its authority to issue injunctive relief, the federal district court, in ruling on Conn and Miller's First Amendment claim, did issue a preliminary injunction and order the teachers immediately reinstated.

circumstantial evidence, including Respondent's weak defense and its witnesses' lack of credibility, coupled with Miller's standing as a prominent Union activist, overwhelmingly justifies an inference that Respondent's motivation in the instant case was unlawful. Respondent's witnesses consistently contradicted not only Charging Party, whose testimony I found extremely reliable, but often the available documentary evidence and, in one case, statements made in a prior sworn affidavit.

The inconsistencies in Respondent's theory of the case suggest that, from the very outset, the school district had no intention of ever giving Charging Party a meaningful opportunity for recall. Cassandra Washington testified that after the 2012 layoffs went into effect, each teacher within the district was allowed to pick three schools at which to interview for purposes of recall. However, Miller was only offered the chance to interview at two schools and she was given no input in the selection process. Her testimony was corroborated by an email message from Respondent's human resources department to Miller dated May 21, 2012. In that message, the DPS representative instructed Miller to appear at a job fair the following day for interviews with two high schools. It is undisputed that Charging Party was not qualified to teach high school courses and when Miller pointed out that fact in a subsequent email to the human resources department, she received no response. It was not until several months later that Miller was finally able to interview for a middle school teaching position, and that opportunity arose not because of any assistance from the school district, but rather because Miller herself reached out to the principal of Golightly Educational Center, Sherrell Hobbs, to inquire about a possible job opening. Although Miller was offered a teaching position at that interview, the circumstances surrounding the rescission of that job offer were decidedly suspicious.

The record indicates that Hobbs was initially impressed with Charging Party's qualifications and eager to bring Miller onto the staff at Golightly. After expressing interest in hiring Charging Party in 2011, Hobbs quickly set up an interview when Miller contacted her again the following year. The interview went well enough that Hobbs felt comfortable offering Miller a position teaching math for the 2012-2013 school year. In fact, Hobbs not only showed Miller a spreadsheet listing her name as a staff member, she also instructed the assistant principal, Alan Cosma, to take her on a tour of the building and show her the classroom in which she would be teaching in the fall. In addition, Hobbs told Miller that she wanted her to attend a back-to-school parade as a Golightly representative. Almost immediately thereafter, however, the situation changed drastically. Within hours after the interview had concluded, Hobbs sent an email to human resources marked "URGENT" in which she indicated that Miller no longer had a job offer. However, Hobbs did not bother to notify Miller of this new information. Rather, it was not until several days later, when Miller called Hobbs to discuss preparations for the upcoming school year, that Hobbs conveyed the bad news to Charging Party. Miller testified credibly that Hobbs' demeanor had completely changed and that the principal was suddenly cold and unfriendly.

Respondent asserts that the job offer was rescinded not because an administration official told Hobbs that she could not hire Miller, but rather because there were an insufficient number of positions available at Golightly Educational Center for the 2012-2013 school year. However, the record establishes that this contention was mere pretext. Respondent's sole

witness with respect to the math position at Golightly was Hobbs. As previously noted, Hobbs was an extraordinarly unreliable witness who seemed intent on framing the facts in the best light possible for the DPS. For example, although Hobbs initially claimed that she could not recall the exact date of her interview with Charging Party, she was certain that it had taken place sometime before August 11, 2012, and regardless, well before the August 17th date cited by Miller. In addition, Hobbs claimed that she could not recall when she learned from Wilma Taylor-Costen that there were not enough FTEs available, but that she knew it was not the same day as the Miller interview. However, when confronted on cross-examination with copies of various email messages from that time period, Hobbs was forced to concede that her meeting with Miller actually took place later in August and that she received the call from Taylor-Costen the same day she met with Miller. Based upon her testimony and demeanor on the stand, I conclude that Hobbs was deliberately attempting to obfuscate the fact that Miller was eliminated as a candidate for the job within hours after the position was offered to her.

Hobbs' testimony regarding the nature of the offer to Charging Party was similarly unconvincing. Hobbs asserted that the offer to Miller was conditional. Hobbs testified she had no authority to formally hire anyone for a position on her staff and that only human resources could make such an offer after fully vetting the candidate. Hobbs claimed that, at most, she would have told Miller that she would "work to see how to make [the job] happen." Such testimony directly contradicts Miller's testimony, as well as the conduct of Hobbs and Cosma during and after the interview. Miller testified credibly that Hobbs explicitly stated, "You're going to be teaching at Golightly" and that she then lightheartedly warned her not to take another position before the start of the school year. As noted, Hobbs showed Charging Party a spreadsheet during the interview which listed Miller's name as a math teacher. The fact that the document was computer generated strongly suggests that Hobbs intended to add Miller to her staff even before the interview had commenced and that she did not anticipate any roadblocks in the hiring process. Hobbs also advised Miller that she wanted her to attend the back-to-school function for Golightly and, before concluding the meeting, she arranged for the assistant principal to take Miller on a tour of the building, including a visit to the classroom to which she would be assigned. During the tour, the assistant principal encouraged Miller to organize a math club for Golightly students. These actions suggest that, at the very least, both Hobbs and Cosma believed that the submission of Miller's name to the human resources department was a mere formality. Hobbs' claim that the offer was conditional is also strongly belied by the fact that, just hours after extending the offer, she sent an urgent email to human resources requesting that Miller be removed from the "teacher selection list." Based upon the record, there can be no serious dispute that Miller had a teaching job when she left the interview.

I also find Hobbs' testimony concerning her awareness of Miller and Conn's union activities preposterous and further indication that the principal was merely attempting to provide cover for Respondent's unlawfully motivated efforts to keep Charging Party from teaching in the school district. On direct-examination, Hobbs alleged that she did not know that Charging Party was married to Conn or that she was a Union activist. In fact, Hobbs attempted to portray herself as someone with so little interest in union activities that she could not possibly have been aware of Miller and Conn's Union background. Hobbs testified, "I'm not a union person; that's just not me right? So I don't even keep up with things like that.

That's just not me." As noted, however, Miller and Conn were notorious Union activists and were recognized as such by the administration, the media and the general public. Moreover, Charging Party testified credibly that Hobbs recognized her at the very start of the interview and that she praised Miller and her husband for being "fighters." When asked about the issue on cross-examination, Hobbs finally admitted that she had in fact heard of Conn and that she knew he was a Union activist. In fact, Hobbs even conceded that she was aware that Conn had previously run for president of the DFT.

Respondent would have this tribunal believe that the Golightly offer to Charging Party was rescinded because at some point after the interview, Hobbs abruptly discovered, with the assistance of Taylor-Costen, that she had overestimated the number of available teaching positions at Golightly for the 2012-2013 school year. Hobbs testified that she then sent the email marked "URGENT" to human resources because she wanted to protect Miller and give her the opportunity to look for another job. Yet, despite that supposed concern for Charging Party's future well-being, it is undisputed that Hobbs never even bothered to call Miller to notify her that the position was no longer available. In fact, Miller only discovered that the offer had been rescinded when she phoned Hobbs the following week to discuss preparations for the upcoming school year. Moreover, the record establishes that less than two weeks after Hobbs urgently instructed human resources to remove Miller's name from the teacher selection list because there were no openings for a math teacher, the principal suddenly scheduled an interview with another math teacher, Carolyn Perry, for the very same position. Miller was never notified that the position had once again become available. Instead, Hobbs immediately extended a job offer to Perry and assigned her to Room M305, the same classroom Cosma had shown Miller a few weeks earlier.

Respondent contends that Perry was hired because after the offer to Charging Party had been rescinded, Hobbs learned that another math teacher, Brandon Graham, abruptly took a teaching position out-of-state. Even if that were true, I find Hobbs claim that she simply forgot about Miller in the rush to prepare for the start of school wholly unpersuasive. After all, Hobbs had previously expressed an interest in hiring Charging Party in 2011 and was apparently so impressed with Miller during her interview the following year that she offered her a job on the spot. It is simply implausible that, in the absence of animus, Charging Party would not have been the very first person called when Hobbs learned of Graham's departure. I conclude that the only plausible explanation is that Hobbs initially intended to hire Charging Party but was forced to reverse that decision after management got wind of the fact that a job offer had been proffered to such a well-known union activist. The supposed lack of available FTEs was merely an excuse utilized by Respondent to avoid putting one of the most notorious and outspoken critics of management back on the payroll. In so holding, I draw a negative inference regarding Respondent's motives from the fact that the school district failed to call Taylor-Costen and Alan Cosma as witnesses to corroborate Hobbs' testimony in this matter.

After losing out on the position at Golightly, Charging Party was never called back to work by Respondent or even interviewed for another position elsewhere within the school district, despite the fact that she was certified to teach in a critical shortage area. Although Miller had heard rumors that Respondent was deciding which teachers to recall based upon performance evaluation scores, she did not learn of her own evaluation score until just prior to

the start of the 2012-2013 school year, and the DPS did not provide her with a detailed breakdown of her evaluation score until January 11, 2013. It was only then that Miller discovered that she had been charged with 31 unexcused absences and had received zero points for the attendance component of the evaluation. Miller was not provided a copy of the Brown classroom observation report until the day of hearing in this matter. Based upon the totality of the evidence, including the shifting and contradictory testimony of Respondent's witnesses, I conclude that the evaluation itself, and the data upon which it was based, contained substantial errors and misrepresentations and that such evidence unquestionably supports an inference of discriminatory motive in Respondent's failure or refusal to recall Miller to a teaching position following the 2012 layoffs.

With respect to the attendance score, there is no dispute that Charging Party missed a substantial amount of work during the 2011-2012 school year due to a legitimate medical issue which required her to undergo multiple surgeries and numerous hospitalizations. However, Charging Party testified credibly that not a single absence that year was unapproved by the Employer and that she consistently followed the required protocol for reporting absences by entering her leave information in Sub-Finder and routinely communicating with the staff at Marquette Elementary-Middle School. Charging Party presented documentary evidence to support her claim, including email communications between herself and Patricia Parks, the secretary at Marquette.

In an attempt to minimize the significance of Charging Party's testimony, Respondent contends that for purposes of calculating the performance evaluation score, the nature of any particular absence was irrelevant. According to the DPS, all sick days, whether approved or not, counted against a teacher on the attendance component of the evaluation and, therefore, Miller was properly charged with 31 absences for the 2011-2012 school year. In support of this contention, Respondent relies on the testimony of its assistant director of labor relations, Joline Davis, who asserted that for purposes of computing the attendance score, the only type of absence not charged against teachers was approved FMLA leave. However, that assertion was contradicted by documentary evidence proving that the school district itself drew a distinction between approved and unapproved absences. On her performance review, Miller is listed as having missed 31 days of work in 2011-2012, with all of those absences specifically identified by Respondent as "unexcused." In addition, a DPS-produced document submitted into evidence by Respondent entitled "Teacher Tenure Act Retention Scoring" explicitly states that "approved medical leave" was not to be included when calculating the attendance component of the performance evaluation.

That same document also indicates that FMLA leave was not to have been counted against teachers. There is no dispute that Miller requested eight days of FMLA leave due to having been hospitalized in May of 2012 and that the school district approved her request. Charging Party also testified that earlier that same year, she submitted paperwork seeking approval for FMLA leave to cover 10 days of absences in February. Miller described what she did to obtain the necessary paperwork for the February FMLA leave and she explained in detail the steps she took to submit that documentation to the school district for approval. Miller testified credibly and without equivocation that, pursuant to instructions provided to her by Marquette principal Dwana Brown, she presented the completed FMLA request form

for the February absences to a district representative at Respondent's offices in the New Center Building. However, the school district's own internal audit report does not reflect that any of Miller's 31 absences were covered by FMLA leave. At hearing, Davis conceded that the internal audit report was inaccurate, but she asserted that the document was erroneous only to the extent that it failed to reflect the eight days of FMLA leave from late May and early June and that the error did not ultimately contribute to Charging Party having received zero points on the attendance portion of the performance evaluation. I find Davis' attempt to downplay the error as some innocent discrepancy dubious. Regardless of any actual effect on Charging Party's attendance score, the existence of this significant mistake gives credence to a conclusion that Respondent manipulated its personnel records in order to rid itself of an outspoken union activist.

The record establishes that Charging Party's performance evaluation was critically flawed in more ways than just the attendance score. The performance component of the evaluation process adopted by the DPS included a mandatory classroom observation. According to documents provided by the school district, Charging Party was observed in her classroom by Brown on June 11, 2012. However, Miller testified credibly that Brown never once came into her classroom during that entire school year. Moreover, the record establishes that Miller was actually off work on FMLA leave on June 11, 2012, the date that Brown supposedly conducted the classroom observation. The Employer's own payroll report lists Miller as having been absent from May 28, 2012, through June 11, 2012. Unlike the Ross observation, which contains numerous specific details about Miller's classroom performance, the Brown report is essentially devoid of any meaningful comments or criticisms; for all intents and purposes, the report could fairly be described as perfunctory.

Brown was not called to testify as a witness in this matter. Based upon the arguments set forth in the two motions for summary disposition and Charging Party's responses thereto, it was patently obvious in the lead-up to the hearing that Miller's performance evaluation score would be a critical issue. Therefore, Respondent knew or should have known that Brown would be an important witness and, for that reason, I draw a negative inference from the school district's failure to ensure that her testimony would be a part of the record in this matter. For all of the above reasons, I conclude that the classroom observation purportedly conducted by Brown never occurred and that the report on which it was based was a total fabrication. The fact that Miller's performance rating was based on a falsified report is yet further reason for concluding that the school district acted with a discriminatory motive in its treatment of Charging Party.

Even if I were to accept the proposition that the Brown observation was legitimate, there is nothing in the record which would explain how that observation translated into a 1.9 performance rating score. Brown assessed Charging Party as "effective" on all of the core elements. In fact, the only negative part of the observation was a comment about Miller's supposedly spotty attendance, an aspect of Miller's job performance which, of course, was already accounted for elsewhere in the evaluation rubric. Although Respondent called both its assistant director of labor relations and its executive director of human resources to testify regarding the evaluation process, neither witness was able to shed any light on how the classroom observation report was converted into a numerical ranking or why such a

seemingly positive assessment of Miller's performance only garnered her a 1.9 score. Such clarification was essential given that Miller was one of only two teachers employed at Marquette Elementary-Middle School who was rated "effective" yet received a performance rating lower than 2.0. In contrast, 33 teachers who received an "effective" rating had scores ranging from 2.0 to 2.5.

Charging Party's 1.9 performance rating score becomes even more untrustworthy when the observation reports conducted around the same time period by Nancy Ross, a retired DPS principal, and Michael Barclay, a DPS assistant principal, are taken into consideration. In her evaluation of Charging Party, which was completed in May of 2012, Ross evaluated Miller's classroom performance as "highly effective" with respect to two categories and "effective" on all of the other components. In the comment sections of the evaluation, Ross was equally laudatory, describing Miller's classroom as "warm and caring" and noting that her students were "actively engaged in the lesson, even those who tried not to be were drawn into active participation." The classroom observation by Barclay, which was conducted in late April of 2012, was similarly positive. Yet, there is no indication that either observation report was taken into consideration in calculating Miller's performance rating. Rather, the DPS-produced spreadsheet listing the performance evaluation scores for Marquette teachers refers solely to the observation of Charging Party purportedly conducted by Brown on June 11, 2012. In contrast to the obviously fabricated Brown observation, there is no evidence in the record to suggest that the Ross and Barclay reports were anything other than legitimate and reliable.

There is little doubt that the performance rating score which Charging Party received had a meaningful impact on her opportunity for recall to another teaching position within the district. As noted, Miller's performance rating was 1.9, which resulted in her receiving 40 points on the performance component of the evaluation. The record establishes that a classroom observation score of 2.0 or higher would result in a teacher receiving 50 points on the performance component of the evaluation. Thus, Miller's composite score would have jumped from 64 percent to 74 percent had she been rated only slightly higher on the classroom observation portion of the evaluation. This is significant given Washington's testimony that, as of late 2012 or early 2013, only candidates with composite evaluation scores of 70 percent or higher were eligible for recall. In fact, of the 12 math teachers who remained on layoff as of June 18, 2013, all but two of the teachers on the list had cumulative performance evaluation scores under 74 percent. In other words, only two math teachers with scores of 74 percent and higher had not been recalled by June 18, 2013, in a district of more than 3,000 teachers at the time. For the reasons set forth above, I find it more likely than not that Respondent manipulated Miller's performance evaluation score in order to prevent her recall because of her union activities.

In an apparent attempt to downplay the significance of evidence calling into question the accuracy of Charging Party's 2011-2012 performance evaluation, Respondent relies on the testimony of Cassandra Washington, its executive director of human resources. Washington asserted that teacher evaluation scores played absolutely no role in the school district's decision to lay off teachers in 2012 and that, at least initially, the evaluations were not even a consideration for the district when deciding which teachers to recall. According to

Washington, all recall decisions prior to December of 2012 or January of 2013 were made solely by the various school principals, none of whom had any access to the candidates' performance evaluation scores.[17] However, Washington's testimony at hearing was in direct conflict with sworn statements she made earlier in an affidavit attached to the school district's second motion for summary disposition. In that motion, Respondent asserted that Miller was not recalled for the 2012-2013 school year solely because of her performance evaluation score. In support of that contention, Respondent submitted a written affidavit in which Washington swore, under the penalty of perjury, that after determining that layoffs were necessary for the 2012-2013 school year, the DPS "retained the District's higher rated teachers in accordance with the assigned applicable subject area and certification." Additionally, Washington maintained in her affidavit that, "In 2012, teachers were recalled to the District on the basis of his/her evaluation score." I consider these remarks to constitute prior inconsistent statements which serve to further underscore the unreliability of the school district's witnesses.

The record also supports an inference that Respondent took additional steps to prevent Miller's recall in the summer of 2013. In March of that year, the school district entered into a settlement agreement with the DFT which gave teachers like Miller the opportunity to expunge their performance evaluation scores and exercise their right to "priority recall" into an available position. Miller submitted the expungement form, along with a request for priority recall on April 18, 2013. On the expungement form, Miller listed her cell phone number, the same number she had used during the past seven years of employment with the district. In fact, Miller testified that when she gave up her landline sometime around 2005, she notified human resources of her new contact information and that, thereafter, Respondent consistently used her cell number to reach her in the event of weather or other emergencies. Charging Party also submitted documentation, including leaflets and email correspondence, demonstrating that she repeatedly and consistently gave out her cell phone number for both school business and union-related matters.

By letter dated August 23, 2010, the school district notified Miller that it had received her request and that she would be contacted if a vacant position became available. However, Miller was never recalled. Rather, she was supposedly sent a letter from the school district on or about September 25, 2013, indicating that the DPS had been unable to contact her via her phone number on record and, for that reason, her name was being removed from the priority recall list. At hearing, Respondent introduced into evidence a document which it claims demonstrates that a representative of the school attempted to contact Miller at 6:45 p.m. on August 21, 2013, and that her number had been disconnected. The phone number listed on the document, however, was not Miller's cell number. Notably, Respondent did not produce any documentation from its PeopleSoft system or any other written record which would contradict Miller's claim that she officially changed her contact number to her cell phone around 2005. Furthermore, the individual who allegedly attempted to contact Miller on August 21st was not

[17] If Washington's testimony is to believed, then the DPS was seemingly operating in violation of Section 1248 of the School Code, MCL 380.1248, which explicitly requires that school districts use its performance evaluation system as the basis for all policy decisions relating to a staffing or program reduction or recall therefrom.

identified by name at hearing or called by Respondent to testify in this matter, and I draw a negative inference from the district's failure or refusal to secure the testimony of this seemingly critical witness. I find it implausible that the school district would decide to essentially disavow itself from any obligation to a longtime employee such as Miller on the basis of a single attempt to contact that individual by phone, particularly where, as here, the record demonstrates that the district routinely corresponded with Miller by other means such as email or letters. For example, Respondent notified Miller by email of the job fair she was scheduled to attend in May of 2012 and the district provided Miller with her performance evaluation score by letter dated October 19, 2012.

Based upon the record as a whole, I find substantial evidence to conclude that representatives of the school district took steps to ensure that Heather Miller would not be recalled to a teaching position following her 2012 layoff, including rescinding the job offer extended to her by the principal of Golightly Educational Center, as a direct result of her having engaged in protected concerted activities. The record overwhelmingly establishes that Charging Party was an outspoken critic of the DPS and that management at every level was well aware of her background as an activist on behalf of her fellow employees. In fact, Respondent was found by the Commission in a prior case to have unlawfully terminated Miller and her husband in retaliation for their opposition to a school closure plan. Respondent offered little in the way of credible evidence to establish the existence of any legitimate and substantial business justification for its failure or refusal to recall Miller to a teaching position. To the contrary, the classroom observations conducted by Ross and Barclay in 2012 show her to be, at the very least, a satisfactory teacher. The testimony of the school district's witnesses was shifting and contradictory, while the documentary evidence submitted into the record demonstrated that Respondent's stated explanation for its failure to recall Miller was pretextual. Accordingly, I conclude that Respondent's conduct violated Section 10(1)(c) of PERA. For the same reasons, I find that the actions taken by the school district against a high profile Union activist would objectively tend to restrain, interfere or coerce a reasonable employee in the exercise of his or her rights under the Act, in violation of Section 10(a)(1).

The DPS contends that because Miller was given the opportunity to exercise her right to expungement and priority recall, any unfair labor practice which may have occurred in this matter was rendered moot and, therefore, the charge must be dismissed. "Mootness precludes the adjudication of a claim where the actual controversy no longer exists, such as where 'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome,'" *Michigan Chiropractic Council v Comm'r of Ins*, 475 Mich 363, 371 n 15 (2006) (opinion of Young, J.), quoting *Los Angeles Co v Davis*, 440 US 625, 631 (1979) (internal citations omitted), or where a subsequent event renders it impossible to fashion a remedy. *In re Contempt of Dudzinski*, 257 Mich App 96, 112 (2003); *Waterford Sch Dist*, 23 MPER 91 (2010) (no exceptions). Although the school district acknowledged receipt of Charging Party's request for expungement, there is nothing in the record to prove that her performance evaluation was, in fact, purged from DPS records. In any event, the expungement of Miller's score in 2013 could not have meaningfully remedied or negated the unlawful conduct which had already occurred, while the supposed opportunity for priority recall offered to Charging Party in 2013 was, in actuality, nothing more than a false promise.

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

Respondent Detroit Public Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from:

    a. Interfering with, restraining, or coercing employees, including but not limited to Heather Miller, in the exercise of rights guaranteed in Section 9 of the Act, including the right to pursue grievances, hold or seek union office, participate in other lawful protests or demonstrations regarding DPS employment issues, or seek remedies from the Commission.

    b. Discriminating or retaliating against employees, including but not limited to Heather Miller, regarding terms or other conditions of employment in order to encourage or discourage membership or the holding of office in a labor organization.

    c. Subjecting Heather Miller to discriminatory adverse employment actions, including issuing unwarranted adverse performance evaluations or failing to recall her from layoff.

2. Take the following affirmative action to effectuate the purposes of the Act:

    a. To the extent that it has not yet done so, expunge Heather Miller's 2011-2012 performance evaluation and purge from her personnel file any report relating to the classroom observation purportedly conducted by Dwana Brown on June 11, 2012.

    b. Immediately restore Heather Miller to active employment with placement in the school and classroom appropriate to her certification and qualifications and consistent with the collective bargaining agreement between the DPS and the DFT.

c. Make Heather Miller whole for any loss of pay or other financial or fringe benefits that she may have suffered, including seniority or pension or leave credits which she would have, but did not, accrue from the beginning of the 2012-2013 school year through the present, with interest at the statutory rate.

d. Place and maintain a copy of the Decision and Order in this matter in Heather Miller's personnel file.

e. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted; post it prominently on any website maintained by the DPS for employee access for a period of thirty (30) consecutive days; and read the attached notice in full at a regularly scheduled school board meeting.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 21, 2015

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the DETROIT PUBLIC SCHOOLS, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL cease and desist from:

1. Interfering with, restraining, or coercing employees, including but not limited to Heather Miller, in the exercise of rights guaranteed in Section 9 of the Act, including the right to pursue grievances, hold or seek union office, participate in other lawful protests or demonstrations regarding DPS employment issues, or seek remedies from the Commission.

2. Discriminating or retaliating against employees, including but not limited to Heather Miller, regarding terms or other conditions of employment in order to encourage or discourage membership or the holding of office in a labor organization.

3. Subjecting Heather Miller to discriminatory adverse employment actions, including issuing unwarranted adverse performance evaluations or failing to recall her from layoff.

WE WILL take the following affirmative action to effectuate the purposes of the Act:

1. To the extent that we have not yet done so, expunge Heather Miller's 2011-2012 performance evaluation and purge from her personnel file any report relating to the classroom observation purportedly conducted by Dwana Brown on June 11, 2012.

2. Immediately restore Heather Miller to active employment with placement in the school and classroom appropriate to her certification and qualifications and consistent with the collective bargaining agreement between the DPS and the DFT.

3. Make Heather Miller whole for any loss of pay or other financial or fringe benefits that she may have suffered, including seniority or pension or leave credits which she would have, but did not, accrue from the beginning of the 2012-2013 school year through the present, including interest at the statutory rate.

4. Place and maintain a copy of the Decision and Order in this matter in Heather Miller's personnel file.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

DETROIT PUBLIC SCHOOLS

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.