

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

WESTERN MICHIGAN UNIVERSITY,
Public Employer-Respondent

MERC Case No. 20-J-1601-CE

-and-

LISA C. MINNICK,
An Individual Charging Party.

APPEARANCES:

Dykema Gossett, by James P. Greene, Elisa J. Lintemuth and Jason Harrison, for Respondent

Lisa C. Minnick, appearing on her own behalf

DECISION AND ORDER

On July 1, 2021, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order¹ in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

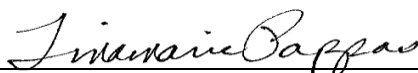
The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

ORDER

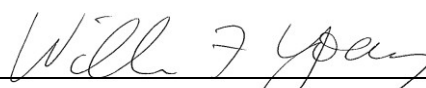
Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Tinamarie Pappas, Commission Chair

Issued: October 6, 2021



William F. Young, Commission Member

¹ MOAHR Hearing Docket No. 20-021707

**STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

WESTERN MICHIGAN UNIVERSITY,
Public Employer-Respondent

-and-

Case No. 20-J-1601-CE
Docket No. 20-021707-MERC

LISA C. MINNICK,
An Individual Charging Party.

Appearances:

Dykema Gossett, James P. Greene and Elisa J. Lintemuth and Jason Harrison, for
the Public Employer

Lisa C. Minnick, appearing on her own behalf

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON
MOTION FOR SUMMARY DISPOSITION**

On October 15, 2020, Lisa C. Minnick (Charging Party) filed the above captioned unfair labor practice charge with the Michigan Employment Relations Commission (Commission) against Western Michigan University (Employer or University). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission (Commission).

Unfair Labor Practice Charge and Procedural History:

Charging Party claims that the University's decision to deny her a promotion in academic rank violated PERA. Initially this matter was set to be heard on December 8, 2020.

On November 18, 2020, the Respondent filed a Motion for Summary Disposition seeking dismissal of the charge on the grounds that Charging Party had failed to state a claim under the Act for which relief could be granted.¹ The December 8, 2020, hearing was adjourned pending a

¹ Respondent's motion included a request that I hold oral argument. However, as the moving party, Respondent is not entitled to oral argument as a matter of course. Additionally, Charging Party did not request the same. As such, I declined to order oral argument.

decision on the motion. Following an extension request, Charging Party timely filed her response on January 8, 2021.²

Factual Background:

The following factual background is derived from the parties' pleadings. Factual assertions made by Charging Party are assumed true for purposes of addressing Respondent's motion.

Charging Party has been employed by the University since at least 2007. She earned tenure and was promoted to Associate Professor in 2009. Charging Party is a member of the bargaining unit represented by the Western Michigan University of the American Association of University Professors (Union). Charging Party has held several Union positions during her time with the University, beginning as a Steward in 2007. From 2013-2018, Charging Party served as the Union's president.

Regarding her time as president, Charging Party stated, in her initial charge, the following:

During my multiple terms in office, I was an active, vocal, and effective union president. I took seriously my elected position as defender of our collective-bargaining agreement and my fiduciary responsibilities on behalf of WMU's Board-appointed faculty, i.e., the WMU-AAUP bargaining unit. That often meant challenging the administration and occasionally the Board of Trustees when it appeared that faculty rights established in our legally binding contract were being infringed upon, a fairly frequent occurrence. It also meant organizing and leading lawful concerted actions to support our bargaining teams during the 2014 and 2017 negotiation cycles. I was very good at my job.

The response of the university and its administrative agents to my lawful concerted activities on behalf of my bargaining unit and in defense of our contract included actions throughout my presidency and beyond that I allege were coercive, discriminatory, and retaliatory. I can provide documentation for many of these occurrences, more than a few of which were perpetrated in public settings, including meetings of the WMU Board of Trustees. I allege that these coercive actions were attempts to intimidate me into complicity, retaliate against me for trying to hold accountable the university and its administrative agents, humiliate and shame me into silence, discourage others from speaking up themselves or defending me, ostracize me professionally, cause me reputational harm, and isolate me from the campus community.

This pattern of institutional coercion, retaliation, and abuse, which began early in my first presidential term and continued throughout my nearly six years in office, provides important context for the promotion denial and my ULP charge.

² Charging Party's response numbered more than 1,000 pages and included a brief and 49 different exhibits.

Charging Party's tenure as president ended on December 31, 2018, because of term limits.

On October 15, 2019, Charging Party submitted her application for consideration of her promotion on the rank of full professor. The process and standards applicable to that promotion are set out in Article 18 of the collective bargaining agreement between the University and Union.

Article 18, entitled "Promotion Policy and Procedure", states in the relevant part the following:

18.§3 JUDGMENTAL CRITERIA. No later than October 15 of the academic year of the review, all faculty who are eligible for promotion on the basis of qualifying criteria and who wish to be evaluated for promotion by the department shall submit their promotion files to their department chair. . . . Areas to be evaluated include professional competence, professional recognition, and professional service for traditionally ranked faculty The department's policy statement shall clearly state the criteria and standards that department faculty must meet. The same standards may not be appropriate for different disciplines. Criteria specified in this section and in approved Department Policy Statements¹ shall be used in making promotion recommendations:

18.§3.1 Professional Competence. Competence in teaching is a necessity for promotion for teaching faculty. . . .

18.§3.2 Professional Recognition. Professional recognition comes in many forms and may vary with the faculty members' disciplines, but is a necessity for promotion. In all fields, research, publication, and/or evidence of creative work are considered valuable. Consequently, the publication of scholarly books, monographs, and articles constitute the most usual output that should be recognized. Refereed scholarly material in electronic form shall be considered as evidence of professional recognition. In the areas of literature and the fine and performing arts, creative artistic production is also a primary vehicle for achieving professional recognition. In many fields, working with schools, providing consultation for external agencies, serving as a research consultant for colleagues and advanced graduate students, and preparing scholarly projects are appropriate bases for recognition. In addition, holding office in national, regional, and state professional associations and contributing papers or services to such organizations constitute professional recognition. The preparation of professionally sound proposals and/or acquisition of externally funded grants constitute a form of recognition.

18.§3.3 Professional Service. The knowledge and skills of the faculty constitute a resource to the community, region, state, and nation in the name of the University. Faculty service to academic units, colleges, the Faculty Senate, the University, and the Chapter provides these skills and abilities for professional and academic

accreditation, and University governance and planning. Professionally relevant service in any of these venues, both inside and outside of the institution, shall be an important consideration for granting promotion.

18.§3.7 Application of Judgmental Criteria to Traditionally-Ranked Faculty. In considering candidates for promotion, professional competence, professional recognition, and professional service are all important. For the purpose of clarification in the promotion review process, the following terms are presented ordinarily, from high to low: outstanding; substantial; significant; satisfactory, unsatisfactory. . . . For promotion to full professor, a faculty member must have:

(a) achieved outstanding professional recognition and a significant record of professional competence; or

(b) achieved outstanding success in professional competence and gained substantial professional recognition; or

(c) gained substantial professional recognition, a satisfactory record of professional competence, and rendered significant professional service.

18.§9 GRIEVANCE. Final decisions made by Western shall be subject to the grievance procedures in this Agreement as stipulated in Article 12, Grievance Procedure.

Charging Party's application to full professor included both a Curriculum Vitae and a Promotional Review Narrative. As part of the narrative, Charging Party admitted that during her time as president of the Union, her academic research and publication efforts were negatively affected, writing:

At times, especially during the first year or two of my service as union officer, I tried to devote time to my linguistic research. . . . It was a very difficult balancing act, one at which I was ultimately not able to succeed. . . . continuing my linguistic scholarship had already become increasingly difficult, if not nearly impossible, when I became WMU-AAUP president unexpectedly in August 2013.

Despite the foregoing, Charging Party argued in that same narrative that her union related work should be considered as "Professional Recognition" for purposes of evaluating her request for promotion.

Pursuant to Article 18 of the contract, Charging Party's application was then presented to various groups or individuals to consider. Initially, these groups included the English Department, the College Promotion Committee for the College of Arts and Sciences, and the

Chair of the English Department. In each of these three instances Charging Party was recommended for advancement. Moreover, each of the three relied upon Charging Party's work with the union when evaluating her "Professional Recognition."

Next, Charging Party's application was reviewed by the University's Dean of the College of Arts and Sciences, Dr. Carla M. Koretsky. Unlike the previous reviewers, Koretsky did not recommend Charging Party for promotion. In a letter explaining her decision, Koretsky determined that Charging Party had "achieved a substantial record of Professional Competence, a significant record of Professional Recognition and an outstanding record of Professional Service." Koretsky noted that "according to Article 18.3.7 of the current [contract], promotion to full professor requires substantial or outstanding professional recognition." Koretsky, in addressing Charging Party's request that her union work be considered as "Professional Recognition", wrote:

However, I do not agree with your departmental promotion committee that these activities can substitute for a substantial record of peer-reviewed scholarly publication, whether in the form of authored or co-authored books or monographs, book chapters or journal articles.

Koretsky concluded her letter by stated:

I am confident that with your return to faculty from the all-consuming service work you have engaged in during recent years, you will have the time to complete the scholarly work focused on the second-language acquisition outlined in your narrative and will certainly be a very strong candidate for promotion.

On or around February 21, 2020, pursuant to Article 18, Charging Party submitted an appeal to Koretsky solely related to the Dean's decision as it related to "Professional Recognition." In that appeal, Charging Party argued that Koretsky had misclassified her union related work as "Professional Service" instead of "Professional Recognition."

Koretsky denied the appeal. As part of that denial, Koretsky noted that union related work was specifically referenced in Article 18.3.3 under the definition of "Professional Service." Koretsky repeated her belief that Charging Party's union related work should not be considered as "Professional Recognition." To that point, Koretsky wrote, "Specifically, I believe that a reasonable interpretation of Article 18.3.2 is that it refers to activities that are invited or provided as the direct result of an established record of scholarship, which, as articulated in Article 18.3.2, is typically garnered through an established record of peer-reviewed publications and performances."

Following Koretsky's review of Charging Party's application, the next and final step in the process was the review by the University's Provost and Vice President for Academic Affairs, Dr. Jennifer P. Bott. In a letter dated April 10, 2020, Bott, similar to Koretsky, found Charging Party's application to demonstrate substantial achievement in "Professional Competence", significant achievement in "Professional Recognition", and outstanding achievement in "Professional Achievement." Also similar to Koretsky, Bott determined that Charging Party had

not met the requirements for promotion because she had not achieved a hiring rating with respect to “Professional Recognition.” Charging Party filed an appeal and Bott denied that appeal in another letter dated April 13, 2020.

Following the action by Bott, Charging Party filed a grievance on June 18, 2020, claiming that both Koretsky and Bott had violated various articles of the contract, including Article 18 and articles related to academic freedom, professional conduct and anti-discrimination. With respect to Article 18, Charging Party repeated her earlier arguments that her union work should have counted towards her Professional Recognition.

On July 10, 2020, Associate Provost, Dr. Edward Martini denied Charging Party’s grievance. Central to Martini’s denial was the finding, similar to Koretsky and Bott, that Charging Party’s union work should not be counted towards the area of “Professional Recognition” and was in fact properly accounted for within the area of “Professional Service.”

On July 17, 2020, Charging Party pursued her grievance to the next level. On August 10, 2020, the University’s Director of Labor Relations denied that grievance finding that Koretsky and Bott did not violate the contract by not considering Charging Party’s union work as “Professional Recognition.”

Charging Party did not proceed to the next contractual step in the grievance procedure, arbitration, and instead filed the instant charge. In her initial filing with the Commission, Charging Party acknowledges that arbitration would have been the next appropriate step but states it “is not a feasible option at this time.”

As part of her response to the Respondent’s motion, Charging Party provided a rather lengthy discussion of events that occurred during her tenure as Union president. However, given the generalness of those allegations and the lack of a causal connection to the individuals central to this dispute, Koretsky and Bott, these allegations will not be discussed in greater detail herein.

Discussion and Conclusions of Law:

Paramount to understanding the Commission’s jurisdiction, one must remain cognizant that not all unfair, or even unlawful, treatment of its employees by an employer violates PERA. Absent a factually supported allegation that the employer interfered with, restrained, and/or coerced an employee in the exercise of the rights guaranteed under PERA’s Section 9, or otherwise retaliated against the employee for engaging in, or refusing to engage in, union or other activities of the type protected by the Act, the Commission has no jurisdiction to make a judgment on the fairness of the employer's actions. See, e.g., *City of Detroit (Fire Dep’t)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524.

Section 10(1)(c) of PERA makes it unlawful for a public employer to “[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization.” In order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act, 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 Ewart Pub Sch*, 125 Mich App 71, 74 (1983). However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id* at 74; *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703, 706.

The crux of the present dispute is squarely centered on the decision by Koretsky and Bott to consider Charging Party's union related work under the area "Professional Service" as opposed to "Professional Recognition." Charging Party clearly accepts that the requirements and procedures for the promotion that she seeks are set forth in the contract. Were this matter before the undersigned under the guise of a claim for repudiation by the Union, the only conclusion one could make would be that the subject matter is covered by the contract – that there exists a reasonable basis within the contract that the Employer can rely upon to support its actions – and that the matter should proceed through the grievance arbitration procedures.³ Here, however, the Charging Party has attempted to paint this conflict as a matter of systematic discrimination under Section 10(1)(c) of the Act. Although not covered in detail above, the allegations set forth within Charging Party's response to the Respondent's motion relative to animus were general and conclusory in both nature and appearance.

Here, the simple and relatively straight forward sequence of events that directly precedes the filing of Charging Party's unfair labor practice charge began with Koretsky and Bott reviewing Charging Party's application for promotion under the collective bargaining agreement. Charging Party strongly disagrees with their decision as it relates to the weighing of her union work and does a very thorough job of discussing the same and explaining why, in her view, her approach should be the right one. While Charging Party's initial filing and subsequent response to the motion are well thought out, persuasive and comprehensive, those filings, when taken as a whole, fail to establish a prima facie case of discrimination under PERA. More specifically, despite the impetus of the present matter being clearly centered on the decisions made by Koretsky and Bott, Charging Party did not present any factual allegations against the two that would support even the slightest inference that their actions were motivated by anti-union animus.

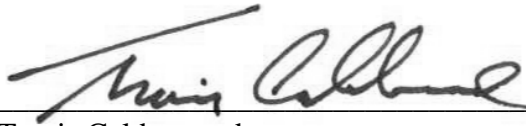
Having considered Charging Party's arguments and allegations in total, I conclude such does not warrant any change to my conclusion. As such, and for the reasons set forth above, I recommend that the Commission issue the following recommended order.

³ Charging Party herself clearly accepts the appropriateness of arbitration as shown by her statements in her unfair labor practice charge.

RECOMMENDED ORDER

The unfair labor practice charge filed by Lisa C. Minnick against Western Michigan University is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Travis Calderwood", is written over a horizontal line.

Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: July 1, 2021