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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BIRMINGHAM PUBLIC SCHOOLS,
Public Employer-Respondent,

MERC Case No. C16 I-098

-and-

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

APPEARANCES:

Lusk Albertson PLC, by Robert T. Schindler, for Respondent

McKnight, Canzano, Smith, Radtke & Brault, P.C., by Darcie R. Brault, for Charging Party

DECISION AND ORDER

On June 27, 2018, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order[1] in the above matter finding that Respondent violated § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Respondent's assignment of Robyn Tarnow to teach kindergarten in May 2016, an assignment that continued for the following school year, was a threat directed at her exercise of her right to file and pursue a grievance and a violation of § 10(1)(a) of PERA. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Respondent filed exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on August 20, 2018. After being granted an extension of time, Charging Party filed its cross exceptions and a brief in support of the ALJ's Decision and Recommended Order on October 1, 2018. After filing a request for an extension of time, Respondent filed its response to cross exceptions on October 26, 2018.

In its exceptions, Respondent contends that the ALJ erred in concluding that its assignment of Tarnow to teach kindergarten was an implicit threat of retaliation directed at her exercise of her right to file and pursue a grievance and in concluding that Tarnow's employment evaluations were adverse employment actions. Respondent also contends that the remedy recommended by the ALJ is an improper remedy.

[1] MAHS Hearing Docket No. 16-027440

In its cross exceptions, Charging Party argues that the ALJ erred when she failed to conclude that Tarnow's reassignment to kindergarten and Respondent's failure to allow her to transfer to another school were each adverse employment actions that violated § 10(1)(c) and that the ALJ also erred when she failed to find that Respondent's refusal to allow Tarnow to transfer also violated § 10(1)(a). Charging Party further argues that the ALJ erred when she did not conclude that Respondent's minimally effective ratings of Tarnow violated § 10(1)(a) and 10(1)(c) of PERA.

We have reviewed the exceptions filed by Respondent and find that some have merit and have reviewed the cross exceptions filed by Charging Party and find them to be without merit.

Factual Summary:

A. Background

Charging Party Birmingham Education Association, MEA/NEA (BEA or Union), represents teachers employed by Respondent Birmingham Public Schools. Robyn Tarnow taught second grade at Respondent's Pierce Elementary School (Pierce) for more than twenty years prior to the 2015-2016 school year and, during this period, developed Kidwitness News (KWN), a curriculum delivery method that uses current events to teach a variety of different subjects and skills.

As part of KWN, each night a student in Tarnow's classroom was selected to take home the "reporter's notebook" and, with parental involvement, to write about a current news event and share it with the class the next day. Tarnow did not provide ideas for the stories and did not screen the news stories before they were discussed in her classroom.

In April 2013, Pierce Principal James Lalik received a complaint from a parent regarding certain topics that had been discussed in Tarnow's classroom, including the shooting of children at Sandy Hook Elementary School in December 2012, a death in an auto accident on a local freeway, and a grandmother who had shot her grandson in a nearby suburb. Lalik discussed the complaint with Tarnow and told her to cease allowing spontaneous discussion of any topic that a student might choose to bring up during the KWN segment of her class and, instead, to have students write down and submit to her any topic that they wanted to discuss with the class. Lalik also told Tarnow to avoid inappropriate topics, including violence, death and sex.

Charging Party BEA, then, filed a grievance on Tarnow's behalf alleging that Lalik's directive violated Article XII, the "academic freedom" clause, of the parties' collective bargaining agreement and advanced the grievance to arbitration. On June 30, 2014, an arbitrator issued an award sustaining the grievance and instructing Respondent to "immediately discontinue its restrictions on what news topics can be presented and discussed in Grievant's second grade classroom and to discontinue its restrictions on how those topics can be raised in the classroom."

Subsequent to this, Tarnow taught second grade for the 2014-2015 school year.

B. Tarnow's Assignments to Third Grade and Kindergarten

The collective bargaining agreement between Respondent and Charging Party requires a school principal, before adopting a tentative master schedule for the following year, to communicate with teachers regarding specific courses to be taught, grade level, number of different courses, nonacademic assignments, changes in grade or subject assignment, and building assignments. It also requires that all teachers be notified of their assignments for the next school year prior to the close of school in June, when feasible.

At Pierce, Principal Lalik's practice was to send out an email to all teachers each January or February asking teachers about their preferences for assignments for the following school year. Lalik then made assignments for the next school year sometime in February. Pierce teachers were not told what their assignments would be until mid-May, when teachers in all Respondent's elementary schools received their assignments on the same day.

On January 16, 2015, Lalik sent an email to all Pierce teachers asking for each teacher's preferences for assignments for the 2015-2016 school year. In his email, Lalik also asked each teacher if he or she was interested in creating a continuous "loop" with a partner teacher.[2]

On February 13, 2015, Tarnow replied to Lalik's email as follows:

Hi, I like working with second graders. Our team works well together.

On the basis of this email and prior conversations with Tarnow, Lalik did not believe that she was interested in looping. Because all first grade and second grade teachers would be required to loop during the 2015-2016 school year, Lalik decided to move Tarnow to third grade for that school year. Tarnow then used KWN in her third grade classroom during the 2015-2016 school year and was not required to screen or limit the topics raised in that classroom.

In early 2016, Tarnow was again asked for her preference for assignments for the following school year and indicated that she preferred to teach second or third grade. Lalik, however, believed that there were problems "within the third grade team and the level of collaboration" during the 2015-2016 school year, and that, as a result, he wanted to move "a couple" of teachers from third grade to other grades. Lalik also testified that he had concerns about Tarnow's classroom management during the 2015-2016 school year. Based on these observations, he concluded that third grade was not a "good fit" for Tarnow.

In May 2016, Lalik and Assistant Principal Julie LaBurn told Tarnow that she would be teaching kindergarten during the 2016-2017 year. When Tarnow objected that she could not use KWN in kindergarten, Lalik offered to let Tarnow teach KWN as an extracurricular assignment.

[2] "Looping" refers to the practice of a teacher remaining with the same group of students for more than one year. For example, a teacher is assigned a class of students in one year and the same teacher is then assigned the same class the next year. After the second year, the students move on to the next grade with a different teacher, and the looping teacher has a new class of younger students.

Tarnow refused the offer. During the 2016-2017 school year, Tarnow taught a modified version of KWN in her kindergarten classroom.

In early 2017, Tarnow again indicated to Lalik that her preference was to teach second grade. In May 2017, however, Tarnow was again assigned to kindergarten for the following school year, a year in which first grade and second grade teachers continued to loop at Pierce.

C. Tarnow's Evaluations

Copies of Tarnow's performance evaluations for the following school years were admitted into the record: 2002-2003, 2005-2006, 2008-2009, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, and 2016-2017.[3]

Prior to the 2011-2012 school year, Respondent gave its teachers written evaluations only once every three years, and School Principal Paula Greene was the principal evaluator for Tarnow's 2002-2003 and 2005-2006 evaluations. Lalik was the principal evaluator for the 2008-2009, 2011-2012, 2012-2013, 2013-2014, and 2015-2016 evaluations. Assistant Principal Julie LaBurn was the principal evaluator on Tarnow's 2014-2015 and 2016-2017 evaluations.

Prior to the 2011-2012 school year, teachers were rated as "acceptable," "improvement needed," "not acceptable," or "not observed" on eleven factors and received an overall performance rating of "acceptable," "improvement needed," or "not acceptable." For the 2011-2012 evaluation, the ratings were "acceptable/effective," "improvement needed/minimally effective," and "not acceptable/ineffective." For the 2013-2014 evaluation, the ratings became "highly effective," "effective," "minimally effective;" and "ineffective" (although the BEA and Respondent had agreed that no teacher would be given a "highly effective rating" that year).

From 2015 through 2017, Respondent continued to use an evaluation that rated teachers as "highly effective," "effective," "minimally effective" and "ineffective" but began using numeric scores in evaluating teachers. On the 2014-2015 performance evaluation form, teachers were assigned numeric "raw" scores between zero and four in five categories. Two of these categories were based on student assessment data and three were based on the observations of the evaluators. Teachers were rated "highly effective," "effective," 'minimally effective," or "not effective" in each category based on their numeric raw score in that category. The raw scores were also converted into weighted component scores, and the total of the weighted scores was the teacher's final evaluation score. Teachers with final scores from 3.5 to 4.0 were rated "highly effective" overall; those with scores from 2.5 to 3.49 were "effective;" those with scores from 1.5 to 2.49 were "minimally effective;" and "ineffective" teachers were those with scores of less than 1.5.

On all her evaluations prior to the 2011-2012 school year, Tarnow was rated as "acceptable." For the 2011-2012 and 2012-2013 school years, Tarnow was rated as "acceptable/effective."

[3] The charge alleges that Tarnow's 2015-2016 and 2016-2017 evaluations constituted unlawful retaliation for Tarnow's filing of the academic freedom grievance.

When Lalik evaluated Tarnow again at the end of the 2013-2014 school year, after Tarnow's grievance was filed in May 2013 but before the arbitration award was issued in June 2014, Lalik referred to Tarnow's classroom management as "loose," and noted that students had been observed talking off topic during whole group sessions instead of listening to the teacher. In this evaluation, Lalik also stated that Tarnow was not currently meeting in a Professional Learning Committee (PLC) with the other second grade teachers and said that he would like to see her "move toward being a regular participant in the second grade team." Tarnow, however, was rated as "effective" on all ten factors involved in the evaluation and received an overall performance rating of "effective."

For the 2014-2015 evaluation, the first evaluation Tarnow received after the arbitration award had been issued, Assistant Principal LaBurn was the principal evaluator and gave Tarnow a "minimally effective" rating in the category of "classroom environment and culture," and devoted the entire "area of focus for continued growth" comment section to Tarnow's lack of classroom organization. LaBurn stated that the arrangement of Tarnow's classroom and the accessibility and use of materials were areas that "must be addressed." In the 2014-2015 evaluation, LaBurn rated Tarnow as "effective" in both "student engagement" and "purpose" and "highly effective" in the categories involving her student assessment data. Tarnow's final weighted overall score was 3, which gave her an overall rating of "effective."

Lalik was Tarnow's principal evaluator for her 2015-2016 evaluation and rated Tarnow as "minimally effective" in both "professional collaboration and communication" and "classroom environment and culture." She was again rated "effective" in both "student engagement" and "purpose," and "highly effective" in the three categories involving student assessment data. Her final weighted overall score was 2.95, which again gave her an overall rating of "effective."

Assistant Principal LaBurn was the principal evaluator for Tarnow's 2016-2017 evaluation and rated Tarnow as "highly effective" in the category of "area of focus." Tarnow was again rated "minimally effective" in "classroom environment and culture," and "effective" in the other observational categories including "professional collaboration and communication." Her rating in the three student assessment data categories was "highly effective." Her final weighted overall score was 3.1, which again gave her an overall rating of "effective." In the comment section, LaBurn noted that "classroom management has been an area of needed improvement consistently over the years." LaBurn wrote, "Your response to misbehavior produces uneven results" and "Consistency in routines and organization in classroom space impacts productivity and behaviors in a classroom."

Although Tarnow received an overall rating of "effective" in both the 2015-2016 and 2016-2017 evaluations, her final weighted evaluation scores for these years made her the lowest rated teacher at Pierce.

Under Respondent's "Administrative Guidelines for Evaluation Process" policy, when there is a reduction in the number of positions in a particular building, the teacher with the lowest final score in that building, after certifications and qualifications are considered, is the first to be

laid off. That is, an "effective" teacher with a low final score would be laid off before an "effective" teacher with a higher final score with certifications in the same areas. The laid off teacher could then "bump" a teacher with a lower final score, if there is one, in another building. The record, however, indicates that no Pierce Elementary School teacher had been laid off in the twelve school years preceding the hearing and that over the past few years, Respondent has consistently hired new elementary school teachers to fill vacancies that occur from teachers retiring or leaving for other reasons.

D. Tarnow's Attempt to Transfer to Positions at another School

In June 2017, Tarnow determined that there were vacant second grade and first grade positions for the upcoming school year at Bingham Farms Elementary School.[4] In accordance with Respondent's policy for teachers seeking to transfer to an open position, Tarnow sent an email to Assistant Superintendent Human Resources Dean Niforos expressing her interest in the positions, especially the second grade position. Niforos, however, did not send Tarnow's application to the Bingham Farms principal until after the positions had been filled. Niforos testified that his failure to transmit Tarnow's application was an oversight.

E. The Unfair Labor Practice Charge

The Union filed the instant unfair labor practice charge on September 27, 2016 and amended the charge on August 21, 2017. The charge, as amended, alleges that Respondent violated § 10(1)(a) and (c) of PERA when it "unlawfully intimidated, threatened, discriminated against, interfered with, restrained, retaliated against and/or coerced" Robyn Tarnow because she filed a grievance that resulted in an arbitration award in her favor. The acts alleged to violate PERA were, first, in May 2016, assigning Tarnow to teach kindergarten for the 2016-2017 school year, thus, effectively nullifying the arbitration award. Second, in May 2017, again assigning Tarnow to teach kindergarten despite her stated preferences. Third, in May 2016, issuing a year-end evaluation that, although rating Tarnow as "effective" overall, rated her lower than any of the other teachers at her elementary school. Fourth, on May 4, 2017, giving Tarnow an evaluation for the 2016-2017 school year that continued to subject her to undue scrutiny and unfair evaluation. Fifth, in the summer of 2017, disparately and in a discriminatory manner denying Tarnow an interview for a vacant position in another elementary school.

On October 28, 2016, before the charge was amended, Respondent filed a motion for summary dismissal asserting that the charge did not state a claim under § 10(1)(c) of PERA and that the charge failed to state a claim of an independent violation of § 10(1)(a) of PERA. On July 27, 2017, the ALJ issued an interim order denying Respondent's motion.

[4] The ALJ notes that, after receiving her 2014-2015 evaluation, Tarnow applied for vacant first grade and kindergarten positions at Bingham Farms Elementary and a vacant kindergarten position at Greenfield Elementary and that Tarnow was interviewed by the principals of Bingham and Greenfield but not selected for any of the three positions. The charge, however, was never amended to allege that Respondent's failure to select Tarnow for these positions was a violation of PERA and a request to amend the initial charge would have been untimely.

The hearing was held on two dates, October 24 and October 30, 2017, and, on June 27, 2018, the ALJ issued a Decision and Recommended Order in which she found that neither Tarnow's reassignment to kindergarten nor Respondent's failure to allow her to transfer to another school were adverse employment actions under § 10(1)(c). Although the ALJ found that Tarnow's evaluations constituted adverse employment actions under § 10(1)(c) of PERA, she also found that hostility towards Tarnow's academic freedom grievance was not a motivating cause of the minimally effective ratings Tarnow received on some portions of her 2015-2016 and 2016-2017 end-of-year evaluations. The ALJ, however, also found that Respondent's assignment of Tarnow to teach kindergarten in May 2016, an assignment that continued for the following school year, carried an implicit threat of further retaliation directed at her exercise of her right to file and pursue a grievance in the future in violation of § 10(1)(a) of PERA. As a remedy, the ALJ recommended that the Commission, in addition to issuing a cease-and-desist order and requiring posting of a notice, order Respondent to assign Tarnow, if she so requests, to a second grade classroom at Pierce when a second grade vacancy became available.

On August 20, 2018, Respondent filed exceptions to the ALJ's Decision and Recommended Order. In its exceptions, Respondent argues that the ALJ erred in concluding that Tarnow's employment evaluations were adverse employment actions and in concluding that its assignment of Tarnow to teach kindergarten carried an implicit threat of further retaliation directed at her exercise of her right to file and pursue a grievance in the future in violation of § 10(1)(a). Respondent also contends that the remedy recommended by the ALJ is an improper remedy.

On October 1, 2018, Charging Party filed a brief in support of the ALJ's Decision and Recommended Order and cross exceptions to the Decision and Recommended Order. In its cross exceptions, Charging Party argues that Tarnow's reassignment to kindergarten and Respondent's failure to allow her to transfer to another school were each adverse employment actions that violated § 10(1)(c) and that Respondent's failure to allow her to transfer also violated § 10(1)(a). Charging Party further argues that Respondent's minimally effective ratings of Tarnow violated § 10(1)(a) and 10(1)(c) of PERA.

On October 26, 2019, Respondent filed a response to Charging Party's cross exceptions and a Motion to Reopen the Record.[5] On November 5, 2018, Charging Party filed a Response in Opposition to Respondent's Motion to Reopen the Record.

Discussion and Conclusions of Law:

I. The Alleged Violations of Section 10(1)(c).

Section 10(1)(c) of PERA makes it unlawful for a public employer to "discriminate with regard to hire, terms, or other conditions of employment to encourage or discourage union membership." The elements of a prima facie case of unlawful discrimination under PERA are,

[5] In its Motion to Reopen the Record, Respondent seeks to reopen the record to enter Tarnow's 2017-2018 year end evaluation into evidence. Under Rule 166 of the Commission's General Rules, however, a motion for reopening the record may be granted only if it would require a different result and, in this case, nothing in Respondent's Motion would require that we reach a different result. See *Detroit Public Schs*, 30 MPER 32 (2016).

in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory action. *Taylor Sch Dist v. Rhatigan*, 318 Mich App 617, 636 (2016); *Saginaw Valley State Univ*, 30 MPER 6 (2016); *Utica Community Schs*, 28 MPER 11 (2014); *Grandvue Medical Care Facility*, 27 MPER 37 (2013); *City of Detroit*, 24 MPER 11 (2011); *Grand Valley State Univ*, 23 MPER 70 (2011); *Univ of Michigan,* 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). See also *City of St Clair Shores*, 17 MPER 27 (2004); *North Central Cmty Mental Health Services*, 1998 MERC Lab Op 427, 436. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA v Evart Pub Sch,* 125 Mich App at 74.

In *Taylor Sch Dist and Taylor Federation of Teachers, AFT Local 1085 v Nancy Rhatigan and Rebecca Metz,* 318 Mich App 617, 638 (2016), the Court commented on the meaning of the term "adverse employment action" in the context of § 10(1)(c) of PERA. It quoted from *Pena v Ingham Co Rd Comm,* 255 Mich App 299, 311–312 (2003), as follows:

> In *Wilcoxon v Minnesota Mining & Mfg. Co,* 235 Mich App 347, 364, 597 NW 2d 250 (1999), we defined an adverse employment action as an employment decision that is "materially adverse in that it is more than [a] 'mere inconvenience or an alteration of job responsibilities'" and that "there must be some objective basis for demonstrating that the change is adverse because a 'plaintiff's subjective impressions as to the desirability of one position over another' [are] not controlling.'"

Although there is no exhaustive list, typically an adverse employment action takes the form of an ultimate employment decision, such as a termination of employment, a demotion evidenced by a decrease in wages or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

In its exceptions, Respondent argues that Tarnow's performance evaluations did not constitute an adverse employment action and that Charging Party's contention that § 10(1)(c) was violated should also be dismissed on this basis. Charging Party, in its cross exceptions, argues that the ALJ correctly found that Respondent's minimally effective ratings of Tarnow were adverse employment actions and that the ALJ erred in concluding that they did not violate § 10(1)(c) of PERA.

In the present case, there is no dispute that Tarnow's pursuit of the Article XII academic freedom grievance was activity protected by PERA or that Respondent knew of her protected activity.

In *Wayne State Univ,* 28 MER 17 (2014) the Commission held that the Charging Party's "less than satisfactory" rating on a written job evaluation did not, in and of itself, amount to an adverse employment action under § 10(1)(c). The job evaluation form used by the employer in that case rated employees in various categories, and overall, on a five-step scale ranging from "unsatisfactory" to "outstanding." The charging party had previously received performance ratings ranging from "fully satisfactory" to "outstanding." However, on the evaluation in question the charging party was rated "less than satisfactory" in four categories and "fully satisfactory" in the other five, resulting in an overall rating of "less than satisfactory." In dismissing the charge, the Commission noted that the charging party was not demoted, disciplined, or reduced in pay, had not suffered a material change in her job duties, and had "offered no evidence to support her claim that the evaluation had repercussions under the collective bargaining agreement for promotional opportunities and for wage (step) increases."[6]

In the present case, Charging Party was not demoted or disciplined and had not suffered a material change in her job duties or a reduction in pay. Nonetheless, Respondent's "Administrative Guidelines for Evaluation Process" gives "effective" elementary teachers with higher final scores preference over those in the same building with lower scores. Consequently, a less than effective rating in any category on a year-end evaluation lowers the teacher's final score and increases the risk that the teacher will lose his or her job in a reduction in force in the following school year. Although Respondent asserts that the risk is minimal since it has not laid off teachers in many years, a lower final score has potential repercussions for job security under Respondent's policy, even if the risk is small. Consequently, unlike the Charging Party in *Wayne State,* Tarnow arguably suffered tangible job consequences as a result of her 2015-2016 and 2016-2017 evaluations and can plausibly assert that these evaluations constituted adverse employment actions under § 10(1)(c) of PERA.

Nonetheless, even assuming that Tarnow's evaluations constituted adverse employment actions, the record does not establish that her 2015-2016 and 2016-2017 performance evaluations were motivated by hostility toward her protected activity in violation of § 10(1)(c). As noted by the ALJ, there is no direct evidence and Charging Party presented nothing to even remotely indicate that Lalik, LaBurn, or any other Respondent representative had anti-union animus or was hostile toward Tarnow's filing of the grievance or her participation in the grievance/arbitration process. Although Lalik admitted that he was disappointed by the result of Tarnow's arbitration and believed that Respondent should have won, this is not sufficient to establish anti-union animus or hostility.

Although Charging Party relies on timing as evidence of a discriminatory motive and contends that Respondent dramatically lowered its evaluation of Tarnow after the grievance and arbitration, we have long held that suspicious timing is not sufficient, by itself, to establish that the employee' s union activity was a motivating factor in an employer' s decision. *City of Detroit*

[6] A review of Commission decisions does not reveal any decision in which the Commission found that a negative performance evaluation was an adverse employment action.

(Water & Sewerage Dep ' t), 1985 MERC Lab Op 777, 780; *Macomb Twp. (Fire Dep ' t.)*, 2002 MERC Lab Op 64, 73. Notwithstanding this, the record establishes that Principal Lalik and Assistant Principal LaBurn expressed concern about Tarnow's classroom management and mentioned greater collaboration with her colleagues as a "goal for continued growth" in her year-end evaluation for the 2008-2009 school year (see Tarnow's June 15, 2009 Evaluation Reaction Statement) long before the academic freedom grievance was filed. Lalik included both classroom management and more cooperation with her team as "goals" for Tarnow the next time he evaluated her in 2011-2012. Although Lalik did not mention these issues in Tarnow's 2012-2013 evaluation, he noted the following in her 2013-2014 evaluation:

> Classroom management in Robyn's classroom is loose. During a follow up meeting she expressed that it is the norm in her classroom for students to shout out answers or even random thoughts. Students have been observed to be talking off topic during whole group lessons instead of listening to the teacher.

His criticism of her classroom management and her collaboration with her colleagues was clearly not something Lalik raised for the first time in her 2015-2016 evaluation. To the contrary, it was a continuation of criticisms that he and others had made in evaluations for a number of years prior to the filing of her grievance and the arbitration award involving the grievance.

Additionally, the evaluation process was significantly changed during the 2014-2015 school year. One change involved the switch to a numeric rating system, in which teachers are given numeric raw scores in each category which are then converted into weighted component scores. The total of the component scores was the teacher's final overall score. The second change was the adoption of the 5D+ rubric. With the 5D+ rubric, the evaluator reads a series of statements covering each teaching area and decides which statement applies to determine whether the teacher should be rated as "unsatisfactory," "basic," "proficient," or "distinguished," in that area. Additionally, Respondent adopted a new system for recording notes during classroom observations. Under this system, evaluators use computers to make simultaneous notes of things they observe within the classroom as the observation progresses. They also code them to a particular teaching area within the 5D+ rubric. Respondent stated that these changes "led to harsher evaluation of teachers, including, but not limited to Tarnow" and the ALJ reasonably concluded "that these changes in the system were significant enough to explain the escalation of criticism over Tarnow's classroom management from concern to a lower rating."

Respondent only began using its numeric evaluation system in the 2014-2015 school year and, as a result, there is no way to determine how Tarnow might have ranked under this system in the school years before she filed the academic freedom grievance. Tarnow's low rating compared to other Pierce teachers is, therefore, not sufficient to establish that her evaluations were discriminatorily motivated. Given the lack of evidence of hostility and given the evidence put forth of a legitimate non-discriminatory basis for the evaluations, we do not believe that Charging Party has met its burden of demonstrating that hostility towards Tarnow's academic freedom grievance was a motivating cause of the minimally effective ratings she received on two of the components of her 2015-2016 evaluation and one of the components of her 2016-2017

evaluation. Consequently, we agree with the ALJ that the evaluations did not violate either § 10(1)(c) or 10(1)(a) of PERA.

In its cross exceptions, Charging Party also argues that Tarnow's assignment to kindergarten in 2016 and reassignment in 2017 were adverse employment actions that were motivated by her protected activity in violation of § 10(1)(c). Nonetheless, the record does not establish that kindergarten is generally considered by teachers in Tarnow's school as less desirable than third grade. Tarnow, in fact, testified that, in 2015, she applied for vacant kindergarten positions at Bingham Farms Elementary and Greenfield Elementary and that she was interviewed for the positions. Additionally, Tarnow did not experience a decrease in wages or benefits, was not given a less distinguished title, and did not have significantly diminished responsibilities. To the contrary, the record establishes that Tarnow objected to the kindergarten assignment because she believed that it prevented her from using KWN in the way that she wanted to use it. Consequently, Tarnow's objection was personal to her and involved her subjective impressions as to the desirability of one position over another. This is not sufficient to meet the definition of an adverse employment action for purposes of § 10(1)(c).

Notwithstanding this, the record also establishes that Lalik believed that there were problems "within the third grade team and the level of collaboration" during the 2015-2016 school year, and that, as a result, he wanted to move "a couple" of teachers from third grade to other grades. Lalik also had concerns about Tarnow's classroom management during the 2015-2016 school year. Based on these observations, he concluded that third grade was not a "good fit" for Tarnow and assigned her to kindergarten.

Although Charging Party also argues, in its cross exceptions, that Respondent's failure to allow Tarnow to transfer to another school was an adverse employment action, Respondent's failure or refusal to allow Tarnow to transfer also does not meet the definition of an adverse employment action under § 10(1)(c). In this case, there is no evidence that teaching at Pierce is generally considered less desirable than teaching at another of the district's elementary schools. As is the case with Tarnow's reasons for objecting to her reassignment to kindergarten, her reasons for wanting to transfer to a different elementary school were personal to her. Further, the ALJ credited Assistant Superintendent Human Resources Niforos' testimony that he did not send Tarnow's application to the Bingham Farms principal until after the positions had been filled due to an oversight. Consequently, Charging Party's allegation that Respondent's failure or refusal to allow Tarnow to transfer to another school violated § 10(1)(c) of PERA was also properly dismissed.

II. The Alleged Violations of Section 10(1)(a).

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 them under § 9 of the Act. These rights include the right to engage in union activities and other "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." Under § 9 of PERA, employees have the right to file grievances, as well as engage in other protected concerted activities, free from employer threats. *MERC v. Reeths-Puffer School District*, 391 Mich 253, 265-66 (1974), *aff'g* 1970 MERC Lab Op 967. Employees also have the

right to use the grievance procedure without fear of punishment or reprisal. *City of Lincoln Park,* 1983 MERC Lab Op 362. It is the chilling effect of a threat and not its subjective intent that PERA was created to address. *University of Michigan,* 1990 MERC Lab Op 272, *aff'd* Court of Appeals, Dkt. No. 128678 (7/16/92, unpublished); *City of Detroit (Fire Dept)*, 1982 MERC Lab Op 1220.

In its exceptions, Respondent contends that the ALJ erred in concluding that Tarnow's assignment to kindergarten was "a threat directed at her exercise of her right to file and pursue a grievance" in violation of § 10(1)(a). A review of the ALJ's decision reveals that, in support of her conclusion that Tarnow's assignment to teach kindergarten violated § 10(1)(a) of PERA, the ALJ relied upon the Commission's decisions in *City of Inkster*, 26 MPER 5 (2012), *City of Greenville,* 2001 MERC Lab Op 55, *City of St Clair Shores*, 17 MPER 76 (2004), and *Huron Valley Schs*, 26 MPER 16 (2012).

In *City of Inkster*, the employer questioned an employee about a rumor regarding the assignment of union work to non-union employees. The employer demanded to know whether the employee made a statement, at a union meeting, alleging that the employer planned to hire nonunion workers to do bargaining unit work and threatened to suspend him if he had made the statement. On this basis, the Commission found that the employer violated § 10(1)(a) when it threatened to investigate and discipline the employee if its investigation revealed that he made the statement.

In *City of Greenville,* a city manager informed a probationary public safety officer that he might lose his job as a result of participating in a City Council meeting at which employees, including union officials, raised safety concerns. The Commission found that the employer violated § 10(1)(a) because the city manager's remarks could reasonably be interpreted as a threat to dissuade the probationary public safety officer from engaging in further protected activity.

Additionally, in *City of St Clair Shores*, the Commission dismissed an unfair practice charge alleging that the employer unlawfully threatened two employees who were carrying out their duties as union representatives. In rejecting the ALJ's finding that the employer violated § 10(1)(a), the Commission noted that expressions of opinion by management representatives, even if critical of unions or union officers, do not violate § 10(l)(a) unless there is a threat of retaliatory action.

Similarly, in *Huron Valley Schs*, the Commission found no basis for Charging Party' s claim that the employer violated § 10(1)(a) when it allegedly threatened her in connection with a grievance she filed. In dismissing the ULP charge, the Commission noted that criticisms made by a public employer to an employee regarding grievance activity do not violate PERA, so long as the statements do not expressly or impliedly threaten to penalize the employee for filing a grievance.

In the present case, as in *Huron Valley Schs*, Respondent did nothing to expressly or impliedly threaten to penalize Tarnow for filing a grievance; nor did the Respondent take action to direct her to cease engaging in any protected activity. To the contrary, Tarnow was merely

informed that she would be assigned to teach kindergarten for the 2016-2017 school year in May of 2016, three years after the grievance involved in this dispute was filed and two years after the arbitration award resolving the grievance was issued. Tarnow's assignment to teach kindergarten was not an adverse employment action and, unlike *City of Inkster* and *City of Greenville*, Respondent did not communicate an intent to suspend or discharge Tarnow.[7] Principal Lalik testified to his concerns over Tarnow's classroom management and explained why he believed that, due to these concerns, Tarnow would be "a better fit" in kindergarten than in third grade. He also explained that he did not want to put Tarnow back in second grade or assign her to first grade because of her unwillingness to loop.

Additionally, as correctly noted by Respondent, § 15(3)(j) of PERA makes teacher placement, including grade assignments, a prohibited subject of bargaining. Consequently, there is no dispute that Respondent had the contractual right to assign Tarnow to teach kindergarten. As we recently explained in *Wayne State Univ*, 32 MPER ___ (2019), a statement or action that reflects an option contractually available to the Employer is not an unlawful threat. See also *Waldron Area Schools,* 1996 MERC Lab Op 441, 447 (no exceptions) (a statement that reflects an option legally available to the Employer is not an unlawful threat); *City of Portage*, 1989 MERC Lab Op 569 (no exceptions) (letters to shop steward delineating the Employer's apparently correct interpretation of the Agreement were not threats); *Detroit Public Schools*, 1989 MERC Lab Op 569 (supervisor's memo not an unlawful threat because it merely informed the employee of what the supervisor believed the contract required him to do).

Although Charging Party also argues, in its cross exceptions, that Respondent's failure to allow Tarnow to transfer was an implicit threat, Charging Party's argument was not raised until it filed cross exceptions to the ALJ's decision. In accordance with our previous findings, we will not consider new issues that have not been raised before the Administrative Law Judge. *Pontiac Sch Dist*, 27 MPER 52 (2014); *City of Detroit*, 1993 MERC Lab Op 131, 132; *Teamsters Local 580,* 1991 MERC Labor Op 575, 576; *City of Detroit (Fire Department),* 1987 MERC Labor Op 417, 420; *SEMTA,* 1985 MERC Labor Op 316. Moreover, even if Charging Party's argument were timely raised, Respondent's failure to allow Tarnow an interview in the summer of 2017 was due to an oversight, after Respondent previously allowed her to interview for positions in 2015. Respondent's oversight did nothing to expressly or impliedly threaten to penalize Tarnow and there is nothing to indicate that Respondent had a discriminatory motive in doing so.

Consequently, neither Tarnow's assignment to kindergarten nor Respondent's failure to grant her an interview for a vacant position in 2017 constituted a threat directed at her exercise of her right to file and pursue a grievance in violation of § 10(1)(a) of PERA. The Commission, therefore, finds that the ALJ erred by concluding that Respondent violated § 10(1)(a) of PERA.[8]

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[7] As noted above, Tarnow applied for other kindergarten positions in 2015, and it does not appear that Tarnow herself considers assignment to kindergarten as a form of punishment.

[8] Although not necessary to resolve this dispute, we also find that the remedy recommended by the ALJ is an improper remedy.

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: JUL 22 2019

TRUE COPY

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

BIRMINGHAM PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C16 I-098
Docket No. 16-027440-MERC

-and-

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

APPEARANCES:

Lusk Albertson PLC, by Robert T. Schindler, for Respondent

McKnight, Canzano, Smith, Radtke & Brault, P.C., by Darcie R. Brault, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard on October 24 and October 30, 2017, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by both parties on December 29, 2017, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge:

The instant unfair labor practice charge was filed by the Birmingham Education Association, MEA/NEA, against the Birmingham Public Schools on September 27, 2016, and was amended on August 21, 2017. Charging Party represents a bargaining unit of Respondent's employees that includes teachers. The charge alleges that Respondent violated Section 10(1)(a) and (c) of PERA by discriminating against a teacher in Charging Party's bargaining unit, Robyn Tarnow, because she filed a grievance that resulted in an arbitration award in her favor. The acts alleged to be discriminatory are, first, in May 2016, reassigning Tarnow to teach kindergarten for the 2016-2017 school year, thus effectively nullifying the arbitration award. The previous year, Tarnow had been reassigned from second to third grade. Although this reassignment occurred outside the statute of limitations for the charge filed in September 2016, Charging Party asserts

that the May 2016 reassignment continued the discriminatory pattern begun in May 2015. Second, in May 2017, again assigning Tarnow to teach kindergarten despite her stated preferences and her more than twenty-year history of teaching second grade. Third, in May 2016, issuing a year-end evaluation that, although rating Tarnow as "effective" overall, rated her lower than any of the other fifty-five teachers at her elementary school. Charging Party asserts that the May 2016 evaluation continued a pattern of unfair and discriminatory evaluations that began with the evaluation Tarnow received in May 2015. Fourth, on May 4, 2017, giving Tarnow an evaluation for the 2016-2017 school year that continued to subject her to undue scrutiny and unfair evaluation. Fifth, in the summer of 2016, refusing to allow Tarnow to transfer to a different school. Sixth, in the summer of 2017, disparately and discriminatory denying Tarnow an interview for a vacant position in another elementary school.

The charge also alleges that because the above actions had a chilling effect on Tarnow's exercise of her Section 9 right to file a grievance, they constituted independent violations of Section 10(1)(a) even if some of them were not "adverse employment actions," within the meaning of Section 10(1)(c) of PERA.

II. Respondent's Motion for Summary Disposition:

On October 28, 2016, before the charge was amended, Respondent filed a motion for summary dismissal asserting that the charge did not state a claim under Section 10(1)(c) of PERA because neither Tarnow's evaluations nor her reassignments constituted adverse employment actions. Respondent also argued that the Section 10(1)(c) allegations should be dismissed because Charging Party had alleged no facts that would support either a finding that the Respondent had anti-union animus or a finding that Charging Party's successful pursuit of Tarnow's grievance was a motivating cause of any of the acts alleged to constitute the unlawful discrimination. Respondent also asserted that the charge failed to state a claim of an independent violation of Section 10(1)(a) of PERA.

On July 27, 2017, I issued an interim order denying Respondent's motion. I concluded that Tarnow's less-than-totally favorable 2015-2106 evaluation constituted an adverse employment action for purposes of Section 10(1)(c) of PERA. I noted that because Respondent's layoff and recall policy gave effective teachers with higher final evaluation scores preference over effective teachers with lower final scores, Tarnow's evaluation score for the 2015-2016 school year had a concrete effect on her terms and conditions of employment. I concluded that Tarnow's reassignment to kindergarten did not constitute an adverse employment action. However, I held that, depending on the circumstances, Tarnow's reassignment might reasonably be viewed by her as a threat and might, therefore, constitute an independent violation of Section 10(1)(a). I concluded that this determination required an evidentiary hearing and that whether the facts supported a finding of anti-union animus or discriminatory motive were also determinations to be made on the basis of the record as a whole after an evidentiary hearing. I therefore denied Respondent's motion for summary disposition and scheduled an evidentiary hearing on both the Section 10(1)(c) and independent 10(1)(a) allegations.

On August 21, 2017, Charging Party amended its charge to allege that Respondent continued to discriminate against Tarnow by again issuing her a less-than-favorable year-end

evaluation on May 4, 2017, by reassigning her to teach kindergarten again for the 2017-2018 school year, and by denying her an interview for a vacant position at another school in the summer of 2017.

III. Findings of Fact:

A. Background

Tarnow taught second grade at Respondent's Pierce Elementary School continuously for over twenty years. During this period, Tarnow developed a curriculum delivery method for use in second grade, Kidwitness News (KWN), which used current events to teach a variety of different subjects and skills. One part of KWN of which Tarnow was particularly proud involved her second graders conducting interviews of various adults; over the years, Tarnow's students had the opportunity to interview several prominent persons. KWN was not part of Respondent's core curriculum, and Tarnow was the only teacher who used it. However, both Pierce's current principal, James Lalik, and its former principal, Paula Greene, praised KWN in Tarnow's written teaching evaluations. In 2000, Respondent's then-superintendent, John Hoeffler, nominated Tarnow for a national teaching award based on KWN. KWN also was the subject of a congratulatory resolution from Respondent's Board of Education and received mention in an article in the New York Times.

As part of KWN, each night a student in Tarnow's classroom was selected to take home what was called the "reporter's notebook." The student, with parental involvement, was to write about a current news event and share it with the class the next day. All students were allowed to participate in the discussion of the story, to share other current news stories of which they were aware, and to engage in spontaneous discussion of these stories. Tarnow did not provide ideas for the stories and did not screen the news stories before they were discussed in her classroom. These discussions appear to have been part of KWN from its inception and had not given rise to parent complaints. However, in April 2013, Lalik received a complaint from a parent regarding certain topics that had been discussed in Tarnow's classroom. These topics included the tragic shooting of small children at Sandy Hook Elementary School in December 2012, a death in an auto accident on a local freeway, and a grandmother who had shot her grandson in a nearby suburb. Lalik discussed the complaint with Tarnow but they failed to reach agreement on modifications to KWN. Lalik then directed Tarnow, in writing, to cease allowing spontaneous discussion of any topic students might choose to bring up during the KWN segment and instead to have students write down and submit to her any topic they wanted to discuss with the class. Lalik also told Tarnow to avoid inappropriate topics, including violence, death and sex.

Tarnow complied with the directive, although she complained to Lalik that his directive was having a negative impact on student participation. In her 2012-2013 year end evaluation, Lalik complemented Tarnow for changing her practice to make sure that "avoidable topics are not brought up in class." However, Charging Party also filed a grievance on Tarnow's behalf alleging that Lalik's directive violated the "academic freedom" clause in the parties' collective bargaining agreement. This grievance was still pending when Tarnow, at the end of the 2013-2014 school year, was assigned again to teach second grade for the 2014-2015 year.

Charging Party advanced the grievance to arbitration. On June 30, 2014, an arbitrator issued an award sustaining the grievance and instructing Respondent to "immediately discontinue its restrictions on what news topics can be presented and discussed in Grievant's second grade classroom and to discontinue its restrictions on how those topics can be raised in the classroom." In the award, the arbitrator criticized Lalik for issuing the directives without "any actual investigation of how such topics were handled in the classroom and without any concrete evidence that showed that such discussions had been or would be harmful to second grade students or would no longer be [approved] by the parents of her students."

B. Tarnow's Reassignments

As noted above, prior to the 2015-2016 school year, Tarnow had taught second grade for more than twenty years. In the 2014-2015 school year, Tarnow "team taught" with a group of other second grade teachers, i.e. each teacher taught a certain subject or subjects to all the second grade classes. In the 2014-2015 school year, Pierce also had "multiage" classrooms that combined students of different ages and levels, including classrooms that combined first and second graders. Tarnow had not taught in a multiage classroom.

The collective bargaining agreement between Respondent and Charging Party in effect during the 2014-2016 school year stated that before adopting a tentative master schedule for the following year, a principal was to communicate with teachers in his/her building "regarding specific courses to be taught, grade level, number of different courses, nonacademic assignments, changes in grade or subject assignment, building assignments, etc." It also stated that all teachers were to be notified of their assignments for the next year prior to the close of school in June, when feasible, and that changes in teacher assignments in the same building or department from year to year should be voluntary "to the extent possible." This language had been in the parties' agreements for many years and was carried over into the parties' next agreement covering the period 2015-2018.

Principal Lalik's practice was to send out an email to all Pierce teachers each January or February asking teachers their preferences for assignments for the following school year. Lalik then made assignments for the next year sometime in February. Pierce teachers were not told what their assignments would be until mid-May, when teachers in all Respondent's elementary schools received their assignments on the same day.

In January 2015, Lalik sent this email to Pierce teachers in all grades:

> As we plan to create grade level teams for the 2015-2016 school year we hope to have some insight from you. We continue to work towards creating teams of teachers that work well together in their grade level PLCs [Professional Learning Communities]. The following information will be helpful to us as we begin the discussion of teacher placement for next school year.
>
> Who are the 1 to 3 teachers whom you feel professionally you match/work well with?

Are you interested in teaching multiage? (We are always considering additional sections based on teacher and community interests.)

Are you interested in creating a continuous loop with a partner teacher?

Are there any other unique teaching formations or groupings that you would like us to consider for next year or in the future school years?

Is there anything else you would like us to consider?

"Looping," as referred to in Lalik's email, consists of the same teacher working with the same class of students for two years. That is, a teacher is assigned a class of students and the same teacher is assigned the same class the next year. After the second year, the students move on to the next grade with a different teacher, and the looping teacher has a new class of younger students. In January 2015, no teachers at Pierce were looping, at least in the early elementary grades.

After receiving a reminder from Lalik to respond to his email, Tarnow sent the following reply on February 13, 2015:

Hi, I like working with second graders. Our team works well together.

Lalik does not normally speak face-to-face with teachers about their assignment preferences unless teachers ask to speak to him. He also testified that he does not normally inform teachers before the May announcement date that their grade assignments are going to be changed, even if they have not expressed interest in teaching the grade to which he is assigning them.

In February 2015, Lalik knew that two second grade teachers were planning to retire at the end of the 2014-2015 year. Two other teachers, Tarnow and a teacher named Meador (first name not in the record) were teaching second grade. In addition, there were also at least two teachers teaching multi-age first/second grades. Lalik testified that two of the teachers teaching multi-age first/second grades, and a teacher currently teaching third grade, expressed interest in looping. It is not clear from the record whether any or all of these teachers approached Lalik to suggest looping or whether they merely responded affirmatively to his email asking if they were interested in the idea.

In any case, after receiving the responses to his January 2015 email, Lalik decided that, beginning with the 2015-2016 school year, all the first and second grade teachers would be paired up to loop. The three teachers who had expressed interest in looping, Meador, and a teacher currently teaching first grade were assigned to either first or second grade classrooms in 2015-2016, with the expectation that in 2016-2017 those assigned to first grade would "loop" to second grade in 2016-2017 and those assigned to second grade would "loop" to first grade. New teachers were hired to fill the other first and second grade vacancies for the 2015-2016 year with the understanding that they would also loop the following year.

As noted above, Tarnow did not say anything in her February 13, 2015, email about looping. There is no dispute that Lalik did not actually ask Tarnow directly, either in person or in a subsequent email, whether she wanted to or would be willing to loop. Lalik testified that he knew from prior conversations that Tarnow preferred to teach second grade and that she had no desire to teach other grades. He testified that back in 2005 or 2006, Tarnow was assigned to teach first grade but requested to be moved back to second grade. He also said that in the past when he asked teachers to rank their grade preferences, Tarnow wrote, "second grade, second grade, second grade." According to Lalik, because looping takes a considerable amount of work and coordination between teachers, it was important to him that all the teachers engaged in looping be enthusiastic about trying the concept and be willing to work as a team. He admitted that teachers would not actually loop to another grade until the 2016-2017 school year. However, Lalik testified that he wanted all second grades in 2015-2016 to be taught by teachers who had agreed to loop. Because all the first grade and second grade teachers would be involved in the looping experiment, and he believed that Tarnow was not interested in looping, he decided to move Tarnow to third grade for the 2015-2016 school year.

After she was informed of her reassignment to third grade, Tarnow spoke to Charging Party President Scott Warrow. Warrow then asked Dean Niforos, Respondent's assistant superintendent for human resources, why Tarnow's request to remain in second grade had not been honored. Warrow did not get a response to his inquiry. Insofar as the record discloses, Lalik never provided Tarnow or Charging Party with the explanation set out above.

As noted in the "Background" section above, the arbitrator's award directed Respondent to "discontinue its restrictions on what news topics can be presented and discussed in Grievant's second grade classroom and discontinue its restrictions on how those topics can be raised in the classroom." During the 2015-2016 school year, Tarnow used KWN in her third grade classroom and she was not required to screen or limit the topics raised in that classroom.

When Tarnow was asked in early 2016 her preference for assignments for the 2016-2017 school year, she said second or third grade. Lalik testified that there were problems "within the third grade team and the level of collaboration" during the 2015-2016 school year, and that, as a result, he wanted to move "a couple" of teachers from third grade to other grades. Lalik also testified that he had concerns about Tarnow's classroom management during the 2015-2016 school year. Based on these observations, he concluded that third grade was not a "good fit" for Tarnow.

Copies of all Tarnow's performance evaluations for the 2002-2003 school year through the present were admitted into the record. Prior to the 2011-2012 school year, Respondent gave its teachers written evaluations only once every three years; Tarnow's 2002-2003, 2005-2006, and 2008-2009 school years were included in the exhibits. Copies of Tarnow's 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, and 2016-2017 evaluations were also admitted.[1] For the first two evaluations, Paula Greene was the school principal and principal evaluator. Lalik was the principal evaluator for the 2008-2009, 2011-2012, 2012-2013, 2013-2014, and 2015-2016 evaluation. Lalik and Assistant Principal Julie LaBurn each evaluate half the staff each year, and LaBurn was the principal evaluator on Tarnow's 2014-2015 and 2016-2017 evaluations.

[1] Since 2011, Respondent has issued written evaluations to all its teachers every year.

The two evaluations prepared by Greene say nothing negative about Tarnow's classroom management, and Lalik's 2008-2009 evaluation of Tarnow does not mention her classroom management. However, in a November 25, 2008 observation of Tarnow's classroom, Lalik expressed concern about her students' classroom behavior and suggested that she get some help from the school counselor on that issue. His "goals" for Tarnow, as stated in the comments section of his next evaluation in 2011-2012 evaluation, included improved classroom management strategies. In addition, in a January 29, 2012, observation report on Tarnow's classroom, Lalik talked about the amount of time Tarnow's students spent off task, and suggested that Tarnow arrange to work with a "Conscious Discipline" consultant from the intermediate school district.

Lalik did not comment on Tarnow's classroom management in her 2012-2013 evaluation. However, when Lalik evaluated Tarnow again at the end of the 2013-2014 school year, Lalik referred to Tarnow's classroom management as "loose," and noted that students had been observed talking off topic during whole group sessions instead of listening to the teacher.

Assistant Principal LaBurn prepared Tarnow's evaluation for the 2014-2015 school year, the first school year after the arbitration award was issued and during which Tarnow was teaching second grade. LaBurn also criticized Tarnow's classroom management and, as discussed below, rated her "minimally effective" in this area. When Lalik prepared Tarnow's evaluation for the 2015-2016 school year, the year she taught third grade, he again rated her "minimally effective" in classroom management.

Lalik explained at the hearing that he felt that Tarnow's weaknesses in the area of classroom management were magnified when she taught third grade, because by third grade students tend not to be as deferential to authority as younger children and are thus more likely to take advantage of loose classroom rules. According to Lalik, he decided that Tarnow would do better with younger children. According to Lalik, he did not want to reassign Tarnow to first or second grade because the current first and second grade teachers had already made plans to loop for the 2016-2017 school year. Because Tarnow had an early childhood endorsement, and because Lalik had a kindergarten opening for the 2016-2017 school year, he decided to assign her there. Assistant Principal Julie LaBurn testified that she and Lalik discussed Tarnow's placement and that she told Lalik that she believed that Tarnow's skills lent themselves well to kindergarten.

Lalik admitted that in the spring of 2016, another third grade teacher came to him and specifically requested reassignment to kindergarten for the 2016-2017 school year. However, according to Lalik, he did not want to move that teacher because she was "the anchor" of the third grade team. According to Lalik, he moved several teachers in addition to Tarnow to grades that they did not want to teach in the spring of 2016. These teachers included a fifth grade teacher moved to third grade and first and fourth grade teachers both reassigned to fifth grade.

According to Tarnow, about a week before new assignments were announced in May 2016, Lalik came into Tarnow's classroom and asked her if she had thought about kindergarten. She said she hadn't, and told him that if she taught kindergarten, she could not teach KWN.

Tarnow testified that about a week later, Lalik and LaBurn came to her classroom together and told her that she would be teaching kindergarten the following year. Tarnow told Lalik again that she could not use KWN in kindergarten. Tarnow did not recall Lalik or LaBurn providing any explanation for this move. At some point, Lalik offered to let Tarnow teach KWN as an extracurricular assignment. Tarnow refused the offer. According to Tarnow, she had designed KWN to be integrated into the curriculum and it would not work as a stand-alone, once-per-week activity.

Tarnow contacted Charging Party President Warrow to tell him of her new assignment.[2] As he had the previous year, Warrow asked Niforos about Tarnow's involuntary assignment to kindergarten. Niforos told Warrow that he trusted Principal Lalik to make placement decisions. In a subsequent conversation, Warrow pointed out that Tarnow did not want to teach kindergarten because she would not be able to use KWN. Niforos told Warrow that he believed that Tarnow could use KWN to some extent. There is no evidence that Niforos or Lalik gave Warrow an explanation for Tarnow's move from third grade to kindergarten.

During the 2016-2017 school year, Tarnow taught a modified version of KWN in her kindergarten classroom. Part of KWN involves student-conducted interviews, and Tarnow's kindergarten students interviewed various people in the school district and in the community. However, absent from the program was any discussion of, or reporting on, current events. In early 2017, Tarnow indicated to Lalik that her preference was to teach second grade. However, Tarnow was again assigned to kindergarten for the 2017-2018 school year. During that year the number of kindergarten classes at Pierce was reduced and two other kindergarten teachers were reassigned to first grade.

C. Tarnow's Evaluations

As noted above, copies of Tarnow's performance evaluations for the following nine school years were admitted into the record: 2002-2003, 2005-2006, 2008-2009, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, and 2016-2017. Lalik was the principal evaluator for the 2008-2009 evaluation and all the following years except 2014-2015 and 2016-2017. In addition to her evaluations, the record here includes written "reaction statements" that Tarnow submitted in response to some of these evaluations.

Respondent's evaluation form changed its format several times during this period. In 2002-2003, teachers were rated "acceptable," "improvement needed," "not acceptable," or "not observed" on eleven factors and also received an overall performance rating of "acceptable," "improvement needed," or "not acceptable." By the 2011-2012 evaluation, the ratings had become "acceptable/effective," "improvement needed/minimally effective," and "not acceptable/ineffective." In the 2013-2014 evaluation, the ratings became "highly effective," "effective," "minimally effective;" and "ineffective." However, the parties agreed that no teacher would be given a "highly effective rating" that year.

[2] The fifth grade teacher at Pierce who Lalik reassigned to third grade also complained to Warrow about her assignment.

The following year, 2014-2015, Respondent for the first time began using numeric scores in evaluating its teachers. On the 2014-2015 form, teachers were assigned numeric "raw" scores between zero and four in five categories. Two of these categories were based on student assessment data and three were based on the observations of the evaluators. Teachers were to be rated "highly effective," "effective," 'minimally effective," or "not effective" in each category based on their numeric raw score in that category. The raw scores were also converted into weighted component scores, and the total of the weighted scores was the teacher's final evaluation score. Teachers with final scores from 3.5 to 4.0 were rated "highly effective" overall, those with scores from 2.5 to 3.49 were "effective," those with scores from 1.5 to 2.49 were "minimally effective," and "ineffective" teachers were those with scores of less than 1.5.

A detailed rubric, the 5D+ evaluation rubric, was prepared for administrators to help them determine which rating was appropriate. For example, the "classroom environment and culture" category was broken down into seven different areas, and the rubric included statements describing what was "unsatisfactory," "basic," "proficient," and "distinguished," for each area. For the area "use of learning time" the rubric described "basic" as follows:

> Teacher or students occasionally disrupt or interrupt learning activities, which result in some loss of learning time. Some transitions are disorganized and result in loss of instructional time.

"Proficient" was described this way:

> Learning time is mostly maximized in service of learning. Transitions are teacher-dependent and maximize instructional time.

A new observation form was prepared to use with the rubric. During observations, the evaluator typed his or her observations into a computer and recorded the time and date of each observation, and a code, if applicable, keyed to the 5D+ rubric. For example, during an October 17, 2014, observation of Tarnow's classroom, LaBurn made twenty-two separate observations, positive and negative, coded to specific areas of "classroom environment and culture." The 2015-2016 and 2016-2017 evaluation forms continued the same system, although the number of separate rating categories was expanded from five to seven and then eight.

On all evaluations before the 2014-2015 evaluation, Lalik gave Tarnow the highest possible rating on all individual factors and overall. Lalik's 2008-2009 evaluation states briefly, under "goals," that Tarnow should participate in more common planning and work more with her team on new initiatives. His "goals" for Tarnow, as stated in the comments section of the 2011-2012 evaluation included both classroom management strategies and participating in Professional Learning Committees (PLCs) with other second grade teachers.

When Lalik evaluated Tarnow again at the end of the 2013-2014 school year, Tarnow's grievance was pending but the arbitration award had not yet been issued. In this evaluation, Lalik referred to Tarnow's classroom management as "loose," and noted that students had been observed talking off topic during whole group sessions instead of listening to the teacher. In his 2013-2014 evaluation, he stated that Tarnow was not currently meeting in a PLC with the other

second grade teachers and said that he would like to see her "move toward being a regular participant in the second grade team."

On the issue of PLCs, Lalik testified that some of the other second grade teachers, including Barbara Sansone, had told him, in conversations about what they were doing, that "[Tarnow] was doing different things than they were doing and wasn't meeting with them."[3] In an affidavit submitted after the hearing, Sansone states that she never "advised or insinuated" to Lalik that Tarnow's "teaching activities were different than the other teachers in any sense that could be understood as a failure to collaborate." She also states that she never complained about Tarnow or criticized her to Lalik.

The charge alleges that Tarnow's 2015-2016 and 2016-2017 evaluations constituted unlawful retaliation for Tarnow's filing of the academic freedom grievance. Although the 2014-2015 evaluation was outside the statute of limitations, Charging Party also points to that evaluation as establishing a pattern of retaliatory treatment. LaBurn was the principal evaluator for the 2014-2015 evaluation, which was the first evaluation Tarnow received after the arbitration award was issued. LaBurn gave Tarnow a "minimally effective," rating in the category of "classroom environment and culture," and devoted the entire "area of focus for continued growth" comment section to Tarnow's classroom organization. LaBurn stated that the arrangement of Tarnow's classroom and the accessibility of materials were areas that "must be addressed." In the 2014-2015 evaluation, LaBurn rated Tarnow as "effective" in both "student engagement" and "purpose," and "highly effective" in both categories involving her student assessment data. Tarnow's final weighted overall score was 3, which gave her an overall rating of "effective."

During the hearing, LaBurn said this about Tarnow's classroom, both in 2014-2015 and 2016-2017:

> [T]here were materials all over the place . . . so the students didn't know ... where stuff belonged... if I go into other classrooms they have more routines and structures for where you put materials and the overall appearance of the classroom is neater with student supplies. And I really feel this impacts the flow of your day. It takes up a lot of your time as a classroom teacher and instructor because you're looking for stuff. It makes an overall kind of feeling for kids of this kind of chaotic ... environment.

As discussed above, Tarnow was reassigned to teach third grade for the 2015-2016 school year. Lalik was Tarnow's principal evaluator for her 2015-2016 evaluation. The 2015-2016 evaluation added another new observational category, "professional collaboration and communication." Lalik rated Tarnow as "minimally effective" in both "professional

[3] At the close of Lalik's testimony on the second day of hearing, Charging Party requested permission to submit a statement from Sansone to rebut Lalik's claim that she had told him that Tarnow was not participating in their PLC. I informed Charging Party that I would allow her to submit Sansone's affidavit, but that if Respondent then objected, the hearing might have to be reopened. Charging Party attached Sansone's affidavit to its post-hearing brief, but Respondent did not object to its admission of Sansone's affidavit. The affidavit, therefore is part of the record in this case.

collaboration and communication" and "classroom environment and culture." She was again rated "effective" in both "student engagement" and "purpose," and "highly effective" in the three categories involving student assessment data. Her final weighted overall score was 2.95, which again gave her an overall rating of "effective."

Assistant Principal LaBurn was the principal evaluator for Tarnow's 2016-2017 evaluation. That year Tarnow was assigned to teach kindergarten. The 2016-2017 evaluation form added another observational category, "area of focus." Tarnow was rated "highly effective," in this category. She was again rated "minimally effective" in "classroom environment and culture," and "effective" in the other observational categories including "professional collaboration and communication." Her rating in the three student assessment data categories was "highly effective." Her final weighted overall score was 3.1, which again gave her an overall rating of "effective." In the comment section, LaBurn noted that since Tarnow was new to the kindergarten team, relationships had not yet developed that were truly collaborative. She also noted that "classroom management has been an area of needed improvement consistently over the years." LaBurn wrote, "Your response to misbehavior produces uneven results," and "Consistency in routines and organization in classroom space impacts productivity and behaviors."

Although Tarnow received an overall rating of "effective" in both the 2015-2016 and 2016-2017 evaluations, her final weighted evaluation scores for these years meant that she was the lowest rated teacher at Pierce. A chart of the evaluation scores and ratings of teachers at Pierce Elementary for the 2016-2017 school year was admitted into the record. Of these teachers, fifty-one had an overall rating of "highly effective," and four, including Tarnow, had an overall rating of "effective." No teachers had overall ratings of either "ineffective" or "minimally effective." The three teachers, other than Tarnow, who received overall ratings of "effective" had final weighted overall scores of 3.40; the cutoff number for "highly effective" was 3.5. Tarnow's final weighted overall score for that year was 3.1.

Respondent's written "Administrative Guidelines for Evaluation Process" policy describes how final evaluation scores are to be used by Respondent in selecting teachers for layoff in the event of a reduction in force. The policy reads as follows:

Layoff and Recall

Layoff and recall procedures shall adhere to the following outline:

1. Certification/Qualification

2. Evaluation rating, with final score being determinative

3. When final score is tied (equal) the following shall be considered.

    a. Attendance

    b. Discipline

b. Holistic review

4. Seniority, when teachers remain tied after holistic review.

Under this policy, when there is a reduction in the number of positions in a particular building, the teacher with the lowest final score in that building, after certifications and qualifications are considered, is the first to be laid off. That is, an "effective" teacher with a low final score is to be laid off before an "effective" teacher with a higher final score with certifications in the same areas. However, that teacher can "bump" a teacher with a lower final score, if there is one, in another building. That is, if there had been a reduction in the number of teachers at Pierce in 2016-2017 or 2017-2018, and there were other teachers in the school qualified to fill the remaining positions, Tarnow would have been the first to be selected for lay off. However, under the policy, Tarnow could then have "bumped" a lower rated teacher at another elementary or middle school building if there was such a teacher; the record did not indicate whether there were similarly qualified elementary or middle school teachers at other buildings during those years with lower scores. The record indicates that no Pierce Elementary School teacher had been laid off in the twelve school years preceding the hearing, and that over the past few years Respondent has consistently hired new elementary school teachers to fill vacancies that occur from teachers retiring or leaving for other reasons.

D. Tarnow's Attempts to Transfer

After receiving her 2014-2015 evaluation, Tarnow began searching for vacant teaching positions in other Respondent elementary schools. Using the normal transfer application process, Tarnow applied for vacant first grade and kindergarten positions at another Respondent school, Bingham Farms Elementary, and a vacant kindergarten position at a third school, Greenfield Elementary. Tarnow explained that even though she could not teach KNW in kindergarten, she felt that it would be better to move to another building since she felt she was "no longer respected at Pierce." It is Respondent's policy to interview all internal applicants for vacant positions, but internal applicants are not automatically selected over outside applicants. Tarnow was interviewed by the principals of Bingham and Greenfield but not selected for any of the three positions.

Charging Party President Warrow explained that an elementary vacancy in the school district typically draws several internal applicants seeking transfer and also outside applicants. He testified that although a teacher's overall final evaluation score is not determinative of whether he or she will be selected for a vacancy, a principal may consider it in choosing among applicants. No evidence was entered as to how many applicants there were for the three vacancies for which Tarnow applied, and there was no indication in the record whether Tarnow's 2014-2015 evaluation and/or the academic freedom grievance was a factor in her failure to be selected to fill these vacancies.

In June 2017, Tarnow saw that there were vacant second grade and first grade positions for the upcoming school year at Bingham Farms Elementary. Complying with Respondent's policy for teachers seeking to transfer to an open position, Tarnow sent an email to Niforos

expressing her interest in both positions, especially the second grade position. However, Niforos did not send Tarnow's application to the Bingham Farms principal until after the positions had been filled, a fact that came to light after Warrow inquired on Tarnow's behalf. Niforos testified that his failure to transmit Tarnow's application was merely an oversight.

The parties stipulated that for the 2017-2018 school year, Respondent hired two new teachers to teach first grade at Bingham Farms Elementary, and two new teachers to teach second grade there. In addition, James Hobley, a teacher at another Respondent elementary school, transferred to Bingham Farms to teach third grade. Another teacher also transferred to Bingham Farms to teach fifth grade.

IV. Discussion and Conclusions of Law:

A. Tarnow's Evaluations and Reassignments as Adverse Employment Actions

In its motion for summary disposition, Respondent argued that the Section 10(1)(c) allegations should be summarily dismissed because Section 10(1)(c) requires that there be an "adverse employment action," and neither Tarnow's 2015-2016 evaluation nor her assignment to teach kindergarten for the 2016-2017 school year constituted an adverse employment action. The discussion and conclusions of law below were set out in my July 2, 2017, interim order denying Respondent's motion for summary disposition. I note that although Respondent's post-hearing brief repeats these arguments, Respondent did not argue in either its motion or its brief that Respondent's failure or refusal to allow Tarnow to transfer to another elementary school was not an adverse employment action.

Section 10(1)(c) of PERA makes it unlawful for a public employer to "discriminate with regard to hire, terms, or other conditions of employment" to encourage or discourage union membership." In setting out the elements necessary to establish a violation of Section 10(1)(c), the Commission has sometimes included the requirement that there have been an adverse employment action. See e.g., *Grand Valley State Univ,* 23 MPER 70 (2010). However, it has not always included this a necessary element of a Section 10(1)(c) violation. See, e.g., *Macomb Co,* 30 MPER 12 (2016). In any case, the Commission has not, as far as I can determine, engaged in any extensive discussion of what might constitute an adverse employment action under Section 10(1)(c).

However, in *Taylor Sch Dist and Taylor Federation of Teachers, AFT Local 1085 v Nancy Rhatigan and Rebecca Metz,* 381 Mich App 617 (2016), the Court explicated upon the meaning of the term "adverse employment action" in the context of Section 10(1)(c) of PERA. It quoted from *Pena v Ingham Co Rd Comm,* 255 Mich App 299, 311–312 (2003) as follows:

> In *Wilcoxon v Minnesota Mining & Mfg. Co,* 235 Mich App 347, 364, 597 NW 2d 250 (1999), we defined an adverse employment action as an employment decision that is "materially adverse in that it is more than [a] 'mere inconvenience or an alteration of job responsibilities'" and that "there must be some objective basis for demonstrating that the change is adverse because a 'plaintiff's subjective

impressions as to the desirability of one position over another' [are] not controlling.'"

Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as "a termination in employment, a demotion evidenced by a decrease in wages or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."

The *Taylor* Court also cited *Chen v Wayne State Univ,* 284 Mich App 172, 201 (2009), for the proposition that what constitutes an adverse employment action is to be determined on a case by case basis, and noted that the determination will vary according to the specific circumstances of the case. It agreed with the Commission that, in the case before it, an agreement that required the charging parties to pay an agency fee for a period of ten years constituted an adverse employment action for purposes of Section 10(1)(c).

1. Evaluations as Adverse Employment Actions

As Respondent points out, in *Wayne State Univ,* 28 MER 17 (2014), the Commission held that charging party's "less than satisfactory" rating on a written job evaluation did not, by itself, amount to an adverse employment action under Section 10(1)(c). The job evaluation form used by the employer in that case rated employees in various categories, and overall, on a five-step scale ranging from "unsatisfactory" to "outstanding." The charging party had always before received performance ratings ranging from "fully satisfactory" to "outstanding." However, on the evaluation in question the charging party was rated "less than satisfactory" in four categories and "fully satisfactory" in the other five, resulting in an overall rating of "less than satisfactory." The ALJ in that case discussed how the federal courts had defined adverse employment action in the employment law area and held that the charging party's evaluation did not meet the federal court's definition of an adverse employment action. In upholding the ALJ's holding, the Commission merely noted that the charging party was not demoted, disciplined, or reduced in pay, had not suffered a material change in her job duties, and had "offered no evidence to support her claim that the evaluation had repercussions under the collective bargaining agreement for promotional opportunities and for wage (step) increases."

Under MCL 38.93, if Tarnow had been rated minimally effective overall on her 2015-2016 evaluation, Respondent would have been required to provide her with an individualized development plan. However, since her final score placed her within the middle range of the effective category, Tarnow's evaluation did not have statutory consequences. However, Respondent's layoff and recall policy clearly gives "effective" elementary teachers with higher final scores preference over those in the same building with lower scores. Therefore, a less than effective rating in any category on a year-end evaluation, by lowering the teacher's final score, increases the risk that the teacher will lose his or her job in a reduction in force in the following school year. Respondent asserts that in this case the risk is minimal since Respondent has not laid off teachers in many years and does not expect to have to do so in the immediate future. In fact, Respondent continues to hire new elementary school teachers on a regular basis. However, although Respondent has been fortunate enough not to have to lay off teachers in recent years,

the fact is that under Respondent's policies a lower final score has repercussions for job security, even if the risk is small. I find that, unlike the charging party in *Wayne State,* Tarnow suffered tangible job consequences, and not merely injured feelings, as a direct result of her less-than-totally- favorable 2015-2016 and 2016-2017 evaluations. I conclude, therefore, that these evaluations constituted adverse employment actions under Section 10(1)(c) of PERA.

2. Job Reassignments and School Transfers

The Commission has found job reassignments to constitute unlawful discrimination although, as far as I can determine, without specifically holding that they constituted adverse employment actions. For example, in *Wayne Co,* 21 MPER 58 (2008), the Commission affirmed the ALJ's finding that the employer discriminated against a union steward for his protected activities by actions that included a series of reassignments to less desirable job duties. The record indicated, however, that these job assignments, although within the same job classification, were generally recognized by employees as less desirable. See also *Detroit Bd of Ed,* 1997 MERC Lab Op 516 (reassignment of teacher from a classroom position to a position as "relief teacher," requiring her to visit twenty-one classrooms in the course of a week, found to constitute unlawful discrimination.)

In this case, Charging Party does not assert that third grade is generally considered by teachers in Tarnow's school as less desirable than second grade, or that kindergarten is recognized as less desirable than third. Rather, Tarnow's objection to the kindergarten assignment is personal to her, in that it prevents her from using KWN in the way that she wants to use it. I find that Tarnow's reassignment to kindergarten did not meet the definition of an adverse employment action, as defined by the Court of Appeals, for purposes of Section 10(1)(c). I conclude, therefore, that Charging Party's allegation that this reassignment violated Section 10(1)(c) of PERA should be dismissed.

As noted above, Respondent did not specifically argue that Tarnow did not suffer an adverse employment action when she was unable to transfer to another elementary school for the 2015-2016 or 2016-2017 school year. However, I find that Respondent's failure or refusal to allow Tarnow to transfer does not meet the definition of an adverse employment action under Section 10(1)(c). There is no evidence on this record that teaching at Pierce Elementary is generally considered less desirable than teaching at another Respondent elementary school. Like her reasons for objecting to her reassignment to kindergarten, Tarnow's reasons for wanting to transfer to a different elementary school were personal to her. I conclude, therefore, that Charging Party's allegation that Respondent's failure or refusal to allow Tarnow to transfer violated Section 10(a)(c) of PERA should be dismissed.

B. Tarnow's Reassignment to Kindergarten
And the Refusal of Respondent to Allow her to Transfer to Another School as Independent Violations of Section 10(1)(a)

Section 10(1)(a) of PERA does not require that there have been an adverse employment action. An employer violates Section 10(1)(a) if its conduct "interfere[s] with, restrain[s], or coerce[s] public employees in the exercise of their rights guaranteed in Section 9." A violation

of Section 10(1)(a) does not depend on either the employer's motive for its action or the employee's subjective reaction to it, but whether the action "may reasonably be said to tend to interfere with the free exercise of protected rights." *City of Inkster,* 26 MPER 5 (2012); *City of Greenville*, 2001 MERC Lab Op 55, 58. In determining whether a reasonable employee would be coerced, the Commission looks at both the content of the employer's statements or conduct and the context in which the conduct occurred. *City of St Clair Shores,* 17 MPER 76 (2004).

Many of the cases finding violations of Section 10(1)(a), but not 10(1)(c), involve verbal threats to take action against employees because of their activities protected by Section 9. In those cases, there is no Section 10(1)(c) violation because no adverse action has yet occurred. The Commission has also found independent violations of Section 10(10(a) in cases where there has been no adverse employment action but the employer, without a legitimate business reason, has directed employees to cease or avoid engaging in protected activity. For example, in *City of Detroit (Fire Dept)*, 1982 MERC Lab Op 1220, the employer was held to have violated Section 10(1)(a) when it prohibited fire fighters from wearing their uniforms while engaging in lobbying against a City charter amendment which affected their working conditions. See also *City of Detroit,* 19 MPER 15 (2006) (employer violated Section 10(1)(a) by demanding that a police officer shut down a web site that offered a forum for officers to express concerns about work place issues); *City of Lowell,* 28 MPER 62 (2015); (employer violated Section 10(1)(a) by directing employees not to speak at a City Council meetings about a pay dispute between the employer and their union); *Wayne Co,* 22 MPER 48 (2009); (employer violated Section 10(1)(a) by instructing employee not to have any further contact with a union, as such a prohibition was inherently destructive of his Section 9 rights). As Charging Party points out, the National Labor Relations Board (NLRB) and Courts have also found independent violations of Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 USC 150 et seq, Section 10(1)(a)'s counterpart, based on employer conduct. For example, in *Ceridian Corp v NLRB,* 435 F3d 352 (CA DC, 2006), the Court affirmed the NLRB's conclusion that an employer's insistence that employee members of the union's bargaining team use their banked paid time off to participate in bargaining, coupled with its refusal to schedule negotiation sessions outside of normal working hours, violated Section 8(a)(1) of the NLRA.

Charging Party argues that Tarnow's reassignment to kindergarten violated Section 10(1)(a) because its *de facto* nullification of the arbitration award was inherently destructive of Tarnow's Section 9 right to enforce her contractual rights through the grievance procedure. It also argues that the reassignment, coupled with her post-award negative performance evaluations and previous involuntary transfer, constituted an implicit threat of retaliation for using the grievance process.

In order to sustain an allegation of an independent violation of Section 10(1)(a), a charging party must demonstrate that the complained of actions have "objectively" interfered with employees' exercise of their protected rights. *Huron Valley Schs,* 26 MPER 16 (2012). That is, the test is whether the employer's actions, under the circumstances of the case, would have been viewed by a reasonable employee as coercive. For reasons discussed below, I conclude that Respondent' reassignment of Tarnow to teach kindergarten in May 2016 met that test.

The first factor supporting that conclusion, I find, is the timing of the reassignment. There can be no dispute that with the addition of Section 15(3)(j) to PERA in 2011, teacher placement,

including grade assignments, became a prohibited subject of bargaining between public school employers and the unions representing their teachers. However, Tarnow had taught second grade, the grade she clearly preferred, continuously for more than twenty years until her reassignment to third grade for the 2015-2016 school year. The timing of the reassignment was suspicious as it was announced in the spring immediately following the issuance of the arbitration award in June 2014. Moreover, the following year Tarnow was reassigned again to another grade, kindergarten, which she clearly did not want to teach.

The second factor is the relationship between Tarnow's reassignment to kindergarten and Tarnow's successful grievance. That grievance arose from Lalik's discomfort with allowing certain types of news stories to be discussed in a second grade classroom. Part of KWN, as Tarnow had created it, was spontaneous discussion of news topics selected by the students themselves, and Tarnow saw this as an essential element of a program of which she was very proud. It was apparent to Tarnow, and probably to Lalik as well, that that this element of KWN was not appropriate for kindergarteners even if other elements, such student-conducted interviews, could be adapted for their age group. Tarnow was the only Pierce teacher to use KWN. Thus, reassigning Tarnow to teach kindergarten resolved the concern Lalik had attempted to address by the directive that the arbitrator had set aside. [4]

The arbitrator, of course, did not order Respondent to keep Tarnow in second grade if there was reason, other than keeping Tarnow from teaching KWN as she had in the past, to reassign her. As set out in the facts above, at the hearing Lalik testified to his concerns over Tarnow's classroom management and explained why he believed that, due to these concerns, Tarnow would be "a better fit" for kindergarten than for third grade. He also explained why he did not want to put Tarnow back in second grade or assign her to first grade. Insofar as the record discloses, however, Respondent never explained to either Tarnow or Charging Party Lalik's reasons for reassigning Tarnow to kindergarten until the instant unfair labor practice charge was filed. Lalik testified, without contradiction, that he does not normally speak to teachers face-to-face about their assignment preferences or inform them in advance of the May announcement date that he intends to change their assignments. However, Tarnow's reassignment to a classroom where she could not exercise the right she had sought to protect by filing a grievance was not a routine reassignment. Tarnow's response to her evaluations indicates that she did not agree with Lalik and LaBurn about her classroom management, and she might not have accepted Lalik's explanations for his decision to reassign her to kindergarten. However, I find that given the timing of the reassignment, its relationship to the arbitration award, and the fact that Tarnow was not provided with an alternate explanation, it was reasonable for her to interpret her reassignment to kindergarten as a threat directed at her exercise of her right to file and pursue a grievance. In context, this action clearly communicated to Tarnow Respondent's ability to circumvent the arbitrator's directive and the ultimate futility of attempting to enforce her rights under the collective bargaining agreement. It also, I find, carried an implicit threat of further retaliation if she attempted to do so again in the future. I conclude, therefore, that Tarnow's reassignment to teach kindergarten for the 2015-2016 school year, an assignment that continued in the 2016-2017 school year, violated Section 10(1)(a) of PERA.

[4] The appropriate way for Respondent to address these concerns, of course, was to renegotiate the language of the academic freedom provision of the collective bargaining agreement.

However, I do not reach the same conclusion with respect to Respondent's failure or refusal to permit Tarnow to transfer to another school. According to the record, the selection of teachers to fill vacancies at Respondent's schools are essentially made by the principals of the schools in which the vacancies arise. Moreover, there are many applicants, both internal and external, for vacancies in Respondent's elementary schools. According to the record, Tarnow has no evidence that the principals of Greenfield and Bingham elementary based their decision to select other teachers to fill their 2016-2017 vacancies on the outcome of her academic freedom grievance, or that they even knew of the grievance/award. I find that a reasonable teacher in Tarnow's position could not have interpreted these principals' failure to select her to fill their positions as an implicit threat to her employment status. I also find this true of Niforos' apparently inadvertent failure to send to the principal involved Tarnow's application for another open position in the summer of 2017.

C. Tarnow's 2015-2016 and 2016-2017 Evaluations as Violations of Section 10(1)(c)

The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Taylor Sch Dist v. Rhatigan*, 318 Mich App 617, 636 (2016). The test is similar to that used under federal law to establish a violation of the National Labor Relations Act. To establish a claim under both § 8(a)(1) and (3) of the NLRA, it must be established that "(i) an individual was engaged in a protected activity, (ii) the employer was aware of the protected activity, and (iii) ... the employee's protected activity motivated the adverse treatment." *Taylor,* at 636-37, citing *Kentucky Gen, Inc. v NLRB,* 177 F3d 430, 435 (CA 6, 1999). 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.

Inferences of animus and discriminatory motive may be drawn from direct evidence or circumstantial evidence, including the pretextual nature of the reasons offered for the alleged discriminatory actions. *Interurban Transit Partnership,* 31 PER 10 (2017); *Detroit Public Schs*, 30 MPER 2 (2016); *Wayne Co*, 21 MPER 58 (2008). See also *Volair Contractors, Inc*, 341 NLRB 673 (2004); *Tubular Corp of America*, 337 NLRB 99 (2001); *Fluor Daniel, Inc*, 304 NLRB 970 (1991).

In this case, there is no dispute that Tarnow's pursuit of the academic freedom grievance was activity protected by PERA, or that Respondent knew of her protected activity. Lalik admitted that he was disappointed by the result of Tarnow's arbitration and believed that Respondent should have won. However, as Respondent points out, there is no direct evidence that Lalik, LaBurn, or any other Respondent representative had anti-union animus or was hostile toward Tarnow's filing of the grievance or her participation in the grievance/arbitration process.

Charging Party points to timing as evidence of a discriminatory motive behind the decisions of Lalik and LaBurn to rate Tarnow "minimally effective" in the area of classroom management for the 2014-2015, 2015-2016 and 2016-2017 school years, and "minimally effective" in the "professional collaboration and communication" area in 2015-2016. It is true that the 2014-2015 evaluation was the first year-end evaluation Tarnow received after the arbitration award issued in June 2014. It was also the first evaluation Tarnow had ever been given in which she received a rating lower than the best possible in any category. However, it is not true, as Charging Party asserts, that "none of the issues [Respondent] claimed to have with Tarnow preexisted her pursuit of the academic freedom grievance." As set out in the findings of fact, Lalik expressed concern about Tarnow's classroom management, and suggested that she seek help, in a November 2008 observation of her classroom. He also mentioned greater collaboration with her colleagues as a "goal for continued growth" in her year-end evaluation for that school year. Lalik included both classroom management and more cooperation with her team as "goals" for Tarnow the next time he evaluated her, in 2011-2012. Although Lalik did not mention these issues in Tarnow's 2012-2013 evaluation, his criticism of her classroom management and her collaboration with her colleagues was clearly not new with her 2015-2106 evaluation, but rather was a continuation of criticisms he had made in evaluations before the academic freedom grievance was filed.

As noted above, the 2014-2015 evaluation, in which LaBurn rated Tarnow as "minimally effective" in the category of classroom management, was the first evaluation Tarnow received after the arbitration award and also the first time she received a rating lower than the best possible in any category. However, several changes to the evaluation process were implemented during this school year. One was the switch to a numeric rating system, in which teachers are given numeric raw scores in each category which are then converted into weighted component scores; the total of the component scores was the teacher's final overall score. The second change was the adoption of the 5D+ rubric. With the 5D+ rubric, the evaluator reads a series of statements covering each teaching area and decides which statement applies to determine whether the teacher should be rated "unsatisfactory," "basic," "proficient," or "distinguished," in that area. Third, Respondent adopted a new system for recording notes during classroom observations. Under this system, evaluators use computers to made simultaneous notes of small things which they observe within the classroom as the observation progresses. They also code them to a particular teaching area within the 5D+ rubric. Respondent asserts that these changes "led to harsher evaluation of teachers, including, but not limited to Tarnow." I note that in 2016-2017 fifty-one of Pierce's fifty-five teachers were rated "highly effective" overall. However, whether or not any Pierce teachers other than Tarnow were evaluated more harshly after the new system was implemented, I find that these changes in the system were significant enough to explain the escalation of criticism over Tarnow's classroom management from concern to a lower rating.

The fact that Tarnow's minimally effective ratings in the areas of classroom management and professional collaboration made her the lowest rated teacher at Pierce for two consecutive years after the arbitration award was issued is concerning. As noted above, however, Respondent only began using its numeric evaluation system in the 2014-2015 school year and thus there is no way to determine how Tarnow might have ranked under this system in the school years before she filed the academic grievance. Tarnow's low rating compared to other Pierce teachers is not,

I conclude, sufficient to establish that her evaluations were discriminatorily motivated in the absence of other evidence of anti-union animus.

However, Charging Party also argues that the reason Respondent gives for Tarnow's minimally effective rating in "classroom environment and culture," that it reflects her poor classroom management, is pretextual. It points out that Respondent did not implement a corrective plan of action to address Tarnow's allegedly poor classroom management or offer her professional development. It also points to the fact that in these same evaluations Tarnow was consistently rated "highly effective" in the categories based on student assessment data. These inconsistencies, it asserts, indicate that Tarnow's classroom management skills were not the real reason for her "minimally effective" rating but were mere pretext. The record reflects, however, that in both November 2008 and January 2012 Lalik suggested in observation reports that Tarnow seek help with her classroom management from a school counselor or a "Conscious Discipline" instructor. As I noted above, it appears that Tarnow may have disagreed with Lalik and LaBurn about how children in an ideal classroom should behave and how tidy and organized an ideal classroom should be. However, their disagreements preceded the filing of Tarnow's academic freedom grievance. I conclude that the evidence does not support a conclusion that Lalik's and LaBurn's reasons for rating Tarnow "minimally effective" in the area of classroom management were pretextual. I also conclude that Charging Party did not meet its burden of demonstrating that hostility towards Tarnow's academic freedom grievance was a motivating cause of the minimally effective ratings she received as part of her 2015-2016 and 2016-2017 end-of-year evaluations. I recommend, therefore, that the Commission dismiss Charging Party's allegation that Respondent violated Section 10(1) and (c) of PERA by rating Tarnow as "minimally effective" on portions of her 2015-2016 and 2016-2017 year-end evaluations.

V. Remedy

In accord with the findings of fact and conclusions of law set forth above, I conclude that Tarnow's reassignment to kindergarten constituted unlawful coercion and interference with her exercise of her Section 9 rights in violation of Section 10(1)(a) of PERA. To address the coercive effect of this assignment, I recommend that the Commission, in addition to issuing a cease-and-desist order and requiring posting of a notice, order Respondent to assign Tarnow, if she so requests, to a second grade classroom at Pierce when a second grade vacancy become available. If the second and first grade teachers at Pierce continue to loop between first and second grade at the time the order is issued, Respondent should be directed to offer Tarnow an assignment to either first or second grade whenever an assignment in either grade becomes available. I conclude that the other allegations contained in the charge should be dismissed. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

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

1. Cease and desist from:

   a. Interfering with, restraining or coercing employees in the exercise of their rights to organize together, to form, join, or assist in a labor organization, or to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection.

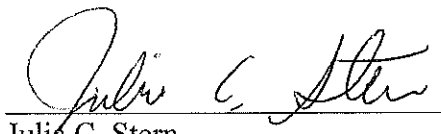
   b. Communicating, by word or action, our intent to circumvent a binding arbitration award issued pursuant to the terms of our collective bargaining agreement with the Birmingham Education Association, MEA/NEA.

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

   a. Assign Robyn Tarnow, if she so requests, to a second grade classroom at Pierce Elementary School when a second grade vacancy becomes available. If the second and first grade teachers at Pierce Elementary School continue to loop between first and second grade at the time the order is issued, Tarnow shall be offered an assignment to either first or second grade whenever an assignment in either grade becomes available.

   b. Post the attached notice to employees at all places on Respondent's premises where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 27, 2018

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **BIRMINGHAM PUBLIC SCHOOLS** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights to organize together, to form, join, or assist in a labor organization, or to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection as guaranteed by Section 9 of PERA.

WE WILL NOT communicate, by word or action, our intent to circumvent a binding arbitration award issued pursuant to the terms of our collective bargaining agreement with the Birmingham Education Association, MEA/NEA.

WE WILL assign Robyn Tarnow, if she so requests, to a second grade classroom at Pierce Elementary School when a second grade vacancy becomes available. If the second and first grade teachers at Pierce Elementary School, continue to loop between first and second grade at the time the order is issued, Tarnow shall be offered an assignment to either first or second grade whenever an assignment in either grade becomes available.

BIRMINGHAM PUBLIC SCHOOLS

By: _____

Title: _____

Date: _____

Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202.
Telephone: (313) 456-3510.
Case Nos. C16 I-098