

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

In the Matter of:

WATERFORD SCHOOL DISTRICT,
Public Employer-Respondent,

MERC Case No. C17 F-054

-and-

WATERFORD EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION III, MEA/NEA,
Labor Organization-Charging Party.

APPEARANCES:

Clark Hill PLC, by Marshall W. Grate, for Respondent

White Schneider PC, by Erin M. Hopper, for Charging Party

DECISION AND ORDER

On June 28, 2018, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order¹ in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 24, 2018

¹ MAHS Hearing Docket No. 17-012503

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

WATERFORD SCHOOL DISTRICT,
Respondent-Public Employer,

-and-

Case No. C17 F-054
Docket No. 17-012503-MERC

WATERFORD EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION III, MEA/NEA,
Charging Party-Labor Organization.

APPEARANCES:

Clark Hill PLC, by Marshall W. Grate, for Respondent

White Schneider PC, by Erin M. Hopper, for Charging Party

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE**

This case arises from an unfair labor practice charge filed on June 13, 2017, by the Waterford Educational Support Personnel Association III, MEA/NEA (Charging Party, WESPA or “the Union”) against the Waterford School District (Respondent or “the school district”). The charge alleges that the school district violated Sections 10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) and (c), by reducing the hours of work of Toni Weddle, an assistant cook and current union representative, in retaliation for her having engaged in various protected concerted activities, including the filing of a grievance. Pursuant to Sections 10 and 16 of the Act, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission). The matter was heard in Detroit, Michigan, on September 26, 2017, and October 24, 2017. Based upon the post-hearing briefs filed by the parties on December 11, 2017, I make the following findings of fact and conclusions of law.

Findings of Fact:

I. Background

Charging Party represents a bargaining unit consisting of approximately 151 nonsupervisory support employees of the Waterford School District, including transportation, food service, custodial, maintenance, skilled trade, truck drivers, and warehouse employees. The instant dispute arises out of the Respondent’s Food and Nutrition Services Department which operates 18 kitchens throughout the school district. The kitchens at Mott High School and Mason

Middle School are designated by the Employer as “base kitchens.” Each base kitchen has a cook manager and two assistant cooks. The assistant cooks assigned to the base kitchen at Mason currently prepare food which is served to students enrolled at the middle school, as well as meals which are transported to “satellite” kitchens within the following schools: Cooley, Grayson, KMS, Schoolcraft, Village and Stepanski. Assistant cooks at Mott High School prepare meals for Mott students, as well as for those students attending classes at Beaumont, Donelson Hills, Haviland, Houghton, Knudsen, Riverdale and Durant.

The kitchens at Mason and Mott function in essentially the same manner and the staff is trained to be interchangeable. The assistant cooks assigned to the base kitchens prepare complex meals that require equipment which is not available in the elementary schools and other satellite locations within the district. This includes foods like turkey and gravy, chicken noodle soup, and sloppy joes. They also prepare salads and other side dishes. The food prepared in the Mason and Mott kitchens is then served immediately or frozen and transported by truck to the satellite kitchens where it is reheated and served to students. Lunches account for the vast majority of the meals produced by the base kitchens, although the assistant cooks at Mott and Mason do prepare some hot breakfast items as well. There are also some lunch meals served within the district which do not originate in the base kitchens at all. For example, the satellite kitchens receive some direct deliveries of food and the school district offers Little Caesar’s Pizza to the student body each Friday.

The number of meals produced by the assistant cooks at Mason and Mott fluctuates, both on a daily basis and from year to year. Although declining enrollment does not necessarily correlate with lower food production levels, the record indicates that the number of students attending public school in Waterford has fallen from 10,836 students during the 2012-2013 school year to 9,289 in 2016-2017. There are a number of factors which affect how many meals must be produced by the base kitchens on a daily basis. These include student field trips, sick children, weather conditions, power outages and half-days. The complexity of each day’s menu also impacts how much work must be performed by the assistant cooks during each school day.

In addition to preparing meals for their own school and for the satellite kitchens, assistant cooks assigned to the base kitchen at Mason Middle School are also responsible for preparing food for the Great Start Readiness Program (GSRP) which provides federally funded meals to students attending the Village school. The GSRP program operates Monday through Wednesday of each week. GSRP meals typically consist of chicken nuggets, corn dogs and other meals which are less complex to prepare than the standard meals produced by the base kitchens. Because these federally funded meals are served family style, the Mason kitchen produces the same amount of GSRP food each day. During the 2015-2016 school year, Mason produced 102 GSRP meals per day. That number decreased in 2016-2017. The Mott kitchen does not produce any meals for the GSRP program.

In addition to the cook manager and two assistant cooks, there are six other employees in each of the base kitchens assigned to help prepare meals and work the food lines. Upon arrival in the morning, the kitchen staff splits up, with half of the employees preparing breakfast while the remaining staff members make sandwiches and other meals. When those tasks are completed, the staff begins preparing for lunch. Mason Middle School has six lunch periods while Mott High School has four, the last of which ends 20-30 minutes earlier than the final lunch period of the day at Mason. While lunch is served, the assistant cooks remain in the kitchen and continue to

prepare food so that there are always fresh meals available to the students. Although there is some lag time between lunch periods, the assistant cooks generally use that time to lay out the food which is to be served during the next period, work on menus and begin preparing meals for the following day. When all of the lunch periods have ended, the assistant cooks inventory whatever food is left over and complete the daily production sheets which track in detail the type and amount of food that was prepared and served. Examples of these production sheets were introduced into the record by Charging Party as Exhibits 15 and 16. The assistant cooks are skilled at anticipating how many meals will be necessary and they typically do not produce much more food than is actually served. The assistant cooks at the Mason kitchen also have to complete paperwork specific to the GSRP program.

II. Assistant Cook Hours Generally

Appendix D of the collective bargaining agreement between Charging Party and the school district contains various provisions governing the terms and conditions of employment for bargaining unit members assigned to the Food & Nutrition Services Department.² Appendix D, Section J, of the contract provides, “All seniority employees except Elementary Food Service Assistants will have a work schedule of not less than three (3) hours for a work day. Elementary Food Service Assistants will have a work schedule of not less than 15 hours per work week.”

The parties stipulated that none of the assistant cooks are guaranteed any specific number of hours per day beyond the three hours set forth in Appendix D, Section J. The assistant cook job posting, which was drafted by the Director of Nutrition and Purchasing Services, describes the position as working an average of 8 hours per day. Historically, the assistant cooks at Mason begin their work at 6 a.m. and have been expected to remain on the job until 2:00 p.m., or until their work is done, whichever is earlier. It is the cook manager’s responsibility to determine when the day’s work has been completed. As noted above, the amount of work required of the assistant cooks varies by day depending on the number of students in attendance and the complexity of the meals served. The school district keeps track of the hours worked by the assistant cooks through the use of time clocks.

III. Union Representation and Release Time

Article 8 of the collective bargaining agreement pertains to Union officers and their representation of bargaining unit members. Article 8, Section A provides that there shall be one Union representative for each of the following divisions: custodial, maintenance, food and nutrition services and transportation employees. According to the contract, the Union representative “shall be a regular employee working in the division they represent.” Article 8, Section B, contains language governing Union release time. The provision states:

- b. The Association Representatives, Vice President or President, during their working hours, without loss of time or pay, may investigate and present grievances to the employer. The immediate supervisor will grant permission as

² The parties introduced two contracts into evidence in this matter. Exhibit 1 covered the period March 23, 2013, to June 30, 2016, while the successor contract was admitted as Exhibit 2. With respect to all provisions relevant to this dispute, the two agreements are substantively identical.

soon as possible, but in any event, within their shift, to leave their work for that purpose.

The privilege of Association Representatives, the Vice President, or the President leaving their work during working hours without loss of time or pay, is subject to the understanding that the time will be devoted to the proper handling of grievance[s] and will not be abused; the Representatives, Vice President and President will perform their regularly assigned work at all times, except when it is necessary to leave their work to handle grievances. Any alleged abuse by either party will be a proper subject for a special conference.

Becky Lesh is a bus driver with the school district and has been Charging Party's president since 2015. Lesh testified that in most instances, it is management which initiates the Union release time process described in Article 8. According to Lesh, an administrator typically notifies the WESPA representative's immediate supervisor that he or she wishes to meet with that representative on a Union matter. Lesh testified that under such circumstances the representative does not need to seek prior permission to leave work to engage in Union business because the request itself came from management. In addition, Lesh testified that WESPA representatives need not seek permission when the Union business does not actually require them to leave the job site. For example, Lesh testified that WESPA representatives are free to discuss Union business with administrators or other members by phone without seeking the prior approval of their supervisor or the human resources department.

Doreen Simonds, Director of Nutrition and Food Services, oversees all of the kitchens, the cook managers and assistant cooks. At hearing, Simonds provided a somewhat different description than Lesh of the process by which a representative is allowed to leave the work site for Union business. Simonds testified that the department mandates that a Union representative obtain permission to use release time from his or her immediate supervisor and requires the representative to explain to that supervisor why the release time is needed. According to Simonds, Union representatives must also seek approval for release time from the school district's human resources department and are required to fill out the appropriate leave request form before leaving the worksite. Simonds testified that the only exception to this rule is in the event of an emergency, in which case a supervisor may bypass the paperwork requirement and grant permission without obtaining the approval of human resources. With respect to a WESPA representative taking phone calls or conducting other Union business from the job site, Simonds testified that the contract requires that representatives perform their regularly assigned work at all times, but that the department "has always been kind of lenient" and that representatives can handle Union business during work time "if there's a good need" and as long as the privilege is not being abused. However, Simonds explained that she would prefer that employees come to management with problems rather than going straight to the Union representative:

[W]hat's in the contract is that they're not supposed to do any work. But it's a privilege. So because it says it's a privilege, that's to our discretion. And I've always wanted to give them as much privilege. We like to have an open door in food services. We want our employees to be able to share concerns. And our goals is to – I worked in the kitchen for a long time. I know how difficult things can be. And we want to have everybody working together. And we deal with a lot in food service that people don't understand. So we've always tried to be an open door.

And allow people if they're complaining about something, and they feel like it's a need to go to the union we try to encourage people to come to us first. Like I was saying earlier, if they have questions about payroll or holiday pay, they really shouldn't interrupt the kitchen, that could go to our secretary. So it's trying to determine who is the best person to work on this situation. And sometimes it is the union rep.

IV. Toni Weddle

Weddle has been the WESPA representative for the Food and Nutrition Services Department since September of 2015. In that capacity, she helps out her fellow bargaining unit members with any problems they may be having with the administration and assists them in interpreting the terms of the collective bargaining agreement. Weddle has been employed by the school district for almost 23 years, the first 15 of which were as a cook in Respondent's senior center. During her tenure with the district, Weddle has never received any discipline or been called in for an investigatory interview, nor has she received a negative evaluation. In September of 2016, Weddle became an assistant cook in the base kitchen at Mason Middle School. At the time she was hired in that position, Weddle met with Simonds and Joy Turney-Hartman, Administrative Assistant of Food Services. Turney-Hartman is the direct supervisor of the cook managers. During their conversation, Simonds explained to Weddle what her work as an assistant cook would entail. Simonds explicitly told Weddle that the hours of the position would vary from day to day and that the assistant cooks are not guaranteed any specific number of hours per day.

Prior to the time that Weddle began working as an assistant cook at Mason Middle School, the school district submitted a complaint to Charging Party alleging that Weddle was abusing her Union release time privileges. On January 25, 2016, Human Resources Director Janet McLeod sent an email to Marcy Feleegy, the MEA UniServ Director who was assigned to the Waterford School District at the time. In the email, McLeod asserted that Weddle was "conducting business during work hours (phone calls, emails, etc.)" and that she was using her title as Food Service Representative in the signature line of her school district email account. Feleegy responded to McLeod that same day. In the email, Feleegy promised to speak to Lesh and determine how best to approach Weddle. With respect to the specific allegations set forth by the school district, Feleegy wrote, "The . . . contract does have language that she can investigate potential grievances during work – I pasted it below – but I recognize that [Weddle] needs to do this on a limited basis AND with the supervisor's approval." The record does not indicate that there were any further complaints about Weddle throughout the remainder of the 2015-2016 school year.

Victoria Harris is the cook manager at Mason Middle School and in that capacity is Weddle's direct supervisor. Harris is also a member of the bargaining unit represented by Charging Party. Towards the beginning of the 2016-2017 school year, Harris became concerned that Weddle and the other assistant cook at the base kitchen were wasting time on the job. Although Harris described Weddle as "a very good worker," she testified that there were times when the assistant cooks were in the back room talking instead of doing their paperwork. Harris also described incidents in which the assistant cooks took too long on certain tasks, such as wiping down counters and sinks. Harris testified that as cook manager, these were issues that she could not ignore. Harris was unsure of how to deal with these concerns, so she contacted

Simonds, who instructed her to continue monitoring the cooks' productivity. Thereafter, Harris documented her observations and reported back to Simonds or Turney-Hartman, her direct supervisor, by phone or email.

Turney-Hartman testified that she first became aware of concerns regarding the productivity of the assistant cooks at Mason in the fall of 2016. At hearing, Turney-Hartman testified in detail about her interactions with Harris. According to Turney-Hartman, Harris complained to her on November 1, 2016, that Weddle was attempting to stretch her hours by asking for extra work. Harris called Turney-Hartman and raised the same concern on November 15, 2016. On December 1, 2016, Harris called Turney-Hartman and told her that the assistant cooks were spending an unnecessary amount of time on tasks and that Weddle was sitting at the break table and chatting about things that were not related to work. On December 13, 2016, Harris called Turney-Hartman and indicated that she was frustrated because Weddle was spending time on the phone with other members of the bargaining unit. When asked at hearing whether Weddle's work as a Union representative impacted the kitchen, Harris responded:

Not a whole lot. But I mean [Weddle] would get phone calls. She would have to look up things once in a while in the contract. A couple times she asked me if it was okay and I said it was okay, it didn't take a lot of time. I never had a union person in my kitchen or working with them even when I wasn't a manager, so I don't know what the rules were as far as what she was able to do when she was punched in on the clock.

Turney-Hartman instructed Harris to convey her concerns to Simonds. Thereafter, Harris contacted Simonds multiple times seeking information on whether Weddle was allowed to do Union work in the kitchen. Harris testified, "[I] was getting impatient because I wanted an answer. Because I didn't know what to tell Toni." At some point, Simonds finally conveyed to Harris that Weddle was not supposed to be doing "union work on company time" but that if there was an emergency which required her to do so, Weddle must obtain permission from Simonds herself.

Harris did not have an independent recollection of having lodged any further complaints about Weddle's union activity. However, she admitted at the hearing that her memory of these events was affected by the passage of time. Harris testified, "I mean, it's you know, so long ago. And things that happened are going [in] one and out the other and I don't focus on them." In contrast, Simonds recalled specifically that Harris called her several times during the month of November and once in December to report that Weddle was still conducting Union business in the kitchen and that other staff members were complaining that her conduct was interfering with the work. On or about December 21, 2016, Simonds told Harris that she would have a decision on how to handle the issue when the staff returned from the holiday break. Simonds testified that, at the time, she and McLeod were in the process of deciding whether to address the matter directly with Weddle or to request a special conference under Article 8 of the agreement. Ultimately, Simonds and McLeod decided on the former. At hearing, Simonds explained:

[M]e and Janet had spoken before the break. We were debating whether we were going to do a special conference per the contract, and sit down and have a talk with the union. And both of us, myself especially, I just thought it would be better if I spoke directly to Toni. We've always have a good relationship. So I didn't

want this to become a real big thing, I just wanted us to talk it out. And I thought we could just resolve it that way.

V. Average Hour Grievance

In November of 2016, Weddle contacted WESPA President Lesh and indicated that she did not believe that the school district had properly computed her “average hour month.” The “average hour month” is a calculation described in Appendix D, Section N of the contract which is based on the amount of time each employee works during a four-week period in October and is used to determine vacation time, sick leave and other benefits for an entire calendar year. Weddle’s average hour month calculation for 2016-2017 was 7.9 hours per day, which she believed was too low by one-tenth of an hour. On or about November 29, 2016, Charging Party filed a grievance asserting that Weddle’s average hour month had not been computed properly and requesting that the school district make Weddle whole and correct the current practice. This was the first grievance filed by Charging Party arising out of the Food and Nutrition Services Department in several years and the only grievance involving Weddle up to that point during her tenure as a Union representative. Simonds first learned about the grievance on November 30, 2016, when she was informed by a secretary that the Union was requesting information to determine whether Weddle’s average hour month had been calculated correctly.

A first step grievance meeting was held on December 15, 2016. In attendance were Simonds, McLeod, Lesh, Weddle and an MEA UniServ Director. Lesh testified that during the meeting, Simonds seemed “extremely upset” that the Union had filed the grievance questioning the department’s calculations. Lesh described Simonds as acting “very agitated and angry” and testified that her response to questions was “very matter of fact.” Lesh testified that this behavior was vastly different than Simonds’ normal attitude, which she described as “very bubbly and friendly and warm.” Weddle similarly described Simonds as being visibly angry, agitated and red-faced during the December 15th meeting. In contrast, McLeod testified that Simonds was acting “normal” during the grievance meeting and that she did not remember her acting agitated or angry. When asked at the hearing to describe her own demeanor at the meeting, Simonds testified, “I believe it was fine. The meeting was pretty cut and dry, we were just talking about the way that we calculated the average hours.” The grievance meeting concluded with management promising to provide the Union with written documentation supporting its calculations. A follow-up meeting on the grievance was scheduled for January 5, 2017. Ultimately, the Union withdrew the grievance after reviewing the documents provided by the district and determining that there had been no error in the calculation of Weddle’s hours for that four-week period.

VI. Employee Break Times

During the course of investigating the average hour month grievance, Simonds discovered that employees in the base kitchen at Mason Middle School were not taking breaks in accordance with the terms of the collective bargaining agreement. Article 14 of the contract states that bargaining unit members are allowed one 15-minute relief period after each four-hour block of work. Under the agreement, employees are only entitled to a second 15-minute break if they work eight hours in a day. During a phone call with Harris on December 16, 2016, Simonds was informed that all kitchen staff members at Mason, including Harris herself, were taking a 30-minute break each morning. According to both Harris and Weddle, this practice had been

going on at Mason for several years. At hearing, Simonds explained that by taking a longer break than allowed under the contract, the staff was unnecessarily prolonging their hours and impacting the productivity of the kitchen because the morning is the busiest time of day and the assistant cooks and other staff members could have used the extra 15 minutes to get more of their work done during those early hours in the day. At hearing, Lesh conceded that the 30-minute breaks constituted a violation of the contract. It is undisputed that the assistant cooks at Mott High School were abiding by the terms of the contract.

On December 19, 2016, Simonds sent an email message to Weddle with the subject "Meeting on Breaks." Simonds testified that it was her usual practice to direct such a message to the Union representative whenever she was requesting a meeting. Copies of the message were also sent to Lesh, Longuski, McLeod and Turney-Hartman. The email stated:

During the average hours investigation, we discovered that Mason has reverted to taking 30 minute morning breaks (relief periods) instead of the allowed 15 minutes.

In 2014/15 school year, we held a meeting at Mason regarding contract language for "relief periods" aka breaks. In attendance was the Mason food service staff, union representation along with Marcy Felegy, Joy and me. We shared contract language and explained that daily breaks could not be combined. As we shared, if staff takes a 30 minute break instead of a 15 minute break in the first four hours worked, they will most likely not need to be at the job site for 8 hours and will not be entitled to a second relief period.

The email quoted the relevant contract language and concluded, "We need to meet and discuss the practice of 'combining breaks' and how we will proceed to correct this."

Simonds held a meeting with employees to discuss the break time issue on December 20, 2016, following which the kitchen staff immediately stopped the practice of taking a 30-minute break every morning. Harris acknowledged that the change gave the kitchen staff "a little bit of extra time in their day or at the end of their day because that's an extra 15 minutes that [they] were sitting when we shouldn't have been."

VII. January 2017 Incidents and Aftermath

The school district's holiday break commenced for employees of the Food and Nutrition Services Department on December 22, 2016. Work resumed on January 3, 2017. The witnesses gave somewhat conflicting accounts of what occurred on that date. Weddle testified that she and the other assistant cook, Louise Seaton, were in the back room of the Mason kitchen finishing up their paperwork at around 1:30 p.m. when Harris approached and told them they had to punch out for the day. Weddle testified that when she asked for a reason, Harris responded, "I don't know you'll have to call and ask Doreen." Weddle got up and called Simonds, who confirmed that the two assistant cooks were to leave for the day. Weddle testified that when she asked Simonds why she had to leave before her work was finished, Simonds merely told her to finish her duties the following day. Weddle replied, "Well, that doesn't seem right." According to Weddle, Simonds responded by stating, "I've also been receiving complaints that you're doing union work on company time. So therefore, if you can do union work on company time, you definitely don't need to work eight hours and your hours will be at seven and a half." Weddle then hung up the phone and left the building.

Harris testified that January 3, 2017, was an easy menu day and that she felt the assistant cooks had ample opportunity to finish their work. However, when she went into the back room, the assistant cooks told her that they were not finished and that they needed time to complete their production reports. Harris responded, "I feel that you had enough time. Either we finish it tomorrow or I'll finish it for you, you need to punch out." Weddle was upset by this conversation and Harris did not know what to do so she went into her office and tried to call Simonds but could not reach her. Instead, she sent an email to Simonds at approximately 1:40 p.m. which stated:

I told Toni and Louise that they had to leave at 1:30, it was 1:25 at that time. Toni was working on the production sheet, she sat down at about 1:15. She said why and I said that they had enough time to finish and I would finish it for them. She was mad and arguing with me that why should she leave when she still had work to do. She called you, no answer so she went back and sat down and is working on whatever. I am [finished] and would like to leave, so I am leaving her here. Ok, you are calling now.

Although Harris testified that it was her decision to send Weddle home at 1:30 p.m., she admitted that Simonds had told her earlier that she, Harris, had the authority to order the assistant cooks to leave. When asked when Simonds advised her that she had that authority, Harris could not recall whether the conversation occurred prior to the holiday break or earlier in the day on January 3, 2016.

Simonds testified that she did not know that Harris was going to send the assistant cooks home at 1:30 p.m. that day, but she admitted to having had an earlier discussion with Harris regarding the scope of her authority as cook manager. Simonds testified that she had informed Harris that she could order the assistant cooks to go home when the work was done and that ending the day by 1:30 p.m. was a goal, but not a mandate. Recalling that conversation at hearing, Simonds testified that she said to Harris, "Vicky, you have rights as a manager, you're the one that determines what the hours are in the kitchen." Simonds asserts that she first became

aware of the incident between Harris and Weddle when she received a call from the Mason kitchen on the afternoon of January 3rd. As Simonds was in the process of responding to the call, she received the email from Harris which is quoted above. Simonds then spoke to Weddle by phone and told her that she needed to abide by her manager's directive to leave the kitchen when the work was done. Simonds admitted to raising the issue of Weddle's union activity during this conversation, but asserted that she did so merely as an aside. Simonds testified that she told Weddle, "[S]ince I have you on the phone, I just want to mention that you know, some of the girls are concerned with some of the union activity going on that's causing some discourse in the kitchen. There is a lot of interruptions, phones, ringing. . . And it was really disruptive to the production in the kitchen." Simonds testified that she informed Weddle that they need to have a discussion about the issue to determine "when [such activity] would be acceptable and when it wouldn't be." According to Simonds, Weddle agreed and indicated that she would leave for the day.

After Weddle went to her car, she contacted Lesh who, in turn, called McLeod. Lesh told McLeod that Simonds had cut Weddle's hours because of her activities as Union representative. McLeod promised Lesh that she would look into the situation and told her "that it would be handled because, you know, that's not something they would discriminate against." McLeod then contacted Simonds, who once again explained that the assistant cooks have no guaranteed hours and that they are to leave when their work was finished. Simonds also told McLeod about her recent discovery that the staff at Mason was taking a 30-minute break each morning in violation of the contract. Simonds informed McLeod that if the cooks took only the allotted 15-minute break each morning, they could get their work done earlier in the day. Simonds admitted to McLeod that she had made reference to Weddle's union activity during the phone call, but indicated that it was merely a "side comment." Based upon the conversation, McLeod was satisfied that Simonds had not reduced Weddle's hours because she was engaging in union business. Nevertheless, McLeod advised Simonds that it was best to "leave things the way they were" while the situation was investigated. Thereafter, McLeod called Lesh back and told her that Weddle would be allowed to finish her work and that they would discuss the matter further during the follow-up meeting on the average hour month grievance which, at that point, had not yet been formally withdrawn.

The parties met for the purpose of discussing the grievance on January 5, 2017. In attendance were Simonds and McLeod for the school district and Weddle, Lesh and interim UniServ Director Eduarda Crain for Charging Party. Lesh began the discussion by bringing up the allegation that Simonds had cut Weddle's hours because she was doing union work. Simonds once again admitted to having made reference to Weddle's work as WESPA representative, but explained that she was merely trying to let Weddle know that people were complaining that her actions were disruptive. When Crain asked for the names of the individuals who had lodged such complaints, Simonds and McLeod refused to provide them.³ Simonds told Weddle that she was sorry that she had misunderstood her comment. Lesh brought up the fact that the contract allows for Union representatives to conduct investigations and noted that some of the time Weddle had spent on the phone during work hours was attributable to the fact that Simonds herself had often called with questions about union matters. McLeod agreed that taking such calls should not reflect negatively on Weddle and explained that management was more concerned with Weddle

³ Simonds did provide the names of the employees who were allegedly making these complaints at the hearing.

taking calls from other unit members during work hours. The parties agreed that Weddle would send out an email to all employees of the Food and Nutrition Services Department instructing them to contact her during work only in the event of an emergency.

During the meeting, Simonds denied that Weddle's hours had been reduced as a result of Harris having instructed her to leave at 1:30 p.m. two days earlier. Rather, Simonds asserted that the assistant cooks at the Mason kitchen were taking more time than necessary to complete their work and that management wanted them to be more productive. In support of this contention, Simonds presented to the meeting participants copies of "Z" reports produced by the school district which showed the number of meals sold by each kitchen. The reports revealed that the base kitchen at Mott High School was able to sell more meals in less time than the kitchen at Mason. Based on these reports, Simonds indicated that she believed the assistant cooks at Mason did not need eight hours in which to complete their work. Weddle disputed the relevance of these reports, arguing that the number of meals sold is not an accurate representation of the work performed by the assistant cooks. In addition, Weddle pointed out that the reports failed to take into consideration the fact that Mason prepares meals for the GSRP program. According to Weddle, Simonds insisted that the reports were an accurate representation of the assistant cooks' productivity. When Crain indicated that the Union would file a grievance over the reduction in Weddle's hours, Simonds responded that this had nothing to do with Weddle and that the assistant cooks at Mason needed to "fit in more efficiently with what the rest of the district was doing." When Leah asked what Weddle was supposed to do if she had not completed her assigned tasks by 1:30 p.m., Simonds indicated that she should leave the work for the following day. No grievance was ever filed over the alleged reduction in Weddle's hours.

Simonds and Turney-Hartman had another meeting with Weddle on January 10, 2017. Simonds scheduled the meeting after Harris reported that there was a lot of unrest in the kitchen at Mason and that Weddle was not happy with her hours. At the meeting, Simonds and Turney-Hartman once again explained that it was management's conclusion that the base kitchen at Mott High School produced more food in less time than the Mason kitchen and that, therefore, the assistant cooks at Mason should be able to complete their work in fewer hours. Simonds testified that she told Weddle that it was management's expectation that the assistant cooks should be able to finish their work by 1:30 p.m. each day, but that this objective was an "ideal" and could vary somewhat, especially given that the other assistant cook at Mason, Louise Seaton, was in the process of retiring at the time. Simonds testified that she understood there would likely be an adjustment period with a new cook starting which could impact the kitchen's efficiency. In contrast, Lesh and Weddle testified that Weddle's hours had been formally "capped" at 7.5 hours.

After the meeting on January 10, 2017, Harris continued to report to management that there were issues in the Mason kitchen. On January 18, 2017, Harris informed Turney-Hartman that Weddle was sitting in the breakroom chatting with other employees. On January 19, 2017, Harris called Turney-Hartman and told her that she had informed Weddle that her work was done and that she should punch out by 1:30 p.m. Harris told Turney-Hartman that Weddle was very upset with this instruction. The following day, Harris reported to Turney-Hartman that Weddle was going around to other employees trying to find work and that she was spending time performing unnecessary tasks. Harris lodged similar complaints about Weddle on February 6, 2017, and February 13, 2017. Finally, on March 1, 2017, Harris sent an email to Turney-Hartman stating that Weddle "came into the office and said that what is so upsetting to her is that

I don't stick up for her." Harris testified that she believed time was still being wasted in the Mason kitchen and that monitoring Weddle's hours had become "very stressful." In response to these issues, Simonds met with Weddle on March 10, 2017, and informed her that she expected the assistant cooks at Mason to finish their work by 1:30 p.m. According to Simonds, that was the date that Weddle's end time formally changed. When asked to explain why the change was made at that time, Simonds testified:

[B]ecause on numerous occasions, Vicky was saying your work is down now, your work is done now, Toni kept arguing and she wouldn't go. So I finally went to Janet and said we have to do something because Vicky is asking for support. I support my cook manager here who is having a very difficult time with an employee.

VIII. Hours Worked by Assistant Cooks

At hearing, Respondent introduced into evidence Exhibit 8 which consists of charts showing the number of hours that Weddle and the other assistant cooks employed at Mason and Mott worked each day throughout the 2016-2017 school year. This data was derived from APEX, the school district's payroll program which compiles data from employees' time clock cards. Exhibit 8 establishes that there were 69 work days from September 7, 2016, the start of the school year, through December 21, 2016, the last day before the holiday break. Weddle worked a full eight hours 35 times during that period. For the remaining 34 days, Weddle's hours ranged from 2.8 to 7.9 hours per day. Based on my calculations, Weddle's average work hours from September 7, 2016, to December 21, 2016, was 7.7 hours per day, rounded to the nearest tenth of an hour. Her average hours during the month of December was 7.5 hours per day.

As noted, the first time that Weddle was directed by Harris to leave work at 1:30 p.m. was January 3, 2017, the day the assistant cooks returned from the holiday break. From that date, through March 10, 2017, the day that Simonds met with Weddle and specifically told her that she could not work past 1:30 p.m., Weddle worked an average of 7.5 hours per day pursuant to my calculations. During that 40-day period, Weddle worked a full eight hours four times and on two occasions she worked more than eight hours in a day. For the remaining days, Weddle's hours ranged from six to 7.9 hours a day. On 29 of those 40 days, Weddle worked more than 7.5 hours.

From March 13, 2017, through June 14, 2017, the last day of the 2016-2017 school year, there were 55 work days for the staff at the Mason Middle School base kitchen. Of those 55 days, there were 43 days during which Weddle worked exactly 7.5 hours. She worked more than 7.5 hours three times during that period. Weddle averaged 7.4 hours a day from March 13, 2017, through the end of the school year. Over the course of the entire 2016-2017 school year, Weddle worked an average of 7.5 hours per day.

At hearing, Weddle testified that some of the times listed on Exhibit 8 as eight-hour days may have been instances in which she worked as a substitute cook at the school district's senior center rather than at the Mason kitchen. However, Weddle could not state with any specificity exactly how many times she worked at the senior center during this period. In contrast, Simonds testified that based on her review of the school district's records prior to the hearing, there were two days during which Weddle worked at the senior center in December of 2016 and two days in

June of 2017. Simonds testified that she was “pretty sure” but could not swear to the fact that Weddle did not work at the senior center at all from February to April of 2017.

Louise Seaton was the other assistant cook at Mason Middle School from the beginning of the 2016-2017 school year through her retirement on January 12, 2017. During that period, she worked an average of 7.6 hours per day. Seaton was replaced by Amy McLean, who worked at the Mason kitchen from January 13, 2017 through April 28, 2017. Her average hours during that period was 7.5 hours per day.

The only assistant cook other than Weddle to work throughout the entire 2016-2017 school year in one of the base kitchens was Mary Seeterlin, who worked at Mott High School. According to Exhibit 8, Seeterlin averaged 7.3 hours per day during that school year.⁴ Seeterlin worked more than 7.5 hours 62 times in 2016-2017. Jill Heady was an assistant cook at Mott from September 19, 2016, through December 21, 2016. She worked more than 7.5 hours 3 times and averaged 6.6 hours per day during that period. Heady was replaced by Teresa Buccelato, who worked an average of 7.3 hours per day from January 3, 2017, to June 16, 2017. During that period, Buccelato worked more than 7.5 hours in a day 20 times.

IX. Base Kitchen Production Statistics

As noted, management witnesses testified that statistics maintained by the school district revealed that the kitchen at Mott High School was performing more efficiently than the kitchen at Mason Middle School. In support of this contention, Respondent introduced Exhibit 14 which is based on a calculation endorsed by the State of Michigan showing the average time spent by staff per meal sold. Data from the document was derived from Meal Magic, the district’s point of sale software system. Exhibit 14 indicates that Mason served 487,133 lunches over the course of the 2016-2017 school year which equates to 2,865 lunches per day. During that period, the kitchen staff averaged 60.9 labor hours per day, which means that the Mason kitchen averaged 47 lunches per labor hour. This figure includes meals served at Mason, Cooley, KMS, Schoolcraft, Village and Stepanksi. In contrast, the Mott Kitchen served 66,5248 lunches over the same period of time, or 3,913 lunches per day, at Mott, Beaumont, Donelson Hills, Houghton, Knudsen, Riverside and Durant. The staff at Mott averaged 59.6 labor hours per day which equates to 66 lunches served per labor hour. The report does not account for meals prepared by the base kitchens but not actually served.

Respondent Exhibits 17, 18 and 19 consist of graphs showing all “food items” prepared by the school district’s base kitchens for a portion of the 2015-2016 school year and all of 2016-2017. A food item is any item or component of a meal that must be prepared at one of the base kitchens. These exhibits were compiled based on the data from the production records prepared each day by the assistant cooks. From January of 2016 through April of 2017, the kitchen staff at

⁴ Exhibit 26 consists of Respondent’s own calculations of the hours worked by Weddle and Seeterlin in 2016-2017. The average hours listed on that exhibit differ slightly from my calculations which are derived from averaging together the numbers listed on Ex. 8, which, as noted, constitutes a day-to-day record of the hours worked by the assistant cooks. According to Exhibit 26, Weddle averaged 7.6 hours per day in 2016-2017 while Seeterlin worked an average of 7.1 hours during that period. This discrepancy has no impact on my conclusions in this matter.

Mason prepared a total of 262,034 food items for the middle school and seven satellite buildings. This figure includes food items prepared at Mason for the GSRP program. In contrast, Mott prepared 318,070 food items for the high school and eight satellite buildings, or 56,036 more food items than were prepared by Mason over the same time period. Included within this calculation are food items prepared by kitchen staff at both Mott and Mason for Webber, a building which was dropped as a satellite location following the 2015-2016 school year. From January through April of 2016, Webber received 24,440 food items from Mott and 2,120 from the kitchen at Mason Middle School.

Respondent Exhibits 20 and 21 are “Z” reports prepared by the school district for the purpose of obtaining reimbursement from the United States Department of Agriculture (USDA). Exhibit 20 documents the number of lunches prepared by each base kitchen for the 2015-2016 and 2016-2017 school years, while Exhibit 21 shows the number of breakfasts prepared by the kitchens during those same school years. Both exhibits include meals prepared at the Mason kitchen for the GSRP program. According to Exhibit 20, the Mott High School kitchen prepared 412,619 lunches in 2015-2016, while the kitchen at Mason Middle School prepared 319,574 during that school year. There were 381,107 lunches prepared by Mott in 2016-2017 compared to 277,083 lunches prepared in the Mason kitchen. With respect to breakfasts, the kitchen staff at Mott prepared 381,081 meals during the 2015-2016 school year and 357,677 meals in 2016-2017. In comparison, the staff at Mason prepared 286,015 breakfasts in 2015-2016 and 245,796 breakfasts in 2016-2017. In total, Mott produced 188,111 more meals than Mason in 2015-2016 and 215,905 more meals the following school year.

Positions of the Parties:

Charging Party asserts that the school district violated Sections 10(1)(a) and (c) of PERA by capping Weddle’s hours at 7.5 per day in retaliation for her having engaged in various protected concerted activities of which members of the administration, including Simonds, were aware. According to Charging Party, those protected activities included filing and defending a grievance over the computation of her average hour month and taking phone calls from Union members in her capacity as WESPA representative. Charging Party contends that animus toward Weddle’s protected concerted activity is proven by the fact that Simonds told Harris that Weddle was not allowed to conduct union business at work without the permission of management. According to Charging Party, this directive was contrary to Article 8 of the parties’ contract governing the conduct of Union representatives. In addition, Charging Party contends that anti-union animus is established by the hostile demeanor which Simonds displayed during the December 15, 2016, grievance meeting and by her admission at hearing that she encourages employees to come to her with union issues before contacting Charging Party. The Union characterizes the timing of the reduction of Weddle’s hours as suspicious, having occurred just after the average hour month grievance was filed on Weddle’s behalf. To that end, Charging Party notes that this was the first grievance arising out of the Food and Nutrition Services Department in several years. As further proof that Weddle’s protected activity was a motivating cause of the discriminatory action, Charging Party cites the fact that Simonds referred to complaints about Weddle’s conduct as Union representative on January 3, 2016, when Simonds directed Weddle to go home at 1:30 p.m.

Charging Party asserts that none of the justifications set forth by the school district in support of the reduction in Weddle’s hours are legitimate. Although Charging Party

acknowledges that Weddle and other employees violated the collective bargaining agreement by taking one 30-minute break each morning, the Union asserts that this practice had no impact on the productivity or efficiency of the Mason kitchen. In addition, the Union asserts that this purported justification for the reduction in Weddle's hours is undermined by the fact that it was not brought up by management at the January 5, 2017, meeting. Although there was considerable testimony regarding complaints allegedly made about Weddle having conducted Union business at work, Charging Party contends that her actions were authorized by Article 8 of the contract. The Union further argues that testimony regarding Weddle's alleged refusal to clock out was contradictory and unreliable. According to Charging Party, the school district's reference to production records to justify the reduction of Weddle's hours is without merit. While conceding that there have been days when the Mott kitchen produced more food than Mason, the Union asserts that the contrary is also true. Moreover, the Union argues that the production statistics relied upon by Respondent are not reliable because those documents fail to account for the fact that the Mason kitchen prepares food for the GSRP program and because the reports include Webber, despite the fact that neither Mott nor Mason prepared food for that building during the 2016-2017 school year. According to the Union, the "Z" reports are not an accurate reflection of work performed since they only account for meals sold. Finally, Charging Party asserts that the justification provided by the school district should be disregarded based upon the fact that witnesses gave conflicting accounts of when the "cap" on Weddle's hours was actually implemented.

Respondent first argues that there was no unlawful interference with Weddle's union activities because it has the right to restrict an employee's exercise of her PERA rights during work time. Although the contract allows Union representatives to conduct certain union business at work, the school district contends that this provision is inapplicable here because it extends only to the investigation of grievances and does not cover answering questions from other members. In any event, the district asserts that the union release time provision establishes a privilege, not a right, which Weddle abused. Respondent denies that the conversation between Weddle and Simonds on January 3, 2017, constituted evidence of a PERA violation. According to the school district, it was not unlawful for Simonds to mention to Weddle that they needed to have a talk about her union activity, as that was an issue which was disrupting work and possibly constituted a misuse of paid work hours. Respondent contends that the weight of the evidence clearly indicates that management was respectful of requests to take paid working hours to conduct union activities consistent with the provisions of the contract.

The school district further contends that Charging Party failed to establish that Weddle was a victim of unlawful discrimination. According to Respondent, there is no evidence in the record of anti-union animus or hostility toward employee's protected rights, nor is there any proof that Weddle's hours were actually reduced. It is undisputed that assistant cooks are not guaranteed eight hours of work per day; rather, their shifts are done when the work is completed. Although the Union contends that Weddle's hours were "capped" at 7.5 hours per day in early January, Respondent asserts there were many days that she worked more than that throughout the months which followed. In addition, the school district contends that Weddle's average daily hours remained substantially the same before and after the alleged change. Finally, Respondent asserts that even if Charging Party can establish a prima facie claim of discrimination, the school district articulated a legitimate, nondiscriminatory reason for its actions. According to Respondent, any incremental change in hours at Mason during the second half of the 2016-2017

school year was directly related to the district's operational needs to make the Mason kitchen more productive.

Discussion and Conclusions of Law:

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

Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. Analysis of whether an employer's action against employees violates Section 10(1)(c) of the Act is governed by the test first enunciated by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Line, Inc*, 251 NLRB 1083 (1980), enf'd 662 F2d 899 (CA 1, 1981) and approved by the United States Supreme Court in *NLRB v Transportation Management Corp*, 462 US 393 (1983). Under the *Wright Line* test, as adopted by the Commission in *MESPA v Evert Pub Sch*, 125 Mich App 71, 74 (1983), the charging party has the initial burden of establishing that union activity was a motivating factor in the adverse employment action by proving: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Huron Valley Sch, supra*; *Univ of Michigan*, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA, supra*. If it is found that the employer's actions are pretextual, the employer fails by definition to show that it would have taken the same action in the absence of the protected conduct and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp*, 255 NLRB 722 (1981), enf'd 705 F2d 799 (CA 6, 1982); *Metropolitan Transp Services*, 351 NLRB 657, 659 (2007); *NLRB v IBEW, Local 429*, 514 F3d 646 (2007). The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419.

In the instant case, there is no dispute that Weddle was engaged in protected concerted activity of which Respondent's management was aware. In addition to having been the subject of a grievance filed by Charging Party, Weddle has been the Union representative for the Food and Nutrition Services Department since late 2015. In that capacity, she provides assistance to other members of the bargaining unit and answers questions from administrators, including Simonds, the director of the department. Moreover, the record is replete with evidence that Weddle engaged in union activities during work hours, conduct which was the subject of complaints from Harris, her immediate supervisor, and other staff members at the Mason kitchen. Accordingly, I find that Charging Party satisfied the first two elements of a prima facie case of anti-union discrimination for purposes of PERA.

A charging party may meet the *Wright Line* burden with evidence short of direct proof of motivation. In other words, the employer's actual state of mind need not be established. See e.g. *Macomb Cty (Juvenile Justice Center)*, 28 MPER 4 (2014); *City of Royal Oak*, 22 MPER 67 (2009); *Stadium Mgmt Co*, 1977 MERC Lab Op 458; *St Lawrence Hosp*, 1971 MERC Lab Op 1173. Inferences of animus and discriminatory motive may be drawn from competent circumstantial evidence, including, but not limited to, the timing of the adverse employment action in relation to the protected activity, indications that the respondent gave false or pretextual reasons for its actions, and the commitment of other unfair labor practices by the employer during the same period of time. *Keego Harbor*, 28 MPER 42 (2014); *Inkster Housing & Redevelopment Auth*, 23 MPER 21 (2010) (no exceptions). See also *Volair Contractors, Inc*, 341 NLRB 673 (2004); *Tubular Corp of America*, 337 NLRB 99 (2001); *Shattuck Mining Corp v NLRB*, 362 Fd 466, 470 (CA 9, 1966). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. It is well established that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result of anti-union animus. As the Commission stated in *Southfield Pub Sch*, 22 MPER 26 (2009), “[a] temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation.” See also *Univ of Michigan*, 1990 MERC Lab Op 242, 249; *Plainwell Schools*, 1989 MERC Lab Op 464; *Traverse City Bd of Ed*, 1989 MERC Lab Op 556; *West v Gen Motors Corp*, 469 Mich 177, 186.

In the instant case, there is no direct proof that Simonds or any other administrator harbored anti-union animus or hostility. Charging Party contends that animus is established by the fact that Simonds told Harris that Weddle was not permitted to conduct union business during work hours without permission. The Union also cites the January 3, 2017, telephone conversation during which Simonds indicated that she had been receiving complaints about Weddle's union activities within the kitchen. Although the investigation of grievances is activity protected by Section 9 of PERA, the Commission has consistently held that paid time off to engage in union business is a privilege to be negotiated and not a right guaranteed by Section 9. See *Belding Area Schs*, 20 MPER 105 (2007) (no exceptions); *City of Detroit, Dept of Transportation*, 1990 MERC Lab Op 254, 256; *City of Birmingham*, 1974 MERC Lab Op 642 (no exceptions). Absent evidence of a discriminatory motive, an employer may legitimately monitor the use of its time for union business, for example, by requiring union officers to seek permission before leaving work to perform union business. *Berrien Co (Riverwood Center)*, 1993 MERC Lab Op 681 (no exceptions); *City of Grand Rapids*, 1980 MERC Lab Op 18 (no exceptions). Here, Charging Party and the school district negotiated a provision in their collective bargaining agreement governing the use of Union release time. Article 8 describes release time as a “privilege” and indicates that a Union representative must seek permission from his or her immediate supervisor to engage in such activity. Although Lesh testified that representatives are allowed to take calls on union matters at work, Article 8, by its terms, applies only to the investigation, handling and presentation of grievances by a Union representative. In fact, the contract specifically states that Union representatives “will perform their regularly assigned work at all times, except when it is necessary to leave their work to handle grievances.”

It is always concerning when a supervisor or director speaks critically of an employee's union activity. The statements relied upon by the Union in this matter as proof of union animus, however, cannot be viewed in a vacuum. Rather, they were made during a period when the administration had become aware of potential issues with respect to Weddle's time management. At the start of the 2016-2017 school year, Harris became concerned that Weddle and the other assistant cook at Mason, Louise Seaton, were not working efficiently. There had also been complaints lodged about Weddle's union activities dating back to the prior school year, long before Charging Party filed the grievance over the calculation of Weddle's average hours. In January of 2016, McLeod contacted UniServ Director Marcy Felegy regarding a complaint that Weddle was improperly conducting union business at work. In her response, Felegy agreed that such activities should be conducted on a limited basis and only with her supervisor's approval. In October of 2016, Harris contacted Simonds and informed her that Weddle was taking phone calls regarding union matters and that it was interrupting her work in the kitchen. Simonds testified credibly that Harris continued to raise these concerns in November and that other employees were also complaining about Weddle's conduct. Notably, there is no evidence that the activities which were the subject of these complaints were covered by Article 8 of the contract. None of the witnesses who testified in this matter indicated that Weddle was engaged in the investigation, handling or presentation of grievances.⁵ In fact, there were no grievances arising out of the department until late November of 2016 when the dispute over the calculation of Weddle's average hours arose. Simonds explained that she and McLeod were trying to find a way to handle these complaints about Weddle without having to resort to calling for a special conference and that they decided the best approach would simply be for Simonds to talk to Weddle. I find that, under these circumstances, the comments cited by the Union are not sufficient to establish anti-union animus on the part of Respondent, nor did such statements constitute unlawful interference with Weddle's exercise of her Section 9 rights.

Next, Charging Party asserts that anti-union animus is established by the fact that Simonds admitted at hearing that she prefers that employees bring their concerns directly to management. The Union appears to argue that such testimony is proof of management's intent to bypass Charging Party as exclusive representative of its members. What Simonds actually stated, however, was that if employees have complaints, questions about payroll or other issues, they are encouraged to come to management first so as to avoid interrupting the kitchen and wasting the Union representative's time. Although an employer violates the duty to bargain when it deals directly with employees by conferring a benefit upon them or otherwise changing conditions of employment without going through the union, not all communications between an employer and its employees are unlawful. An employer is free to communicate with employees for the purpose of providing information on operations or procedures. *City of Grand Rapids*, 1994 MERC Lab Op 1159; *North Ottawa Comm Hosp*, 1982 MERC Lab Op 555. In the instant case, there is no evidence that Simonds or any other administrator has ever attempted to engage in bargaining with individual employees about grievances or other matters in violation of Respondent's duty to bargain in good faith. Nor is there proof that any member of the bargaining unit has ever been disciplined or threatened with discipline for taking an issue directly to the Union without first

⁵ There was considerable testimony at hearing regarding a grievance which was filed by Charging Party in March of 2017 regarding the security of personal items and the status of a time clock in the Mason kitchen. Although Charging Party asserted at hearing that management interfered with Weddle's ability to investigate that grievance, the Union abandoned that argument in its post-hearing brief, instead referring to the incident as merely a "miscommunication between the parties."

discussing the matter with the administration. To find anti-union animus on the basis of Simonds' testimony would be to inappropriately engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra, supra*.

The Union argues that anti-union animus is established by testimony regarding Simonds' demeanor during the December 15, 2016, meeting on Weddle's "average hour month" grievance. As noted, this was the only grievance arising from the Food and Nutrition Services Department in several years and Lesh and Weddle testified that Simonds seemed angry and agitated during the meeting. However, neither witness recalled Weddle making any specific remarks during the meeting which would confirm their suspicion that Simonds was displeased with Charging Party over the filing of the grievance or which would otherwise indicate that she harbored hostility toward the Union. Moreover, McLeod described Simonds' manner during the meeting as "normal" and testified that she did not remember her being agitated or angry. When asked to describe her own demeanor at the meeting, Simonds testified, "I believe it was fine. The meeting was pretty cut and dry, we were just talking about the way that we calculated the average hours." I did not find the testimony of the Union witnesses to be any more or less credible than that of McLeod and Simonds with respect to the issue of Simonds' demeanor. Moreover, the dispute over the computation of Weddle's hours does not appear to have been particularly contentious. Weddle asserted that the calculation of her average daily hours was off by a mere tenth of an hour. At the meeting, the Employer promised to give the Union documentation to support its calculations and a second meeting was scheduled. After the district provided information to Charging Party, the grievance was withdrawn. Under these circumstances, I find unlikely that Simonds would have reacted to the grievance in the manner described by the Union witnesses and conclude that the evidence concerning the events of December 15, 2016, is insufficient to establish anti-union animus on the part of the school district.

Finally, Charging Party argues that the timing of Respondent's decision to raise the employee break time issue was suspicious and indicative of an intent to retaliate against Weddle for engaging in Union activities. I disagree. The record establishes that while investigating the grievance filed by Charging Party over the school district's calculation of Weddle's average hours, management became aware that the entire kitchen staff at Mason was acting in violation of the collective bargaining agreement by combining two 15-minute break periods into one 30-minute break every morning. Simonds testified credibly that the morning is typically the busiest time of day for the assistant cooks and that the practice had the effect of unnecessarily prolonging the work day since the staff would only be entitled to a second break if they were required to work a full eight hours. Thus, the discovery was of relevance to management's ongoing concerns over the efficiency of the kitchen. It is undisputed that the Mason staff was violating the contract, whereas the assistant cooks and other employees at the Mott kitchen were taking their breaks in accordance with the agreement. When Harris became aware of the contract violation, she put an immediate end to the practice, not just for Weddle, but for herself and the entire staff at Mason. For these reasons, I conclude that the school district's decision to enforce the contractual language governing employee break times in December of 2016 does not establish that Respondent's actions were discriminatorily motivated.

Even if Charging Party had established anti-union animus on the part of Respondent, the charge would nevertheless be subject to dismissal on the ground that Weddle did not suffer any adverse employment action. In order for there to be an actionable discrimination claim under Section 10(1)(c) of PERA, there must be proof of some act on the part of the public employer

which resulted in adverse consequences affecting the alleged discriminatee's terms of employment, such as a demotion, diminution of wages, material change in job responsibilities or other tangible consequences. See e.g. *City of Kentwood*, 26 MPER 40 (2013) (no exceptions) (dismissing a charge where there was no factually supported allegation that the employer actually took any adverse employment action, or threatened to take such action); *Wayne Cty (Jail Health Services)*, 23 MPER 26 (2010) (no exceptions) (counseling memo did not constitute an adverse employment action where there was no allegation that the charging party was disciplined or punished in any way as a result of the memo). Federal courts have defined adverse action in the employment law arena as a materially adverse change in the terms and conditions of employment, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Burlington Industries, Inc v Ellerth*, 524 US 742, 761 (1998).

The Union's theory of the case is that prior to the events giving rise to the instant charge, the assistant cooks at Mott High School had their hours "capped" at 7.5 hours per day while Weddle and the other assistant cook at Mason Middle School regularly worked from 6 a.m. to 2 p.m. According to Charging Party, that situation abruptly changed in early January of 2016 when, as a result of the Union having filed a grievance on Weddle's behalf, the two assistant cooks at Mason were suddenly prohibited from working a full eight hours. However, it is undisputed that the assistant cooks are not guaranteed any specific number of hours beyond the minimum of three hours per day as set forth in the collective bargaining agreement. In fact, Weddle was specifically informed of that fact when she was hired as an assistant cook at the Mason kitchen. Rather, it has been the department's policy that the assistant cooks are to leave work when their daily tasks have been completed. Time records maintained by the school district establish that the hours worked by the assistant cooks at both Mott and Mason have always varied considerably on a day to day basis. Although on average the assistant cooks at Mott have worked less hours than their counterparts at the Mason kitchen, it was not unusual for members of the Mott staff to work past 1:30 p.m. In fact, Seeterlin worked more than 7.5 hours 62 times in 2016-2017. Thus, the record does not support Charging Party's contention that the assistant cooks at Mott had their hours "capped" at 7.5 hours per day.

Similarly, the evidence fails to establish that Weddle's hours underwent any significant change after January 3, 2017. Prior to that date, there were numerous days during which Weddle worked less than eight hours. In fact, her average work hours from September 7, 2016, the first day of the school year, through December 21, 2016, the last day of the semester, was 7.7 hours per day. For the month of December, Weddle averaged 7.5 hours a day. There is no dispute that Harris directed Weddle to leave work at 1:30 p.m. on January 3, 2017, nor does Respondent deny that Simonds subsequently instructed Weddle to punch out when instructed to do so by the cook manager. However, time records do not support Charging Party's claim that Weddle's hours were "capped" at 7.5 as of January 3, 2017 or even shortly thereafter. Respondent Exhibit 8 establishes that from January 3rd through the conclusion of the 2016-2017 school year, Weddle worked more than 7.5 hours 32 times in total. That includes nine days during which Weddle worked eight or more hours.⁶ Although Weddle testified that some of those eight-hour days may have been attributable to the fact that she was working at the senior center, she was not able to identify the specific days she worked as a substitute or even state with certainty how many times

⁶ In fact, Weddle continued to periodically work more than 7.5 hours even after March 13, 2017, the day that Simonds claims she specifically instructed Weddle to leave work by no later than 1:30 p.m.

she worked in that capacity. In total, Weddle's average daily hours for the 2015-2016 school year was 7.5 hours, the same average number of hours she worked during the month of December. Based upon the evidence, I find that any reduction in the amount of time worked by Weddle after January 3, 2017, was de minimis and did not constitute an adverse employment action for purposes of PERA.

Even assuming *arguendo* that the Union had established a *prima facie* case of discrimination, including proof of an adverse employment action, I would nevertheless conclude that the charge is subject to dismissal on the ground that the school district met its burden of proving that any incremental change in Weddle's average hours was related to legitimate concerns over the efficiency of the Mason kitchen. In addition to the complaints about Weddle described above, the school district introduced various production records for both of the base kitchens. Although each report focusses on a different aspect of the production process, taken together these documents overwhelmingly demonstrate that the Mott base kitchen was more productive than the Mason kitchen. Exhibits 17, 18 and 19 demonstrate that during the period January of 2016 through April of 2017, the Mott kitchen produced 318,070 food items for the high school and its satellite kitchens, while the staff at Mason produced 262,034 food items for the middle school and several satellite buildings, for a difference of 56,036 food items. Exhibits 20 and 21, which are comprised of data from a report generated by the district for the purpose of obtaining reimbursement from the USDA, document the number of meals prepared by each base kitchen and includes both breakfasts and lunches. The report shows that the Mott kitchen produced 188,111 more meals than Mason during the 2015-2016 school year and 215,905 more meals in 2016-2017.

The staff at Mott not only produced more food items and meals than the Mason kitchen, they did so in less time. As noted, Exhibit 8 consists of graphs showing the number of hours worked by all of the assistant cooks at the two base kitchens at the time of the events giving rise to this dispute. Based on that data, Weddle's average daily hours for the 2016-2017 school year was the highest of any of the assistant cooks during that period. Louise Seaton and Amy McLean, the two other assistant cooks at Mason in 2016-2017, averaged 7.6 and 7.5 hours, respectively. In contrast, the assistant cooks at Mott, Mary Seeterlin, Jill Heady and Teresa Buccelato, averaged 7.3, 6.6 and 7.3 hours, respectively. These reports are corroborated by Exhibit 14, which is comprised of data from the school district's point of sale system. Exhibit 14 shows that Mott served 66 lunches per labor hour worked by the kitchen staff during the 2016-2017 school year while staff at Mason served only 47 lunches per labor hour. Although Exhibit 14 does not account for meals wasted, the record indicates that the assistant cooks are skilled at anticipating how many meals will be necessary and typically do not produce much more food than is actually served. Exhibits 17, 18 and 19 demonstrate that Mott prepared 56,036 more food items than Mason during the period January 2016 through April 2017. Thus, by any measure, the employees at Mott were working more efficiently than the staff at the Mason kitchen.

In its post-hearing brief, Charging Party argues that the reports submitted by the school district are not a reliable indicator of the work performed by the staff at the Mason kitchen. For example, the Union points to the fact that the Mason kitchen prepares meals for the GSRP program, a task not assigned to the staff at Mott. However, several of the production reports prepared by Respondent take into account GSRP meals. The Union also argues that Exhibits 17, 18 and 19 should not be relied upon because the reports include food items prepared by both Mason and Mott for Webber, a school which was dropped as a satellite location at the conclusion

of the 2015-2016 school year. Since Mott historically produced more food than Webber, Charging Party argues that the reports present a skewed portrait of the work currently being performed by the staff at the base kitchens. However, even if the data from Webber is omitted from the calculations, the reports still show that the Mott kitchen prepared 33,716 more food items than Mason from January of 2016 through April of 2017. Finally, the fact that all of the production reports submitted into evidence in this matter were prepared by Respondent after the charge was filed does not, by itself, cast any doubt on the accuracy or veracity of the data contained therein. The graphs and charts presented by Respondent were compiled from data maintained by the district in the normal course of business and there is nothing in the record to suggest that this underlying data was false or misleading. For the above reasons, I conclude that Respondent had a legitimate business justification for carefully scrutinizing the hours of the assistant cooks at Mason during the 2016-2017 school year.

I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. I find that the record is insufficient to establish that Respondent discriminated against Weddle for engaging in protected concerted activity. For the same reasons, I find that Charging Party failed to establish that management engaged in conduct which would tend to restrain, interfere or coerce a reasonable employee in the exercise of her rights under the Act, in violation of Section 10(a)(1). Accordingly, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by the Waterford Educational Support Personnel Association III, MEA/NEA against the Waterford School District in Case No. C17 F-054; Docket No. 17-012503-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 28, 2018