STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CARMAN-AINSWORTH COMMUNITY SCHOOLS,
Public Employer-Respondent in Case Nos. C14 E-054 & C14 I-096; Docket Nos. 14-008984-MERC & 14-021889-MERC,

-and-

BENDLE PUBLIC SCHOOLS,
Public Employer-Respondent in Case Nos. C14 E-054; Docket No. 14-008984-MERC,

-and-

SHERYL KARAS,
An Individual Charging Party,

-and-

CARMAN-AINSWORTH EDUCATION ASSOCIATION AND
BENDLE/CARMAN-AINSWORTH ADULT AND
ALTERNATIVE EDUCATION ASSOCIATION,
Interested Parties.
_____/

APPEARANCES:

Collins & Blaha, P.C., by Jeremy Chisholm and Lorie E. Steinhauer, for Carman-Ainsworth Community Schools

Thomas & Delaney, by James L. Delaney, for Bendle Public Schools

The Law Office of Eric I. Frankie, PLC, by Eric I. Frankie, for Individual Charging Party

White, Schneider, Young & Chiodini, P.C., by William F. Young, for the Interested Parties

DECISION AND ORDER

On September 22, 2015, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondents 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 any 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: December 7, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan

Employment Relations Commission. Based upon the entire record, including the transcripts of hearing and exhibits, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charges and Procedural History:

On May 2, 2014, Sheryl Karas filed an unfair labor practice charge against Carman-Ainsworth Community Schools and Bendle Public Schools. The charge, which was assigned Case No. C14 E-054; Docket No. 14-008984-MERC, alleges that the Employers violated PERA by preventing Karas, an alternative education teacher, from becoming part of a bargaining unit represented by the Carman-Ainsworth Education Association and/or the Bendle/Carman-Ainsworth Adult and Alternative Education Association. In addition, the charge asserts that management discontinued the alternative education program in which Karas had been teaching and terminated her employment in January of 2014 in retaliation for her efforts to join one or both of the aforementioned labor organizations.

Following receipt of the charge, I notified the unions of the allegations set forth by Karas. By letter dated June 9, 2014, the labor organizations, both of which are local affiliates of the Michigan Education Association (MEA), indicated that they intended to participate in this matter as interested parties.

Karas filed a second charge against Carman-Ainsworth Community Schools on September 4, 2014. In that charge, which was assigned Case No. C14 I-096; Docket No. 14-021889-MERC, Karas asserts that after her position as an alternative education teacher was eliminated, the school district prevented her from working as a teacher at a summer science camp and that it blocked access to her work email. Karas alleges that both actions were taken in retaliation for her filing the earlier charge in Case No. C14 E-054; Docket No. 14-008984-MERC.1

On December 2, 2014, James L. Delaney, counsel for Bendle Public Schools, notified the undersigned that the school district did not believe it was implicated by the allegations and that it would not be appearing at the hearing.

The evidentiary hearing was held on March 31, 2015. At the start of the hearing, Counsel for Charging Party conceded that Karas learned on September 22, 2013, of management's determination that she was not eligible for inclusion in either the Carman-Ainsworth Education Association bargaining unit or the unit represented by the Bendle/Carman-Ainsworth Adult and Alternative Education Association. Based upon that stipulation, I indicated that I would not allow Charging Party to present evidence on her claim that she was prevented from joining these bargaining units because the charge in Case No. C14 E-054; Docket No. 14-008984 was filed more than six months after Karas knew or should have known of the events giving rise to that allegation.

Following the presentation of proofs by Charging Party, Carman-Ainsworth Community Schools moved for a directed verdict on the remaining allegations set forth by Karas in the charges. I granted the motion on the record, with the understanding that this written Decision and Recommended Order would follow.

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1 The allegation pertaining to Charging Party's email access was withdrawn by Karas at hearing.

Findings of Fact:

I. Background

Sheryl Karas was hired by Carman-Ainsworth Community Schools in the fall of 2010 to teach in an alternative education pilot program which came to be known as "Connect." The Connect program was a "proactive educational intervention" designed to provide at-risk students with additional time and support by offering classes with a student-teacher ratio of 12-1 or less. For the first two years, Karas taught Connect classes at a community middle school in Burton, Michigan in an area of the school which was set apart from the rest of the building. At the start of the 2013-2014 school year, all of the district's alternative education programs, including Connect, were consolidated within the Woodland Building, a former elementary school.

II. Inquiries into Bargaining Unit Eligibility

When Karas was hired by the school district, she was not given any indication that her position would be included within a bargaining unit. In August of 2013, Karas began inquiring about whether her position should be part of the bargaining unit represented by the Bendle/Carman-Ainsworth Adult and Alternative Education Association. One individual with whom Karas spoke was April Badgely who, at the time, was vice president of the Bendle/Carman-Ainsworth Adult and Alternative Education Association. At Badgely's suggestion, Karas contacted the Union president, Dan Macko who, in turn, raised the issue with David Swierpel, the school district's director of community services. Swierpel informed Macko that Karas was ineligible to join the Bendle/Carman-Ainsworth Adult and Alternative Education Association because she was teaching middle school students and the unit consists of adult education and high school teachers only. Macko passed that information on to Karas in an email dated September 22, 2013. Several days later, Macko spoke to Karas by telephone and explained to her that she could not join the Union because her position was not in the recognition clause of the collective bargaining agreement between the Bendle/Carman-Ainsworth Adult and Alternative Education Association and the school district.

On September 24, 2013, Karas sent an email to Badgely asking for help understanding the information that Macko had previously provided. Badgely responded to Karas the following day in an email message which stated:

> I talked to Dan, again, to try to get a better understanding of the situation. Apparently, he is being told no by administration because you . . . are a middle school program, you are not considered eligible to join the union, which is strictly for high school teachers. I understand that not all unions work this way, but to be considered eligible, both our union and administration would have to agree to allowing you . . . to join. Since administration is saying no, there's not much more we can do. I would suggest talking to Dave Swierpel is [sic] you have further questions since it is Dave that is making this decision.

Karas never raised the issue of her inclusion in the bargaining unit with Swierpel, though she did meet with him at some point and request a raise in pay.

In January of 2014, Karas exchanged emails with Frank Burger, the president of the Carman-Ainsworth Education Association, the Union which represents the school district's K-12 teachers. On January 15, 2014, Burger notified Karas by email that in order for her to be eligible to join a bargaining unit within the school district, her position must be included within a contract's recognition clause. Burger indicated that he had spoken with MEA UnivServ Director Rondy Murray and that Murray had determined that her position "is not currently recognized by any bargaining unit."2

III. Layoff

Karas testified that, prior to the start of each semester, she would receive written notification from the school district regarding whether her employment as an alternative education teacher was expected to continue. For example, her paycheck dated June 8, 2012, stated, "Unless otherwise notified, you have reasonable assurance of employment in the same or similar capacity with Carman-Ainsworth Community Schools for the 2012-2013 school year." The last such notice provided to Karas was a letter dated June 26, 2013. In that letter, the district indicated that it was offering Karas continued employment for the 2013-2014 school year and that such an offer constituted "reasonable assurance" for the period in question. Based upon that document, Karas believed that she would continue to be employed by Carman-Ainsworth Community Schools through at least the end of the 2013-2014 school year.

In January of 2014, the school district decided to eliminate five positions, including the alternative education teacher position held by Karas, and to reduce the schedules of another eight employees. At hearing, Swierpel testified that the job cuts were made because the district was facing a serious deficit of $600,000. At the same time that Karas was laid off, the Connect program was eliminated and its students were returned to their regular classrooms in the Carman-Ainsworth Middle School. Karas received written notice of her layoff on January 13, 2014. The notice, which was hand-delivered to Karas by Swierpel, indicated that the decision was subject to the approval of the school board at its next meeting.

Karas attended the January 21, 2014, school board meeting and read a statement into the record expressing her disappointment over the discontinuation of the Connect program. Her layoff became effective on January 27, 2014.

IV. Summer Camp

Each summer, Carman-Ainsworth Community Schools operates a two-week science camp. Karas taught at the camp during the summer of 2013. In June of 2014, Karas was contacted by the director of the camp, Elyse Burroughs, and invited to return as a science teacher. After Karas indicated that she was interested in the position, Burroughs promised that she would contact human resources and have them send out the necessary paperwork. Two days later, Karas learned from another teacher that the district had hired someone else for the camp position. Karas called Burroughs and asked for an

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2 Testimony regarding the Burger email was the only evidence introduced by Charging Party pertaining to the Carman-Ainsworth Education Association. As noted, however, counsel for Charging Party conceded on the record that Karas became aware on September 22, 2013, of management's determination that her position was not eligible for inclusion in either bargaining unit.

explanation. Burroughs indicated that when she contacted human resources, she was told that Karas "could not work."

Discussion and Conclusions of Law:

Charging Party contends that Respondents Carman-Ainsworth Community Schools and Bendle Public Schools violated PERA by preventing her from joining a labor organization and that the administration eliminated her position as an alternative education teacher because of her efforts to seek inclusion in the bargaining units represented by the Carman-Ainsworth Education Association and the Bendle/Carman-Ainsworth Adult and Alternative Education Association.3 In addition, Charging Party asserts that Respondent Carman-Ainsworth Community Schools retaliated against her for filing the initial charge in this matter by refusing to allow her to teach at its summer science camp.

I have carefully reviewed the testimony and documentary evidence presented by Charging Party at hearing and have concluded that dismissal of both of the unfair labor practice charges filed in this matter is warranted. First, Charging Party's claim that Respondents prevented her from joining a labor organization is clearly untimely. Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch*, 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). The statute of limitations is not tolled by the attempts of an employee or a union to seek a remedy elsewhere, including the filing of a grievance, or while another proceeding involving the dispute is pending. See e.g. *Univ Of Michigan*, 23 MPER 6 (2010); *Wayne County*, 1998 MERC Lab Op 560.

In the instant case, counsel for Charging Party conceded at the start of the hearing that Karas was aware of management's position with respect to her eligibility for inclusion in the bargaining units by September 22, 2013, more than six months prior to the filing of the charge in Case No. C14 E-054; Docket No. 14-008984-MERC. Even if the charge had been timely filed, however, there is no suggestion in the record that either Respondent acted unlawfully in denying Karas the opportunity to join the labor organizations. Administration made the determination that Karas' position as a middle school teacher in the Connect program was not eligible for inclusion in either bargaining unit and neither union challenged management's decision with respect to that issue. In fact, Macko, the president of the Bendle/Carman-Ainsworth Adult and Alternative Education Association, testified at hearing that positions within the Connect program had never been part of that unit since the program's inception. Similarly, the president of the Carman-Ainsworth Education Association informed Karas of the MEA's determination that her position was not eligible for inclusion "in any bargaining unit" within the school district. The Commission has long held that where an employer and a union concur as to the interpretation of the contract, their construction governs. *Saginaw Valley State Univ*, 19 MPER 36 (2006); *City of Detroit*, 17 MPER 47 (2004). To that end, the Commission has consistently refused to find violations by a union or employer based upon an agreement to exclude certain groups of employees

3 How the Bendle School District was involved with Karas or the Connect program was never explained on the record.

from the bargaining unit, despite the fact that those employees might have been included by the Commission in a unit determination. See e.g. *City of Grosse Pointe Park,* 1983 MERC Lab Op 837, 842-843; *Grosse Pointe Bd of Ed*, 1990 MERC Lab Op 613; *City of Battle Creek*, 1988 MERC Lab Op 909, 916; *Mt. Morris Sch Dist*, 1984 MERC Lab Op 419.

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

Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. 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. *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 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, supra*. This framework is also used to analyze alleged violations of Section 10(1)(d) of PERA, which prohibits public employers from discriminating against a public employee because he or she testified at a hearing or instituted proceedings under the Act. *Innovative Teaching Solutions, Inc*, 22 MPER 12 (2009).

Assuming arguendo that Charging Party's inquiries into whether her position was eligible for inclusion in a bargaining unit constituted protected concerted activity of which Respondents were aware, I find no credible evidence that Swierpel or any other administrator harbored anti-union animus or that Charging Party's inquiries were a motivating factor in the school district's decision to eliminate her position. Although animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. Once the prima facie case is met, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419. See also *MESPA, supra*.

The timing of the adverse employment action in relation to the employee's union activity is circumstantial evidence of unlawful motive, and the closer the employer's action follows upon its learning of the union activity, the stronger that evidence becomes. *Mid-Michigan Comm Coll*, 26 MPER 4 (2012) (no exceptions). However, 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 Public Schools*, 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 *University 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 (2003).

In the instant case, there is no direct evidence establishing that either Respondent harbored anti-union animus. There was no testimony that any supervisor or management official ever made remarks which were hostile toward unions or collective bargaining generally, nor is there any evidence that either school district ever previously engaged in retaliation based on concerted activity. Charging Party contends that the elements of animus and a causal relationship are established by the fact that she was laid off soon after she first made inquiries regarding whether her position was eligible for inclusion in a bargaining unit. However, the record establishes that the labor organizations actually agreed with management's interpretation of their respective collective bargaining agreements. Moreover, Karas was not the only individual laid off in January of 2014. Rather, Carman-Ainsworth Community Schools, in response to a $600,000 deficit, decided to eliminate five positions, including the alternative education teacher position held by Karas, and to reduce the schedules of another eight employees. At the same time, the Connect program in which Karas taught was eliminated and its students were returned to their regular classrooms in the Carman-Ainsworth Middle School. The fact that Charging Party's position was eliminated four months after she began inquiring about becoming part of a bargaining unit is simply insufficient to establish that the decision to eliminate her position and end the Connect program was retaliatory.

Similarly, Charging Party failed to prove that Carman-Ainsworth Community Schools acted unlawfully with respect to its decision not to hire her for the school district's camp program in the summer of 2014.

Karas asserts that the school district prevented her from working at the camp because she filed the unfair labor practice charge in Case No. C14 E-054; Docket No. 14-008984-MERC. That charge was filed on May 2, 2014. Approximately one month later, Karas was offered a teaching position at the summer camp. Although the school district ultimately hired someone else for the position, there is no evidence in the record establishing that the district's decision was motivated by anti-union animus. As noted, suspicious timing alone is not sufficient to establish hostility toward a charging party's protected rights. *Southfield Public Schools, supra*.

Under these circumstances, I conclude that Charging Party has failed to establish a prima facie case of discrimination or retaliation under Sections 10(1)(c) or 10(1)(d) of PERA. For the same reason, I find that Respondents' actions in connection with this matter would not objectively tend to restrain, interfere or coerce a reasonable employee in the exercise of his or her rights under the Act, in violation of Section 10(a)(1).

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

RECOMMENDED ORDER

The unfair labor practice charges filed by Sheryl Karas against Carman-Ainsworth School District in Case No. C14 E-054; Docket No. 14-008984-MERC and against Bendle Public Schools in Case No. C14 I-096; Docket No. 14-021889-MERC are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 22, 2015