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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LELAND PUBLIC SCHOOL,
Public Employer-Respondent,

MERC Case No. C18 K-108

-and-

LELAND EDUCATION ASSOCIATION, NORTHERN MICHIGAN EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

White Schneider PC, by Jeffrey S. Donahue and Andrew J. Gordon, for Charging Party

Thrun Law Firm, P.C., by Katherine Wolf Broaddus and Piotr M. Matusiak, for Respondent

DECISION AND ORDER

On October 31, 2019, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] 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

Samuel Bagenstos, Commission Chair

Edward D. Callaghan, Commission Member

Robert S. LaBrant, Commission Member

Issued: January 9, 2020

[1] MOAHR Hearing Docket No. 18-021366

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

In the Matter of:

LELAND PUBLIC SCHOOL,
Public Employer-Respondent,

Case No. C18 K-108
Docket No. 18-021366-MERC

-and-

LELAND EDUCATION ASSOCIATION,
NORTHERN MICHIGAN EDUCATION
ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
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APPEARANCES:

White Schneider PC, by Jeffrey S. Donahue and Andrew J. Gordon, for the Charging Party

Thrun Law Firm, P.C., by Katherine Wolf Broaddus and Piotr M. Matusiak, for the Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On November 7, 2018, the Leland Education Association, Northern Michigan Education Association, MEA/NEA (Association) filed the present charge against Leland Public School (School District or Employer). 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 Administrative Law Judge Travis Calderwood, of the Michigan Office of Administrative Hearings and Rules, formerly the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission).

Unfair Labor Practice Charge and Procedural History:

The Association's charge claims that the Employer violated Sections 10(1)(a), (c) and (e) of the Act. More specifically, the Association alleges that the Employer violated Sections 10(1)(a) and (c) of the act when it removed Kathryn Murphy from the position of Varsity Cross-Country Coach and forced her to reapply in retaliation for Murphy's protected activity, including but not limited to, her involvement with a grievance and demand for arbitration which was the cause of the Employer filing an earlier unfair labor practice charge, as described in more detail below. The Association also alleges that prior to Murphy's removal from the coaching position, the Employer attempted to bargain directly with Murphy regarding changes to the duties and

compensation of the Varsity Cross-Country Coach and Middle School Cross-Country Coach positions in violation of Sections 10(1)(a) and (e) of the Act.

Prior to the filing of the present matter, the Employer filed its own unfair labor practice charge against the Association in April of 2018, Case No. CU18 D-006, wherein it accused the Association of attempting to bargain over certain issues it claimed were prohibited subjects under Sections 15(3)(b) and (j) of the Act. There, the Employer claimed the Association's demand to arbitrate a schedule assigned to Jeremy Peplinski, a secondary teacher, violated the Association's duty to bargain in good faith under the Act. See MCL 423.210(2)(d).

Pre-hearing conferences in Case No. CU18 D-006, were held by telephone on May 23, 2018, and August 9, 2018, in an attempt to narrow down any factual issues in dispute, and to establish a briefing schedule to allow that matter to be decided by briefs. The Employer filed its motion for summary disposition and accompanying brief and exhibits on September 14, 2018. The Association filed its response and counter-motion for summary disposition along with accompanying brief and exhibits on October 26, 2018. The Association's filing requested oral argument.

As stated above, the present charge was filed by the Association in early November 2018. On November 27, 2018, a pre-hearing conference was held in this matter in which the parties discussed the possible relevance of Case No. CU18 D-006 to this matter. Upon agreement of the parties, I ordered the Association's charge to be held in abeyance pending oral argument and a decision in Case No. CU18 D-006.

Oral argument in Case No. CU18 D-006 was held before the undersigned on December 11, 2018, in Lansing, Michigan. At that time, the parties expressed a desire to proceed to hearing on the Association's charge independent of Case No. CU18 D-006. As such, the hearing in the present proceeding was scheduled for February 14, 2019.

The parties appeared before the undersigned for an evidentiary hearing in this matter on February 14, 2019. Teacher Kathryn Murphy testified on behalf of the Association while Athletic Director Kenneth Ryan Knudsen and Superintendent Jason Stowe testified on behalf of the Employer.[1] At the conclusion of the hearing I indicated that post-hearing briefs would not be due until sometime after I issued my Decision and Recommended Order in Case No. CU18 D-006.

On March 20, 2019, I issued my decision in Case No. CU18 D-006, in which I found that Sections 15(3)(b) and (j) did not preclude the Association from demanding to arbitrate Peplinski's schedule. As such, I recommended that the Commission dismiss the Employer's charge in its entirety.[2] Post hearing briefs in the present proceeding were received on April 26, 2019.

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[1] As will be discussed in more detail herein, Charlie Gann, the Principal at the time relevant to this dispute, and who was central to the Employer's actions, was not present at the hearing and there was no indication that either party made any attempt to secure his attendance and testimony.

[2] The Commission, on May 8, 2019, adopted my Decision and Recommended Order when no exceptions were filed.

Findings of Fact:

The Association represents a bargaining unit comprised of certificated teachers employed by Leland Public School. Relevant to this proceeding, the parties were signatories on a collective bargaining agreement effective from 2017 through 2019. Article 12(C) of the contract identifies several "extra-curricular" activities within which bargain unit members could participate in, along with the additional compensation above their salaries they would receive. Included within these extra-curricular activities are coaching positions. Relevant to this proceeding, the Varsity Cross-Country Coach is eligible to be paid an additional 8% of their salary while the Middle School Cross-Country Coach is eligible for a 4% payment. Subsection (6) of 12(C) states, "The Board of Education, at its discretion, reserves the right to cancel any extra-curricular activity of appointment at any time. Subsection (7) precludes any decision terminating a teacher from these appointments from being grieved under the contract's grievance procedure.

At the time of the hearing, Kathryn Murphy had been employed at Leland Public School for thirteen (13) years and was teaching 7th through 12th grade Art and Design. Murphy, a member of the Association's bargaining unit, served as the unit's President in 2014, 2015, and 2016, and then again in 2018. Murphy also held the positions of Vice President and Grievance Chair in 2017. Testimony established that Murphy was actively engaged in negotiations for several prior contracts between the parties.

In 2009, the School District maintained cross-country (CC) as a "club" sport, meaning the sport did not receive direct financial support from the School, nor was its coach compensated. Murphy coached the high school CC club team, on a volunteer basis, from 2009 through 2011; in 2010 and 2011 Murphy also coached, on a volunteer basis, the middle school CC club athletes. According to Murphy's testimony, she did not serve as the coach during 2012 because she had an academic commitment and she would have been unable to do both.

Beginning in 2012, the one-year Murphy did not coach, the School District recognized both Varsity CC and Middle School CC as official sports. As such, the teams would receive direct financial support from the school including making the coaching positions paid positions. In 2012, Karen Kirt, a teacher and member of the Association's bargaining unit, was the Middle School CC Coach. The record is not clear on who coached the Varsity CC team.

In 2013 Murphy returned to coaching the Varsity CC team. Murphy, with respect to how she took over the Varsity program again, testified, "I was handed a schedule, it was just kind of a given that I was going to be coaching [Varsity CC]..." Murphy claimed that the School's Athletic Director at the time, either Charlie Gann or Curtiss Kelenske, was the individual who gave her the CC schedule. Both Kirt and Murphy would continue to serve as the coaches in the respective programs for the next several years.

During the 2016-2017 school year, the School District's current Athletic Director, Kenneth Knudsen, had a conversation with Murphy wherein she allegedly voiced her

dissatisfaction with certain aspects of how the sport was being treated at the school. More specifically Knudsen stated at the hearing:

> [S]he was not the happiest coach, [she] was constantly upset with transportation issues, you know, because they didn't have many numbers on their team, [so] they had to share buses to away games and stuff like that. She thought kind of cross-country was, you know, treated as a second-tier sport in a lot of ways...

Knudsen further testified that he had heard "rumblings" that Murphy would walk away from coaching after the 2017-2018 school year. Knudsen did not identify the source of the "rumblings."

Murphy testified that in or around May or June of 2017, Kirt approached her and wanted to have a conversation about Kirt assuming the Varsity CC coach position and Murphy transitioning to coach the Middle School program. According to Murphy, the two were not able to actually meet. On June 2, 2017, Murphy, following an unsuccessful attempt via email to set up a meeting with Kirt, sent a follow-up email which stated in part the following:

> I am good with transitioning out of varsity over the next couple years, [my husband] and I have a lot of things we'd like to do in late summer and fall that we can't because of the requirements of varsity [CC]... There are obvious advantages to me doing varsity since I work with these kids up here daily, but I am sure we can work something out, we would probably do a lot of recruiting and communication for each other. I feel like we should do it gradually over the next year or 2, to figure out the issues and work through the kinks. I do want to work with varsity this year and work with [my son] and the boys next year some, and I want to continue being a part of the program, since I have a lot of blood, sweat and tears invested, so I would want to move to the middle school position once I am out of varsity. There are lots of opportunities for you to phase into varsity this year and we can add more next year and then transition to a complete change over, we will need to talk about how the schedule B pay works, and we can figure out some fair split... So think about what you want to start taking over on, and where I can start assisting at [the Middle School]...

According to Knudsen, during the last week or two of the 2016-2017 school year, he and Kirt had a discussion wherein she told him that she and Murphy had a conversation discussing Kirt taking over the Varsity CC program and that Murphy would move to the Middle School CC program. Knudsen testified that he told Kirt the three of them could discuss it when they meet the following school year to discuss the upcoming season. There is no indication in the record to suggest that Kirt shared the above email with Knudsen or anyone else at that time.

In August of 2017, about a week prior to the start of the CC season, Knudsen, Kirt and Murphy met to discuss the upcoming season. Knudsen explained that before every season he would have a sit down with coaches to go over schedules and other related issues. Knudsen testified that during the first part of the meeting the trio discussed routine matters but that during the second half of the meeting, the conversation "turned to what Mrs. Kirt and Mrs. Murphy had

discussed as far as their transition..." Knudsen went on to claim that the two coaches "filled me in what they had agreed upon." According to Knudsen, he discussed the above situation with Gann.

Also in the beginning of the 2017-2018 school year, the Association filed a grievance with Charlie Gann, the School's Principal at that time and former Athletic Director, on behalf of Jeremy Peplinski, challenging the School's assignment of Peplinski to a schedule the Association claimed violated the contract's maximum number of hours.[3] According to Murphy, the Association's Vice President and Grievance Chair at the time, she met with Gann in May of 2017 in an attempt to resolve the grievance; no resolution occurred and Gann would ultimately deny the grievance.

Following Gann's denial at the first step, Keven Pershinske, the Association's President at the time, advanced the grievance to the second step involving Jason Stowe, the School's Superintendent. Murphy testified that while she did not write the grievance that was submitted to Stowe on September 18, 2017 – Pershinske did – she did work on it with him.

Stowe, in a letter dated October 6, 2017, denied the grievance. Following Stowe's denial of the grievance, the parties, including Murphy, Peplinski, Pershinske, Gann, and Stowe, met with a Commission Mediator on November 14, 2017, in further efforts to resolve the issue. Murphy testified that for the first part of the meeting both sides were in the same room together before then moving to separate rooms. The grievance remained unresolved and the Association moved for arbitration.

Also occurring sometime in November, Knudsen testified that, following the end of the 2017 CC season, Kirt approached him and told him that she thought Murphy "might be backing out on their deal." Knudsen claims that he explained to Kirt that, in his experience as an Athletic Director, coaches could make emotional decisions at the end of seasons, and that she should "give it some time."

Near the end of 2017, Knudsen claims Kirt approached him again claiming that Murphy was backing out of the deal and further stated that Murphy was "avoiding her." After this conversation Knudsen decided to take his concerns to Gann.

As indicated above, on April 7, 2018 the School District filed an unfair labor practice charge with the Commission in which it sought the Association's withdrawal of the petition for arbitration, Case No. CU18 D-006.

On Friday, April 13, 2018, Knudsen and Gann met with Kirt to discuss her concerns. According to Knudsen's testimony, Kirt relayed to the two what her and Murphy had agreed upon. Following that meeting Knudsen and Gann met with Murphy.

According to Murphy, the Friday meeting began with Gann and Knudsen telling her that Kirt had resigned her position and that they were "concerned that they were going to lose both us as coaches." Murphy further testified that she was asked for a transition plan and that Gann told

[3] Murphy testified that she could not recall any grievance that may have been filed before the Peplinski grievance.

her she needed to resign from the Varsity CC coach position. It appears the meeting ended shortly thereafter. Murphy testified that she had another meeting that same day with Knudsen and Gann, as well as other meetings in the following week. However, her testimony does not indicate with any specificity what occurred at the second meeting on April 13, 2018, as opposed to the other meetings she identified. Murphy's testimony as a whole reveals that at some point Gann made initial proposals that perhaps the two coaches could split the two programs and even split the additional pay. Murphy testified that at some point, after the aforementioned proposals, she asked Pershinske to attend the meetings with her.

Knudsen's testimony describing the first April 13, 2018, meeting with Murphy was in stark contrast to what Murphy had described. According to the Athletic Director's testimony, during the first meeting with Murphy, the Varsity coach acknowledged that there had been an "agreement" between herself and Kirt. Moreover, Knudsen testified that he and Gann communicated their concern regarding the situation between the two coaches. In describing the second meeting that day with Murphy, Knudsen recounted that Murphy came to them stating that she felt "pressure" and that she began to "backtrack." Knudsen testified that during that second meeting, Murphy repeatedly said, "I'm not going to resign." Knudsen did not recall Gann telling Murphy that she would have to resign. Knudsen did concede that both he and Gann attempted to find a compromise or otherwise resolve the "issue" between the two coaches, testifying:

> We did a lot of brainstorming of, okay, how can we resolve this issue between the two [of them], because obviously we weren't sure if they were going to be able to work together.

Sometime following the second meeting on April 13, 2018, Murphy posted the following to her personal Facebook account.

> I've coached Cross Country at Leland for 10 years, I built it from a club and worked with amazing kids... I cannot imagine a world where I do not get coach, but if it happens that I don't get to do it anymore, I want you to know it would not be my choice.

In response to a question posted asking whether the CC team was being cancelled, Murphy wrote, "no[,] just trying to push me out." In response to another question, Murphy posted, "complicated school politics, one last jab from an outgoing principal."

Knudsen went on to describe another meeting that occurred early the next week, where he along with Gann met with Murphy and Pershinske.[4] The Athletic Director testified that the first half of the meeting was devoted to discussions regarding the above Facebook posts which had been brought to Gann's attention. Gann, following the discussion regarding the posts, stated that Murphy would not be reprimanded for her posts. Knudsen went on to state that the rest of the meeting was spent addressing the coaching issue. According to Knudsen, Murphy eventually decided that she would extend an offer to talk to Kirt directly. Knudsen also testified, in response to a question on whether the idea of splitting the positions was discussed, stated:

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[4] Murphy testified that she asked Pershinske to begin attending the meetings because she "felt uncomfortable with the conversation."

> Yes. We were brainstorming a lot of different ideas, you know, with Mrs. Murphy and Mrs. Kirt, you know, obviously our understanding was they were going to transition to a complete flip-flop. One of the things that we threw out there was, you know, do we need another year for this transition to happen, you know, not one year, but does this need to be a second transition year, is this something where they want to be co-coaches, is it where they do, one does boys, one does girls, you know, there were -- I mean we were just throwing spitball ideas out there.

Knudsen did not attribute the above ideas as coming from just himself or Gann but claimed "we were all talking."

On April 20, 2018, Kirt forwarded Murphy's June 2, 2017, email to Knudsen and Gann. There is no indication that either man had seen the email or had knowledge of it before they received it on April 20, 2018. Gann then forwarded the email to Superintendent Stowe. Stowe, in his email response to Gann, wrote, "Oh[,] this changes things a bit."

Also, on April 20, 2018, Murphy sent an email to Gann and Knudsen letting the two know that she planned on meeting with Kirt over the weekend. Kirt and Murphy met the next day, Saturday, April 21, 2018. On Monday, April 23, 2018, Kirt sent an email to Gann and Knudsen, in which she wrote, in the relevant part:

> [Murphy] and I met this weekend and we were able to have a candid discussion. It felt really good. After even more thought, my decision to resign as Middle School Coach remains. I have many thoughts and ideas that I am certain would build the program in the high school. These have not been implemented. I am ready to be a Varsity Cross Country Coach and am seeking this position only right now.

Knudsen testified that he and Gann discussed the situation and agreed that they would not renew Murphy's coaching position and would instead open up the position and make the two interview for the position.

In the afternoon of April 27, 2018, Gann went to Murphy's classroom and told her of the decision to open up the coaching position. Murphy, in describing what Gann told her, testified, "[a]gain, he said he didn't want to lose both of us, and since we couldn't resolve the issue ourselves, he was going to open up the position." Murphy and Kirt were the only two individuals to apply for the Varsity position.

On May 9, 2018, Knudsen sent an email to Murphy confirming that she was scheduled to interview for the Varsity position on May 21, 2018, at 4:30 p.m. Following a question from Murphy as to who would be on the panel, Knudsen's response indicated that the panel would

consist of himself, Gann, and two parents, one of whom was also a member of the School's Board of Education.[5]

Ultimately the panel selected Kirt for the Varsity Cross Country position. Knudsen, in describing the panel's decision, testified:

> [A]fter both interviews were complete, we deliberated right there that evening, talked about what we thought were strengths and weaknesses of both candidates. We thought that both of them had their own unique strengths and weaknesses, but we ended up coming to a consensus that Ms. Kirt was going to be best choice.

Knudsen also testified that there was no discussion within the panel regarding Murphy's union activity. Moreover, Knudsen testified that at no point during any of the meetings he had attended with Murphy did Murphy ever bring up her union activities and/or intimate that she believed she was being targeted because of the same.

Superintendent Stowe, the third and last witness to testify at the hearing, conveyed the understanding that the School's Board of Education would not have been made aware of the Peplinski grievance. Stowe also testified that he had first become aware of the issue regarding the CC coach positions in June of 2017.

Discussion and Conclusions of Law:

Charging Party's allegations encompass two separate causes of action. Under the first, the Union claims that the School District retaliated against Murphy because of her protected activity in violation of Section 10(1)(c) of the Act. Under the second, the Union claims the School District violated Sections 10(1)(a) and (e) of PERA when it engaged in direct dealing with Murphy when it made proposals regarding splitting the two coach positions and/or adjusting the extra pay.

Charges under PERA must be filed within six months of the alleged unfair labor practice. MCL 423.216(a). 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. Under Section 16(a) of the Act, the six-month period begins to run when the charging party "knows of the act which caused [the] injury, and has good reason to believe that the act was improper or done in an improper manner," even if the person does not realize that they have suffered an invasion of a legal right. *City of Huntington Woods v Wine*, 122 Mich App 650, 652 (1983). While the Employer failed to raise the timeliness issue in its post-hearing brief, because the limitations period is a jurisdictional prerequisite to the consideration of a charge and may be raised at any time, I must consider it herein with respect to the Association's two allegations.

[5] It became known during the hearing that Gann had been a previous athletic director with the School District and would routinely sit on interview panels involving coaches both as the athletic director and after he became Principal.

Retaliation:

The Association's allegations as set forth in its charge, filed on November 7, 2018, argue that the Employer violated Sections 10(1)(a) and (c) when it "removed" Murphy from her coaching position as retaliation for her protected activity. The record clearly establishes that Gann, on April 27, 2018, communicated clearly to Murphy that he was "opening" the Varsity CC Coach position and that she was welcome to apply and seek the position. With respect to the Association's allegations regarding Murphy's "removal" from the position, it is my finding that the said "removal" occurred more than six months prior to the filing of the charge and therefore should be dismissed as untimely under the Act. The preceding notwithstanding, even if one were to consider the filling of the position by someone other than Murphy, which occurred in late May of 2018, as the actual "removal" of Murphy, such an allegation, while seemingly timely, for the reasons set forth does not establish a violation of the Act.

Section 10(1)(c) of PERA makes it unlawful for a public employer to "[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." In order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp* (Fire Dep't), 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983). However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id* at 74; *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703, 706.

In order to prevail on an action brought under Section 10(1)(c), a charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Michigan Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). An essential element of a discrimination claim under PERA is anti-union animus. Where a charging party has alleged that the employer has taken adverse action that was motivated by anti-union animus, the charging party must demonstrate that protected concerted activity was a motivating or substantial factor in the respondent's decision to take the action about which the charging party has complained. *Schoolcraft College Ass'n of Office Personnel, MESPA v Schoolcraft Cmty College*, 156 Mich App 754, 763 (1986); *MESPA v Evart Pub Sch*, 125 Mich App 71, 73-75 (1983). Even if an employee has engaged in extensive union activities, a prima facie case is not established absent evidence of a connection or link between those activities and the alleged discrimination. *Detroit Public Schools*, 16 MPER 29 (2003); *North Central Community Mental Health Services*, 1998 MERC Lab Op 427, 437. While antiunion animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, a charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *City of St Clair Shores*, 17 MPER 27 (2004); *City of Grand Rapids Fire Dep't*, 1998 MERC Lab Op 703, 707. Mere temporal proximity between protected activity

and an adverse employment action is not enough, by itself, to establish a causal relationship. *City of Detroit (Water & Sewerage Dep't)*, 1985 MERC Lab Op 777, 780; *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 73. It is well settled that when a respondent's purported motives for its actions are found to be without merit or credibility, the Commission may properly infer from the totality of the circumstances that the employer was motivated by antiunion animus, even in the absence of direct evidence. *Detroit Public Schools*, 30 MPER 2 (2016); *Wayne Co*, 21 MPER 58 (2008).

Addressing first the absence Gann's testimony at the hearing, the Union takes issue with the fact that Gann was not called to testify by the School District and that because of this, the undersigned must make inferences with respect to what he might have testified on. The preceding withstanding, the parties both agreed that Gann had retired following the 2017-2018 school year. Given Gann's departure from the School District, it is my finding that Gann was no longer under the control of the Employer and that, more importantly, either party could have sought to compel his attendance at the hearing had it thought his testimony would be relevant. As such, I decline to apply any inference with respect to what Gann could have testified to but did not because of his absence.

In the instant matter there is no question that Murphy was actively engaged in protected activity within her various roles with the Union. Moreover, Murphy was actively involved in the Peplinski grievance, the first grievance pursued by the Union in quite some time. In the same vein, there is no question that the School, especially Gann, was aware of Murphy's activities. The preceding notwithstanding, the Association failed to establish antiunion animus. While Murphy did testify that Gann might have been cold to her, that testimony alone, with nothing else, cannot establish animus on the part of the Principal. Moreover, accepting for a moment that Gann did repeatedly demand and/or ask that Murphy resign, Charging Party provided no direct evidence that the undersigned could rely upon to find that those statements were made because of antiunion animus. Ultimately, it is my finding that the circumstances that prompted the situation that would result in Murphy not continuing as the Varsity CC Coach was not influenced by antiunion animus on the part of Gann, but rather began with the vague approach first put forth by Murphy in her June 2017 email to Kirt and was furthered along by her subsequent backtracking from the same.[6]

Direct Dealing:

As stated above, the Union maintains that Gann's suggestions regarding how both Kirt and Murphy could split or share the coaching positions, including the positions' extra pay, violated the PERA's prohibition on direct dealing, thereby violating Sections 10(1)(a) and (e) of the Act. The Employer's brief argues that Gann did not engage in direct dealing because the

[6] I note that the Union points out that the June 2017 email was not shared with Knudsen or Gann until late April of 2018, after Gann made comments that he did want not to "lose both coaches." While true, the fact remains that Knudsen was aware in the beginning of the 2017-2018 school year about the suggested transition and was also approached several times by Kirt regarding her perception that Murphy was having a change of heart. Knudsen's testimony confirms that he kept Gann updated as to the situation and moreover, both Knudsen and Gann met with Kirt. As such, I find that, while Gann and Knudsen might not have known about the June 2017 email when they first began to meet with the two coaches, both men certainly had enough knowledge of the situation referenced within the email that the timing of its revelation is irrelevant.

negotiations were not between the Employer and the Union but were ultimately between Kirt and Murphy.

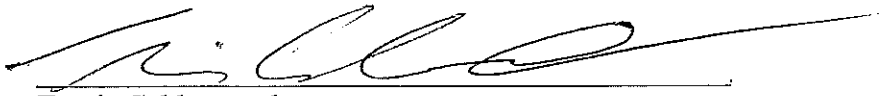
In the instant matter, Murphy's testimony establishes that Gann first discussed making changes to the two coaching position's duties and pay at one of the April 13, 2018, meetings. There is no question that this meeting occurred outside of PERA's six-month statute of limitations. Even if one were to argue that because Murphy was attending the meeting as a coach, and not as the Association's Vice President, and therefore the Association was not aware of the alleged violation of the Act at that meeting, the record clearly shows that Murphy asked the Association's President, Pershinske, to begin attending the meetings the following week because she felt "uncomfortable." Those meetings, which occurred in April of 2018, also clearly occurred outside of the Act's limitations period.

I have considered all other arguments as set forth by the parties and conclude such does not change the outcome. As such, and for the reasons set forth above, I recommend that the Commission issued the following order:

RECOMMENDED ORDER

The unfair labor practice charged filed by the Leland Education Association, Northern Michigan Education Association, MEA/NEA is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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

Dated: October 31, 2019