STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

COUNTY OF WASHTENAW,
Public Employer-Respondent

MERC Case No. 20-C-0740-CE

-and-

TRACEY SMITH,
An Individual Charging Party.
_____/

APPEARANCES:

Tracey Smith, appearing on her own behalf

DECISION AND ORDER

On November 6, 2020, 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

Robert S. LaBrant, Commission Member

Tinamarie Pappas, Commission Member

Issued: February 12, 2021

[1] MOAHR Hearing Docket No. 20-007130

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

In the Matter of:

COUNTY OF WASHTENAW,
Respondent-Public Employer

Case No. 20-C-0740-CE
Docket No. 20-007130-MERC

-and-

TRACEY SMITH,
Individual Charging Party.
_____/

Appearances:

Miller Johnson, by Keith E. Eastland, for the Respondent-Public Employer

Sprinkle Law, by Caroletta Sprinkle, for the Charging Party

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

On March 27, 2020, Tracey Smith, an individual Charging Party, filed the above captioned unfair labor practice charge against her Employer, the County of Washtenaw (County or Respondent). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (Commission).

Charging Party claims that the Employer engaged in activity that violated Section 10(1)(c) of the Act by issuing two separate disciplines, the first, oral discipline, and the second, a suspension that eventually resulted in a Last Chance Agreement (LCA).

This matter was initially scheduled to be heard on May 15, 2020. On April 24, 2020, the Respondent filed a motion for summary disposition pursuant to Rule 165(2)(b)(c)(d) and (f) of the Commission's General Rules, R423.165. The May 15, 2020, hearing was adjourned to allow Charging Party an opportunity to respond to the motion. Charging Party, on her own, timely filed her response on July 17, 2020, following several extension requests.

Upon careful review of Charging Party's filings, Respondent's May 15, 2020, motion and attachments, and well as Charging Party's July 17, 2020, pleading and attachments, it was the

opinion of the undersigned that dismissal of Charging Party's first allegation related to the August 5, 2019, oral warning was warranted as said allegation was untimely under PERA's six-month statute of limitations. With respect to Charging Party's remaining allegation, that the November 2019 discipline and resulting LCA, were issued in violation of Section 10(1)(c) of that Act, I concluded that oral argument was necessary on whether Charging Party was able to meet her burden of proof with respect to anti-union animus and the causal connection between said animus and the Employer's actions. On August 10, 2020, I issued and Interim Order to the above effect and set this matter for oral argument on Respondent's motion for August 25, 2020.

On August 13, 2020, I received a Notice of Appearance filed by Attorney Caroletta Sprinkle on behalf of Charging Party. On August 20, 2020, I received a request to reschedule the August 25, 2020, oral argument from Attorney Sprinkle. The oral argument was rescheduled to September 10, 2020.

The parties appeared before the undersigned by video conference on September 10, 2020, for oral argument on Respondent's motion. Upon careful review of the record, including all pleadings and filings, and the transcript of the September 10, 2020, oral argument, for the reasons set forth below, I find that dismissal of the charging in its entirety is appropriate.[1]

Factual Background:

The following factual background is derived from Charging Party's initial unfair labor practice charge filings, Respondent's May 15, 2020, motion and attachments, and Charging Party's July 17, 2020, pleading and attachments, were not in dispute. All well-plead and relevant allegations set forth by Charging Party are presumed true for purposes of considering the Employer's motions for summary disposition.

Charging Party had been employed with the Respondent for approximately 25 years. For at least the last ten years, she had served as a Union representative for AFSCME Local 2733 Unit C.

Portions of Charging Party's pleadings describe an incident occurring in 2018 in which she applied for, and was initially passed over, for a newly created position. Charging Party filed a grievance on September 26, 2018, challenging that decision. Charging Party eventually prevailed in her challenge and was ultimately awarded the position, but "with multiple amendments that differed significantly than the previously demoted employee." In describing those changes, Charging Party stated in her response to the motion the following:

> …Charging Party was required to complete duties and responsibilities not typically associated with the position. The Respondent imposed impossible quotas of performance and deliverables on the Charging Party. Respondent refused to grant the Charging Party the allocated office space that was attached to the past

[1] On October 9, 2020, I was informed by the Employer, through email, that Charging Party had passed away. The Employer's email indicated that it believed the present matter should be dismissed as moot. The Employer sought concurrence from Charging Party's attorney. On October 28, 2020, Attorney Sprinkle indicated that she could not provide said concurrence on the issue of mootness.

> practice and unit seniority. The pay increase associated with the position was delayed – as the Respondent claimed there were limits on the budget but yet other employees were hired and promoted at pay levels over and above the posted amounts during this time.

On August 5, 2019, Charging Party was issued an oral warning following an incident that occurred on July 23, 2019, in which Charging Party failed "to provide timely and appropriate customer service" which "resulted in a client waiting in the lobby for over three hours…" That oral warning was issued by Sarah M. Mazur, the Deputy Friend of the Court. Charging Party and/or the Union challenged the oral warning through the grievance procedure, with the Respondent denying the grievance at each step. It appears both parties agree that the grievance procedure regarding the oral warning terminated at the third step in October of 2019. According to Charging Party's response to the motion, she had sought a copy of the updated policy that resulted in the oral warning. According to Charging Party she was never provided any such policy. She further claims that it was not until the grievance procedure terminated in October of 2019, did she become sure she would not receive that updated policy. Charging Party's response clearly states, "the Oral Warning isn't the ULP – the refusal of the Respondent to surrender the current updated policy that is the [ULP]."

Charging Party next complains of a November disciplinary incident that resulted in a Last Chance Agreement (LCA). According to documents provided by the Employer with its motion, Charging Party was issued an unpaid suspension on November 7, 2019. The reasons listed for the suspension included, but were not limited to, the unauthorized release of confidential information. This suspension was also issued by Mazur. According to Charging Party's initial filing, "the discipline administered was punitive solely for the purposes of intimidation and retaliation…" Relevant portions of the LCA that resulted from the suspension are reproduced below:

> Employee understands and agrees that her performance and behavior in October 2019, violated the Employer's Unacceptable Workplace Policy, Washtenaw County Trial Court Code of Conduct, Washtenaw County Trial Court Disciplinary Action, Failure in Performance of Duties, and Vendor, Contractor or Subcontractor Confidentiality Agreement. Employee understands and agrees that in lieu of termination, she will return to duty provided that she complies with all conditions and standards outlined below. Failure to do so will result in immediate termination of employment, subject to all due process rights to which the employee would be entitled.
>
> Employer and Employee agree to the following terms and conditions:
>
> * * *
>
> 1. Employee will be suspended without pay from November 8, 2019 through November 15, 2019.
>
> * * *

7. Employer may immediately terminate Employee's employment for violations of this Agreement. The Employee waives the right to challenge through the grievance procedure or other means any termination or other discipline imposed under the terms of this Agreement, unless otherwise provided for in law.

8. Employee understands and agrees that she has been afforded sufficient time to consider this Agreement and that signing this Agreement was of her own free will and with the benefit of representation, if so desired.

The LCA was signed by the Employer, the Union and the Charging Party. There is no indication in the record that the Union and/or Charging Party attempted to file a grievance over the incident leading up to the LCA or that Charging Party had been further disciplined or terminated as a result of any violation of the LCA.

Discussion and Conclusions of Law:

The Commission does not investigate charges filed with it. Charges filed with the Commission must comply with the Commission's General Rules. More specifically, Rule 151(2)(c), of the Commission's General Rules, 2002 AACS; 2014 MR 24, R 423.151(2)(c), requires that an unfair labor practice charge filed with the Commission include:

> A clear and complete statement of the facts which allege a violation of LMA or PERA, including the date of occurrence of each particular act, the names of the agents of the charged party who engaged therein, and the sections of LMA or PERA alleged to have been violated.

Charges which comply with the Commission's rules, are timely filed, and allege a violation of PERA are set for hearing before an administrative law judge. In order to be timely filed, the charge must be filed within six months of the alleged unfair labor practice. MCL 423.216(a).

Rule 165 of the Commission's General Rules, states that the Commission or an administrative law judge designated by the Commission may, on their own motion or on a motion by any party, order dismissal of a charge without a hearing for the grounds set out in that rule, including that the charge is untimely, there are no issues of material fact and one party is entitled to judgment as a matter of law, and/or that the charge does not state a claim upon which relief can be granted under PERA. See R 423.165; See also *Oakland County and Sheriff*, 20 MPER 63 (2007); *aff'd 282* Mich App 266 (2009); *aff'd* 483 Mich 1133 (2009); *MAPE v MERC*, 153 Mich App 536, 549 (1986), *lv den* 428 Mich 856 (1987).

Addressing Charging Party's first allegation, that the Employer's refusal and/or failure to provide an updated policy connected to her July 2019 discipline, I note first that, while the Commission does recognize an Employer's obligation to provide information upon request, the violation of that obligation under Section 10(1)(e) of the Act cannot be maintained by an individual Charging Party. Moreover, to whatever extent that Charging Party may be attempting

to challenge the July discipline through the allegations relating to the failure to provide an updated policy, the fact remains that the July discipline is untimely under the Act and cannot be addressed as such by the Commission.

Moving on to Charging Party's remaining allegation arising from the November discipline and resulting LCA, generally, with respect to public employers, PERA does not prohibit all types of discrimination or unfair treatment. The Commission's jurisdiction with respect to claims brought by individual employees against public employers is limited to determining whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in union or other protected concerted activities.

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

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.

In the instant case Charging Party has not provided any allegations that, if proven true, could meet the burden necessary to establish anti-union animus. Charging Party's status as a Union representative does not, by itself, establish that the Employer's decision

to discipline and/or implement the LCA were undertaken for discriminatory reasons or was otherwise retaliatory in violation of an employee's Section 9 rights. Moreover, while Charging Party does allege that the Employer's actions were in retaliation for her efforts to overturn its 2018 decision to give a promotion to another person as opposed to her, such a connection to the present action is not close in time temporally. As stated above, the purpose of the September 10, 2020, oral argument was to allow Charging Party the opportunity to establish whether she would be able to introduce any evidence into the record on which a reasonable fact-finder could determine that the Employer harbored anti-union animus and that such animus was a causal factor towards the November suspension and resulting LCA. Charging Party, despite being provide ample opportunity to do such, did not allege facts, that if proven true, could establish a prima facie case of discrimination and/or retaliation under Section 10(1)(c) of the Act.

I have considered all other arguments as set forth by the parties in their pleadings and during the oral argument and have concluded such does not warrant any change in my conclusion. As such, and for the reasons set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge filed by Tracy Smith against Washtenaw County is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: November 6, 2020