STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HEMLOCK PUBLIC SCHOOLS,
Public Employer-Respondent

MERC Case No. 18-L-2620-CE

-and-

EMILY CLAYTON,
An Individual Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Roy H. Henley and Ryan J. Nicholson, for Respondent

Emily Clayton, appearing on her own behalf

DECISION AND ORDER

On October 1, 2020, Administrative Law Judge David M. Peltz 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.

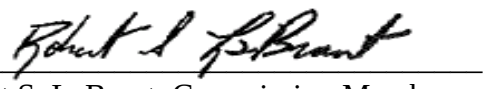
The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

ORDER

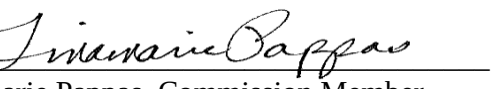
Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Samuel R. Bagenstos, Commission Chair



Robert S. LaBrant, Commission Member



Tinamarie Pappas, Commission Member

Issued: December 30, 2020

[1] MOAHR Hearing Docket No. 18-L-2620-CE

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

In the Matter of:

Case No. 18-L-2620-CE

HEMLOCK PUBLIC SCHOOLS, Docket No. 18-023599-MERC
Respondent-Public Employer,

-and-

EMILY CLAYTON,
An Individual Charging Party.
_____/

APPEARANCES:

Emily Clayton, appearing on her own behalf

Thrun Law Firm, P.C., by Roy H. Henley and Ryan J. Nicholson, for the Public Employer

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed on December 17, 2018, by Emily Clayton against her former Employer, Hemlock Public Schools. 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 David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (Commission).

Facts and Procedural History:

The following facts are derived from the unfair labor practice charge, an amended charge filed on July 14, 2020, and Clayton's response to the Employer's motion for summary disposition, as well as the assertions set forth in the Employer's motion which Clayton has not disputed.

Charging Party was employed by Respondent as a teacher until she resigned on August 19, 2019. On May 17, 2018, an incident occurred in Charging Party's classroom which resulted in numerous allegations of misconduct, including claims that Clayton had left her classroom unattended and transmitted personal information regarding students on social media. Following an investigation, Charging Party was placed on administrative leave. During a meeting with Donald Killingbeck, Superintendent of Hemlock Public Schools, and building administrator

Terry Keyser, Charging Party was directed to surrender her cell phone so that the school district could respond to a Freedom of Information Act (FOIA) request. Charging Party told Keyser that the parent who initiated the FOIA request was harassing her. Although Charging Party initially refused to turn over her phone, she eventually did so in response to pressure from the administration.

During a meeting with her principal and Union representatives on May 23, 2018, Charging Party was informed that she was being suspended for three days without pay and notified that she would be placed on an Individualized Development Plan (IDP) for the 2018-2019 school year. Charging Party subsequently exercised her right to appeal the suspension pursuant to district policy. While that appeal was pending, Charging Party returned to the classroom for the 2018-2019 school year.

On September 5, 2018, Charging Party was given an IDP detailing four areas of concern unrelated to the charges which led to her suspension. Charging Party was supposed to meet with Keyser on September 14, 2018, to discuss the IDP, but the meeting did not occur, in part, because no union representative was available to attend and provide assistance to Clayborn. On September 17, 2018, Charging Party received an email from the Employer directing her to sign the IDP and return it the following day. A few days later, Charging Party reviewed her personnel file and discovered that it contained three letters of reprimand relating to the incident which resulted in her suspension. All of those letters of reprimand were from May of 2018. According to Charging Party, one of the letters, which was never shared with the Union, was later reviewed by the School Board during its September 24, 2018, meeting.

On October 10, 2018, Charging Party met once again with Killingbeck and Keyser. Union representatives were also in attendance at the meeting. Killingbeck had an affidavit prepared for Charging Party to sign as an alternative to the IDP which, if signed, would have constituted an admission by Clayton to all of the charges against her. Charging Party contends that she was threatened and intimidated by Killingbeck during the course of the meeting. At some point around this time, Charging Party's husband filed a FOIA request for documents relating to the three-day suspension. He received the school district's response to the FOIA request on October 11, 2018.

Around this time, Killingbeck and three other administrators conducted a classroom walkthrough of Charging Party's classroom. Following the walkthrough, Killingbeck sent an email to Charging Party in which he described her performance as awful.

On or about October 26, 2018, Killingbeck and Keyser met with Kyle Wilkowski, a Union representative. Charging Party was not in attendance and received no notice that such a meeting was taking place. Charging Party contends that the parties discussed her actions in the classroom and the results of a classroom walkthrough by administrators. The Employer denies that the discussion was specific to Clayborn, asserting instead the meeting was for the purpose of considering how the school district would provide feedback to teachers following classroom observations.

On November 27, 2018, Charging Party met with Keyser to discuss revisions to the terms of the IDP. No Union representative was present at the meeting. The following day, Charging Party signed the IDP in protest. In addition, she provided the school district with all of the documentation required in connection with the IDP. Once again, no union representative was present. Following implementation of the IDP, Charging Party was required to meet with Keyser twice a month during her prep hour and had her performance scrutinized throughout the remainder of the 2018-2019 school year.

On December 4, 2018, Charging Party received a letter of reprimand drafted by Keyser at Killingbeck's direction. According to the letter, Charging Party violated school policy by allowing her students to work in groups in the hallway. Charging Party requested that the Union file a grievance on her behalf. However, no grievance was ever filed because the matter was ultimately treated by the Employer as a violation of the terms of the IDP rather than discipline. Following receipt of the letter of reprimand, Clayborn filed the instance charge, as well as a claim with the Equal Employment Opportunity Commission (EEOC).

Charging Party received an ineffective rating on her year-end evaluation for the 2018-2019 school year. According to the Employer, the ineffective rating stemmed from an incident in the classroom during which Charging Party allegedly shouted at her students, shared personal information with her class and sent students an email in which she described her anger with her students. At some point, thereafter, Charging Party was placed on another IDP for the 2019-2020 school year. The justification which the district provided for the second IDP was that Clayton "had multiple incidents this year regarding classroom management. These incidents has [sic] made her overall rating for this year to be ineffective." Rather than return to work, Charging Party decided to resign her employment with the school district effective August 19, 2019. She is now teaching in a different school district.

A hearing was initially scheduled in this case for February 13, 2019. The matter was subsequently adjourned without date by request of the parties. On July 7, 2020, Charging Party moved to have the case placed back in active status. A hearing was scheduled for September 24, 2020. On July 14, 2020, Clayton filed an amended charge asserting that she was subjected to harassment, increased scrutiny and a hostile work environment for challenging the implementation of the IDP. Thereafter, Respondent moved for summary disposition in a filing received on August 18, 2020. Charging Party filed a response to the motion on August 31, 2020. Upon review of the motion and response, I issued an order adjourning the hearing.

Discussion and Conclusions of Law:

Pursuant to Rule 165(1), R 423.165(1), of the General Rules and Regulations of the Employment Relations Commission, which govern practice and procedure in administrative hearings conducted under PERA by MOAHR, the ALJ may "on [his] own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party." Among the various grounds for summary dismissal of a charge is a failure by the charging party to state a claim upon which relief can be granted. See Rule 165(2)(d). Accepting all of the allegations set forth by Clayton as true, dismissal of the instant charge is warranted.

In the instant case, Charging Party has set forth a litany of allegations against Respondent. Charging Party asserts that the implementation of the IDP was arbitrary and capricious because she had already served a suspension arising from the May 17, 2018, incident. She claims that the school district violated the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 et seq. by failing to provide her with a copy of the letter of reprimand dated May 2018. She asserts that Superintendent Killingbeck interfered with the school board's deliberations and consideration of her testimony. Charging Party alleges that Respondent violated Section 10(1)(d) of PERA by retaliating against her for appealing her three-day suspension. She also contends that the school district retaliated against her because her husband filed a FOIA claim. She asserts that the Employer acted unlawfully by discussing her employment situation with the Union without her permission. Charging Party further alleges that the Employer violated PERA because there was no Union representative present during her meeting with Keyser regarding the terms of the IDP or the following day when she signed that document. She alleges that Killingbeck's October 29 2018, email concerning the classroom walkthrough, the December 4, 2018, letter of reprimand and the ineffective rating on her performance evaluation constituted harassment and retaliation. Finally, Charging Party claims that the school district engaged in a violation of Title VII of the Civil Rights Act of 1964. I have carefully reviewed all of these allegations and conclude that none state a valid claim under PERA.

Section 9 of PERA protects the rights of public employees to form, join or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. The types of activities protected by the Act include filing or pursuing a grievance pursuant to the terms of a union contract, participating in union activities, joining or refusing to join a union, and joining with other employees to protest or complain about working conditions. Sections 10(1)(a) and (c) of the Act prohibit a public employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities described above. PERA does not, however, prohibit all types of discrimination or unfair treatment by a public employer, nor does the Act provide a remedy for a breach of contract claim asserted by an individual employee. 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, or refusal to engage in, union or other concerted activities protected by the Act.

In the instant case, none of the allegations set forth by Charging Party establish a violation of PERA. Although Charging Party contends that she was the victim of harassment and retaliation at the hands of Killingbeck and other school district officials and that the implementation of the IDP was arbitrary and capricious, she has not set forth any factual basis which would support a finding that these actions were taken because she engaged in, or refused to engage in, protected concerted activities. In fact, there is no reference by Charging Party to any activities which could be considered protected conduct under the Act. Nor is there any allegation that Killingbeck or any other representative of the school district was motivated by

anti-union animus in their treatment of Charging Party. Although Charging Party challenged her suspension by appealing that decision to the school board, the appeal was not a grievance under the collective bargaining agreement but rather individual action undertaken by Clayton pursuant to school district policy. In fact, any attempt by the Union to negotiate over the three-day suspension would have constituted a prohibited subject of bargaining under Section 15(3)(m) of PERA, MCL 423.215(3)(m). Allegations pertaining to Bullard-Plawecki and Title II similarly fail to state a claim under the Act, as the Commission has no jurisdiction to address alleged violations of these other statutes. Lastly, there is no merit whatsoever to Charging Party's contention that an Employer must seek an employee's permission before discussing issues relating to that employee with the certified bargaining representative.

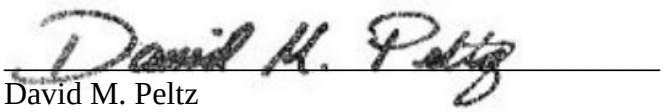
With respect to Charging Party's claim that Respondent acted unlawfully because there was no union representative in attendance when she met with Keyser to discuss revisions to the terms of the IDP or, the following day, when she signed the IDP, no PERA violation has been alleged. In *NLRB v Weingarten, Inc*, 420 US 251 (1975), the National Labor Relations Board (NLRB) recognized that an employee has the right, upon request, to the presence of a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to discipline. The Commission has adopted the Board's reasoning in cases arising under PERA. See e.g. *Univ of Michigan*, 1977 MERC Lab Op 496. However, it is well established that this obligation arises only when the employee actually requests representation by the Union. *Grand Haven Bd of Water and Light*, 18 MPER 80 (2005); *City of Marine City (Police Dep't)*, 2002 MERC Lab Op 219 (no exceptions). In the instant case, Charging Party does not assert that she requested, and was refused, Union representation prior to or during her meetings with Keyser. Moreover, there is no factually supported allegation suggesting that either meeting was investigatory in nature. Accordingly, the charge fails to state a claim which would support a finding of a *Weingarten* violation by the school district.

Despite having been given a full and fair opportunity to do so, Charging Party has failed to meet her burden of establishing the existence of a valid claim under PERA. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Emily Clayton against Hemlock Public Schools in Case No. 18-L-2620-CE; Docket No. 18-023599-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: October 1, 2020