STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT
Public Employer-Respondent

MERC Case No. 19-K-2166-CE

-and-

JEFFREY BROWN,
An Individual Charging Party.
_____/

APPEARANCES:

Finkel, Whitefield & Selik, by Robert J. Finkel and Michael L. Weissman, for Respondent

Jeffrey Brown, appearing on his own behalf

DECISION AND ORDER

On January 28, 2021, 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

Robert S. LaBrant, Commission Member

Tinamarie Pappas, Commission Member

Issued: March 18, 2021

[1] MOAHR Hearing Docket No. 19-022528

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

In the Matter of:

Case No. 19-K-2166-CE
Docket No. 19-022528-MERC

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT,
Respondent-Public Employer,

-and-

JEFFREY BROWN,
An Individual Charging Party.

_____/

APPEARANCES:

Jeffrey Brown, appearing on his own behalf

Finkel, Whitefield & Selik, by Robert J. Finkel and Michael L. Weissman, for the Public Employer

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by Jeffrey Brown against Wayne County Community College District (WCCCD). 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 & Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the transcript of the hearing, exhibits and post-hearing briefs filed on or before April 28, 2020, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

Jeffrey Brown is employed by Respondent as an adjunct faculty member in the Political Science department. The charge, which was filed on November 20, 2019, alleges that Respondent retaliated against Brown for engaging in concerted protected activities by reducing his class load, passing him up for a full-time position in favor of a less qualified candidate and by

assigning a course to another faculty member with less seniority.[1] A hearing was held in Detroit, Michigan on March 5, 2020.

Findings of Fact:

Brown was hired by WCCCD as an adjunct instructor in 2011. He has a degree in political science and American government, as well as a juris doctor degree. Brown has primarily taught Political Science 101, although he has also instructed students in Paralegal Technology. The number of courses assigned to Brown during each academic year has varied throughout his tenure with the College. During the 2016-2017 academic year, Brown taught a total of six classes which equated to 18 credits and 270 student contact hours. The following academic year, Brown taught four courses for 12 credits and 180 contact hours. During the Fall 2017 term, Brown was assigned three classes for 9 credits and 135 contact hours. The following academic year, Brown taught four courses for 12 credits and 180 contact hours. As will be described in more detail below, Brown was assigned one three-credit class during the Fall 2019 term.

As a part-time instructor at WCCCD, Brown is a member of a bargaining unit represented by the American Federation of Teachers (AFT) Local 2000. Brown was a Union steward in 2014 and again in 2018. From 2016-2017, he was a "Union organizer" paid by the AFT. Brown sat across the table from Respondent's chancellor as part of the Union's bargaining team during contract negotiations in 2016. From 2015 through 2018, he advocated for better working conditions for his fellow adjunct faculty members. For example, he carried a sign protesting the treatment of adjunct faculty during a rally held outside the College's administration building in 2016.

Respondent and AFT Local 2000 are parties to a collective bargaining agreement covering the period 2019 through 2021. Pursuant to Article XV of that agreement, which governs the assignment of classes to faculty, class selection is to be determined by seniority within each discipline or program. At hearing, Patrick McNally, Respondent's CEO and Vice Chancellor of Curriculum and Distance Learning, described in detail the procedure by which full-time and adjunct faculty members select classes for each term. According to McNally, Respondent initiates the process by sending a notice to faculty members informing them of the time and date of the class selection meetings, along with an explanation of the process. The notice specifies that any faculty member who is unable to attend the selection meeting may utilize a proxy.

Faculty selection meetings for all disciplines and programs, except Nursing and Practical Nursing, are held at a single location on the same date. After checking in, faculty members are provided a Selection Seniority Report form which sets forth the number of credit hours they have earned within their respective disciplines and the various courses each faculty member is

[1] Brown also asserted that Respondent retaliated against him for providing advice to Patrick Kelley, a WCCCD trustee who was being sued for defamation by the president of Respondent's downriver campus. I refused to allow Brown to present evidence at hearing in support of this allegation based upon my finding that no valid claim had been stated under PERA. The litigation was a private lawsuit which did not involve either the College or the AFT. To whatever extent that Brown may have assisted Kelley with respect to that lawsuit, such action did not constitute protected concerted activity for purposes of the Act.

certified to teach. Faculty members are then divided up by discipline into separate rooms where they hand their forms to administrative staff and wait for their name to be called to select classes. If an instructor's name is called and there is no response, the administrative staff will typically wait a few minutes before moving on to the next instructor on the seniority list.

Full-time faculty select their classes first, followed by full-time retirees and then adjunct faculty. Adjunct faculty members with over 100 credit hours within their respective disciplines or programs have scheduling priority over those instructors with 99 credit hours or less. Depending on their seniority, adjunct instructors are entitled to select up to a maximum of 180 student contact hours per term. According to McNally, the number of available classes vary from term to term based on enrollment. If a faculty member is not able to procure a course during the meeting, that individual, or his or her proxy, can return to the check-in room and sign up for the "No Class Assignment Roster" which is essentially a wait-list for additional classes which might be added later.

The class selection meeting for the Fall 2019 term was scheduled for May 3, 2019, at Respondent's downriver campus. Brown, who has participated in the class selection process each year since beginning employment with WCCCD, received a notice from the College informing him of the meeting. As an adjunct faculty member with over 100 credit hours, Brown's check-in time was scheduled for 1:15 p.m. Brown arrived on time and received his Selection Seniority Report which indicated that he was eligible to teach Political Science 101. By that point in the day, five full-time faculty members in the Political Science department had already made their course selections. The selection process for adjunct faculty began just before 3:00 p.m. With 665 credit hours earned, Conley Warsham was the first adjunct faculty member to be called. Warsham selected four courses totaling 180 contact hours.

Brown contends that he remained at the class selection meeting until around 3:00 p.m., when he had to leave to go to another job. Brown testified that he gave his Selection Seniority Report to Warsham and authorized him to act as his proxy for the remainder of the meeting. Brown then left the room accompanied by fellow adjunct faculty member Ben Tallerico. Brown testified that he received a telephone call from Warsham later that evening. According to Brown, Warsham indicated that Political Science 101 was closed by the time he attempted to select a class on Brown's behalf. However, Brown has no personal knowledge as to what transpired after he left the room and Warsham did not testify as a witness at the hearing in this matter. There is no dispute that Tallerico, who has less seniority than Brown, ultimately received an assignment to teach Political Science 101. It is also undisputed that Brown did not sign the No Class waiting list, nor did Warsham do so on Brown's behalf.

Besides Brown, the only witness called to testify on Charging Party's behalf was Michael Wright, another adjunct faculty member in the Political Science Department who was in attendance at the May 3, 2019, meeting. Wright testified that at the start of the meeting, the adjunct faculty members looked at the schedule and determined that there would be enough classes for each of them. Wright contends that his name was called at approximately 3:00 p.m. and that he was able to select four classes. According to Wright, Stella Webster was the next name called at around 3:03 p.m. Wright contends that he did not see any other faculty members select classes thereafter. Wright did claim to observe Warsham attempting to proxy for Brown,

but he did not testify as to what exactly transpired when Brown's name was called. Wright left the meeting sometime between 3:20 p.m. and 3:30 p.m. and testified that he did not see any other adjunct faculty members present in the room at the time.

Respondent introduced various documents relating to the class selection process. Exhibit 9 is a handwritten document compiled by an administrator of instruction listing the times that each faculty member in the Political Science department selected their courses. The document indicates that Warsham was called to select his classes at 2:50 p.m., followed by Wright at 2:57 p.m., Webster at 3:03 p.m., Panera Smith at 3:07 p.m. and Mark Hoffman at 3:12 p.m. The next entry on the list is Brown, for whom no class selection is indicated. According to the list, Tallerico made his selection at 3:24 p.m. and was the last faculty member of the day called from the Political Science department. The handwritten list was corroborated by two computer generated class assignment forms admitted into evidence in this matter. Exhibit 10 contains Warsham's signature and is dated May 3, 2019, at 2:50:58 p.m. Exhibit 11 is a class assignment form signed by Tallerico dated May 3, 2019, at 3:24:18 p.m.

On or about June 5, 2019, Brown contacted McNally by email and asserted that he should have received the Political Science 101 that was assigned to Tallerico. Thereafter, McNally met with Brown and explained that because there was no response when Charging Party's name was called during the class selection meeting, Tallerico, the next instructor on the seniority list, was called to choose a course.

Ultimately, a "dual enrollment" Political Science 101 course became available for the Fall 2019 term and Brown was given that assignment. Dual enrollment courses are taught to high school students rather than students enrolled at WCCCD. However, the curriculum is identical to non-dual enrollment courses and the instructors teach the same number of hours, receive the same compensation and earn the same number of credit hours as faculty assigned to regular courses at the College.

Discussion and Conclusions of Law:

Charging Party contends that the WCCCD discriminated against him for engaging in protected activities by reducing his class load and by denying him the opportunity to select a course during the May 3, 2019, course selection meeting. Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. Analysis of whether an employer's action against employees violates Section 10(1)(c) of the Act is governed by the test first enunciated by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Line, Inc*, 251 NLRB 1083 (1980), enf'd 662 F2d 899 (CA 1, 1981) and approved by the United States Supreme Court in *NLRB v Transportation Management Corp*, 462 US 393 (1983). Under the *Wright Line* test, as adopted by the Commission in *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983), the charging party has the initial burden of establishing that union activity was a motivating factor in the adverse employment action by proving, in addition to 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*, *supra*. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419.

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

In the instant case, the record supports a finding that Brown engaged in protected concerted activities of which Respondent was aware. Brown testified that he was a Union steward in 2014 and 2016 and that he worked as a paid organizer for the AFT. He was also a member of the Union's bargaining team in 2016 and he participated in a protest outside the College's administration building. Nevertheless, Brown's claim against the College fails on the basis that there is simply no evidence to support a finding of anti-union animus or hostility on the part of the WCCCD administration. When asked during the hearing to explain the connection between his protected activities and the actions taken by the College, Brown could offer no meaningful response and instead relied on conclusory statements such as his claim that proof of Respondent's unlawful motivation was established by "the totality of the circumstances." Much of Charging Party's case was based upon Brown's assertion that Tallerico, an instructor with less seniority, was allowed to select the Political Science 101 course which Brown had wanted to teach. Although Charging Party claims that Warsham called him after the meeting and told him that the class was not available when he tried to proxy for him, Warsham himself did not testify in this matter and, therefore, Brown's account constitutes inadmissible hearsay. Even if that claim were true, however, that fact, standing alone, would not establish that the College

prevented Warsham from selecting a class on Brown's behalf because Brown had engaged in protected activities several years earlier. To find anti-union animus on the basis of this record would be to inappropriately engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, *supra*.

There is also no evidence that Charging Party was subjected to any adverse employment action. Although Brown's class load has varied since he began teaching at the College in 2011, the record establishes that the number of courses available to WCCCD faculty fluctuates based upon enrollment and that Brown was routinely assigned to teach between 135 and 180 student contact hours during each academic year that he worked from the spring of 2016 through the fall of 2018, the period immediately during and after he engaged in protected concerted activity. With respect to the Fall 2019 term, it is undisputed that Brown was ultimately assigned to teach Political Science 101, the same course he was allegedly prevented from selecting during the May 3, 2019, class selection meeting. Although the course to which Brown was assigned was a "dual enrollment" class taught to high school students rather than WCCCD enrollees, the record establishes that there was no difference in terms of curriculum, compensation or accrued seniority. Thus, even assuming arguendo that Brown had established anti-union animus on the part of the administration in connection with the class selection meeting, there is no proof that he suffered any actionable harm which would justify finding a violation of Section 10(1)(c) of PERA.

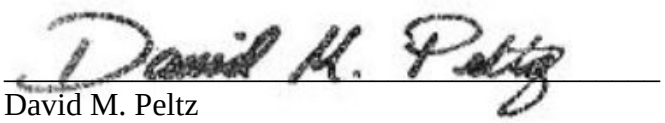
Dismissal of the remaining allegations set forth in the charge is also warranted. Although the charge asserts that Respondent failed to pay Brown the proper rate for teaching a class in March of 2019, no evidence was presented at trial to support this allegation and, therefore, I find that the issue has been waived. With respect to Brown's contention that the College failed or refused to hire him for a full-time faculty position, that claim is untimely under Section 16(a) of PERA, which states that 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. At hearing, Brown conceded that the position for which he applied was filled in 2016, more than three years prior to the filing of the instant charge. 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.

Despite having been given a full and fair opportunity to do so, Charging Party has failed to meet his burden of proving that the WCCCD violated the Act. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Jeffrey Brown against Wayne County Community College District in Case No. 19-K-2166-CE; Docket No. 19-022528-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: January 28, 2021