STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ROSCOMMON COUNTY, MINI-BUS SYSTEM,
Respondent-Public Employer,

Case No. C97 C-66

-and-

INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL, UFCW,
Charging Party-Labor Organization.

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APPEARANCES:

Cohl, Stoker & Toskey, P.C., by David G. Stoker, Esq., for the Respondent

Charles D. Chapman, Vice President and Regional Director, for the Charging Party

DECISION AND ORDER

On July 23, 1998, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 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

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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APPEARANCES:

Cohl, Stoker & Toskey, P.C., by David G. Stoker, Atty, for Public Employer-Respondent

Charles D. Chapman, Vice-president and Regional Director, for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This case was heard at Lansing, Michigan, on October 17, 1997, before James P. Kurtz, Administrative Law Judge for the Michigan Employment Relations Commission, pursuant to a complaint and notice of hearing dated March 26, 1997, issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCLA 423.216, MSA 17.455(16). Based upon the transcript of the record received on February 12, 1998, and the Employer's post-hearing brief filed on December 17, 1997,[1] the undersigned hereby makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA, and Section 81 of the Administrative Procedures Act (APA) of 1969:

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[1]The completed transcript was forwarded to the parties ordering it by the Court Reporter on November 12, 1997, and at the same time was forwarded to the newly-appointed State contractor for reporting services that this Commission is required to use. The Employer's brief was then filed as provided by the transcript, but the transcript was not delivered to the Commission by the contractor until February 12, 1998, some three months after its preparation. So much for the alleged efficiencies and economies realized by the privatization of State services, over the former use by the Commission of its own in-house reporters.

Charge and Background Matters:

This unfair labor practice charge was filed on March 17, 1997 by the International Chemical Workers Council, United Food & Commercial Workers Union, AFL-CIO-CLC, naming the Mini-Bus System of Roscommon County as the Respondent. The charge alleged that the Employer, on or about March 4, 1997, singled out for discipline two bus driver employees, Eugene Rosemary and Mark Gardiner, both outspoken advocates for the Union. The charge alleged that prior to that date the Employer had a long-standing past practice of allowing employees to call off work on days when road conditions were hazardous. The Employer filed an answer on April 28, 1997, denying the past practice and contending that the drivers were disciplined for walking off the job without authorization in violation of departmental policies and the County personnel manual.

The Union was certified on March 4, 1997 as the collective bargaining representative of all full-time and regular part-time nonsupervisory employees of the County Mini-Bus System, including drivers, dispatchers, mechanics, maintenance, and clerical employees, in Case No. R96 L-202. The petition for election had been filed by the Union on December 20, 1996, and a consent election was held on February 21, 1997, the Union winning by a vote of 19-9. Most of the remaining nonsupervisory employees of the County were already represented for purposes of collective bargaining.

The Union also filed an unfair labor practice charge on February 10, 1997 in Case No. C97 B-37, alleging that the Employer had, since on or about December 18, 1996, withheld an annual pay raise and denied benefits to mini-bus employees. This charge was withdrawn on August 15, 1997, after the parties entered into a letter of agreement which provided for withdrawal of the charge, a 3% wage increase for the calendar year 1997 for all mini-bus employees, and continuation of all current economic benefits.

Factual Findings:

The County bus transportation system, known as the mini-bus system, employs about 30 employees and is under the immediate supervision of a manager, who is assisted by an operations supervisor or head dispatcher. On September 2, 1996 the prior manager was replaced by Judith A. Devine. Under the prior manager, either the manager or the operations supervisor would declare a "snow day" when the weather was such that the vehicles could not get around due to road conditions. The practice was to have a two-hour delay, and if the road conditions did not improve, then the employees would be sent home and be paid for the day without utilizing other types of leave, such as sick or personal leave.

The latest personnel manual covering employees of Roscommon County was adopted by the Board of Commissioners on June 6, 1996. The manual provides for a number of different kinds of paid days off, including holidays, vacation, sick leave, personal days, funeral leave, and jury duty. There is no provision in the manual for leave or pay for "snow days," the subject of this proceeding.

The new manager discovered that the County personnel manual had never been distributed to mini-bus employees, so she passed out the manuals at a regular staff meeting held the first Tuesday of every month in either September or October 1996. At this meeting, employees raised a number of questions or concerns about the manual, including their "at-will" status and the lack of any provision dealing with snow days.

Devine discussed with the County Board of Commissioners the issue of paid snow days. The Board was not aware that mini-bus employees were being paid for snow days and took the position that they should not be paid for them, since there was nothing in the personnel manual porviding for such payment. The Board took the position that the manual applies to all County employees, that only it could make a decision regarding snow days, and that a transportation operation must be prepared to get the public home when weather was bad. This decision was communicated to the mini-bus employees at the next staff meeting in either October or November 1996. The decision was also implemented by the Employer on one occasion in January 1997, when the entire bus system was shut down, since the local schools were also closed. Any employees who showed up for work on that occasion were sent home. The employees were not paid for that day, even if they showed up for work, but they were allowed to use other types of leave, such as sick or personal leave, if they wished to be paid for the day.

In early December 1996, Rosemary contacted the Union regarding organizing the mini-bus employees. A meeting of employees was attended by 16 or 17 employees, and an organizing committee was appointed, with Rosemary serving as chairperson and Gardner as a member. Both Rosemary and Gardner were active in the organizational campaign, and while there was no evidence that the Employer knew of their membership on the Union's organizational committee, the Employer admitted knowing that they were Union supporters. As noted above, the petition for election was filed on December 20, 1996, and Rosemary served as the Union's observer at the February 21, 1997 consent election.

Late in the day on February 26, 1997, an on-duty mini-bus driver was involved in an accident in which three persons in another vehicle were killed. Due to the traumatic nature of this event, the mini-bus supervisor made a point to be at work at the time that the first shift of drivers began the following morning at 6:00 a.m. Rosemary and Gardiner were among the full-time drivers scheduled to start at that time. Around 6:00 a.m., the supervisor updated the drivers at the terminal as to the condition of the driver involved in the accident. Rosemary then asked him whether a snow day was going to be declared that day as it had begun to snow heavily. The supervisor said that there was not going to be a snow day, and that the system would be operating. Rosemary also asked if there could be a two-hour delay before beginning the routes, and the supervisor again answered ,"no." Rosemary said that he did not want to drive if the weather was going to be as it had been on two or three previous days. The supervisor stated, "Let your conscience be your guide," reaffirmed that the system would be operating and would not be closing that day, and warned Rosemary of the potential consequences of walking off the job. Rosemary then punched out and went home. Gardiner, who witnessed the exchange between the supervisor and Rosemary, also punched out, asked for a sick day, and went home.

The supervisor notified the manager that Rosemary and Gardner had left work when she arrived around 9:00 a.m. Devine wrote to both and requested that they meet with her on March 4, 1997 to discuss the incident. On March 4, Rosemary met with Devine, a County commissioner, and the supervisor, Gardner being off work that week. Rosemary argued that he thought that the supervisor had given him the option of either working or going home, and that he could use his own judgment. Director Devine testified that walking off the job was an offense for which a bus driver could be fired. However, she did not impose such an extreme penalty because of the high emotions within the department caused by the accident on the previous day. Instead, Rosemary was given a one-day suspension for unauthorized leave from work in violation of the personnel manual. Gardiner met with Devine on March 6, and after hearing Gardiner's version of the incident, he also received a one-day suspension.

The Union contended that other drivers had been allowed to take time off on bad driving days and were not disciplined. As an example, it cited a part-time driver who was scheduled to drive from 2-6 p.m. on February 27, and who was also a Union supporter. She had witnessed the serious accident the day before, or had come upon it shortly after it happened, and she was quite shaken by it. After reporting to work, she told the dispatcher that in light of witnessing the accident and the current weather, she "couldn't handle" her route. She did not drive her scheduled shift, but she did return to the garage later at the Employer's request to receive some psychological counseling regarding her witnessing of the accident, and she was paid for two hours for her time. The manager testified that part-time drivers are not paid for shifts they do not work, and they are treated differently from full-time drivers in that they are allowed to not work as long as there is another part-time driver who can cover their shift.

Discussion and Conclusions:

The caselaw is quite clear that in order to establish a prima facie case of discrimination in regard to employer action adverse to an employee within the meaning of Section 10(1)(a) and (c) of PERA, four factors or findings are necessary: namely, the employee engaged in union or protected concerted activity; the employer knew of such activity; suspicious timing of the employer's action; and, finally, and most important, animus or hostility to the exercise of protected rights, which provides the necessary evidence of the employer's motivation. See *MESPA v Evart Public Schools*, 125 Mich App 71, 75, *aff'g* 1982 MERC Lab Op 384, 395, wherein the element of union animus was found to be lacking; see also *AFSCME, Local 574-A v City of Troy*, 185 Mich App 739, 748-749, *rev'g* 1989 MERC Lab Op 291, 297, where the activity in question was found to be unprotected; but see where discrimination was found, *Flint Neighborhood Improvement and Preservation Project, Inc*., 1996 MERC Lab Op 249, 252-253, 268-269. Once the four elements establish a prima facie case of discrimination, then the burden shifts to the employer to produce credible evidence that the same action would have taken place even in the absence of protected conduct. However, the ultimate burden of proof remains on the charging party. See *Bangor Public Schools*, 1997 MERC Lab Op 386, 392-393; *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9, 18-21.

While it may be conceded that the elements of activity, knowledge, and timing are present in

this case relative to the discipline of Rosemary and Gardiner, the record is devoid of any evidence of animus or anti-union motivation on the part of the Employer. The failure of the part-time driver to drive on February 27, without discipline, was fully explained on the record and does not establish disparate treatment. In view of her involvement with the serious accident the day before, she was allowed to take the time off, which in no way equates with walking off the job without permission. The admitted Union activity of Rosemary and Gardner does not protect them from being disciplined for misconduct, even though they may have been engaged in protected activity at the same time. See *Univ. of Michigan*, 1993 MERC Lab Op 449, 454.

The Union's contention in its charge that the discipline of Rosemary and Gardner violated "a long-standing past practice" of allowing employees to take off work when road conditions were hazardous is without merit. Such a past practice may have existed until the fall of 1996, but it is clear that it was abolished by the new manager of the system after she took over in September 1996. In the monthly staff meetings of employees between September and November 1996, the issue of snow days was raised and a determination made that only the types of leave permitted by the County personnel manual would be allowed. The new manager, Devine, took the issue to the Board of Commissioners who stated that the manual applied to all County employees, and that only the Board could make a decision to declare a snow day. The refusal to continue with the past practice of paid snow days was communicated to the employees before they ever approached the Union to begin organizing in December 1996. Since prior to that time they were unrepresented at-will employees, the County was free to make any changes it desired in their wages, hours, and working conditions, including abolishing the past practice regarding snow days. The cessation of the practice appears to be at least one of the reasons the Union was sought out for representation in the first place. Also, the new policy was implemented, apparently without incident, on the first occasion of hazardous driving conditions in January 1997.

Therefore, I conclude that there is insufficient evidence of a violation of PERA herein, and that the Charging Party-Union has failed to establish a prima facie case of discrimination under the statute. Therefore, it is recommended that the Commission issue the order set forth below:

ORDER RECOMMENDING DISMISSAL

The unfair labor practice and complaint in this matter are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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James P. Kurtz,
Administrative Law Judge

DATED:_____