STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

LAKE ERIE TRANSPORTATION COMMISSION,
Respondent-Public Employer,

-and- Case No. C02 B-048

JACK A. FLEEMAN,
An Individual Charging Party.
_____/

APPEARANCES:

Steven H. Schwartz & Associates, by Steven H. Schwartz, Esq., for the Public Employer

Jack A. Fleeman, In Pro Per

DECISION AND ORDER

On November 15, 2002, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Charging Party, Jack A. Fleeman, failed to present any evidence which would support a prima facie case of discrimination under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ recommended that the unfair labor practice charge be dismissed. On January 8, 2003, Charging Party filed timely exceptions to the Decision and Recommended Order of the ALJ. Respondent filed a timely brief in support of the Decision and Recommended Order of the ALJ on January 15, 2003.

Background:

The facts in this case are not materially in dispute and are fully set forth in the ALJ's Decision and Recommended Order. Charging Party Jack A. Fleeman has worked for Respondent Lake Erie Transportation Commission (Employer) for twenty years. He is a member of the United Steelworkers Local 2511 (Union).

Respondent and the Union are parties to a collective bargaining agreement covering the period of July 1, 1997, through June 30, 2002. The agreement provides for discipline for certain misconduct including tardiness. Pursuant to the agreement, the Employer published a Policy Manual, which established the following disciplinary track for tardiness:

First Violation-Verbal Warning

Second Violation-Written Warning
Third Violation- 2 day suspension
Fourth Violation- 3 day suspension
Fifth Violation-Discharge.

The agreement provides that the Employer may take into consideration prior discipline occurring in the preceding twelve months. Disputes involving the interpretation of the agreement are subject to the contract grievance/arbitration procedure.

Between 1988 and 1996, Charging Party served as a union steward, as chief union steward, and as a member of the local union executive board. Since 1995 or 1996, he has been a member of the AFL-CIO Central Labor Council for Monroe and Lenawee County. On October 3, 2001, Charging Party and a union steward presented an employee petition to the Employer involving a complaint about the condition of bus seats. During the meeting, the Employer informed Charging Party that they had already ordered new seats. According to Charging Party, the meeting went relatively smoothly.

Charging Party was tardy fifty-three times between February 3, 2000, and January 22, 2002. The Employer suspended him for three days on February 12, 2001, and for four days on April 25, 2001. Charging Party was warned that further tardiness could result in additional discipline. After Charging Party was tardy on January 22, 2002, the Employer suspended him for five days on January 26, 2002. The Union filed a grievance on Charging Party's behalf contesting the suspension. The case was pending before an arbitrator at the time of the hearing in this matter. Charging Party filed an unfair labor practice charge on February 21, 2002, alleging that the Employer violated Section 10 of PERA by suspending him in retaliation for past union activities and to discourage future union involvement.

Discussion and Conclusions of Law:

The ALJ properly noted that to establish a prima facie case of discrimination under Section 10 of PERA, a party must show: (1) employee union, or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory action. *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42; *University of Michigan*, 1990 MERC Lab Op 272, 288.

Although the employer was aware of Charging Party's protected activity, there is no evidence that the employer maintained animus or hostility towards Charging Party's exercise of his protected rights. On exception, Charging Party suggests that since the ALJ concluded that the five-day suspension exceeded the progressive disciplinary guidelines set forth in the collective bargaining agreement, that conclusion alone would support a finding that management discriminated against him. The fact that the Employer gave Charging Party a five-day suspension does not indicate that the Employer discriminated

against him, since the Employer could have proceeded to the next level of progressive discipline, i.e. discharge.

The Commission has held that while anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Charging Party must present substantial evidence establishing an illegal motivation or causal nexus between the protected activity and the disciplinary action. See *Rochester School District*, 2000 MERC Lab Op 38, 42; and *County of Saginaw*, 1990 MERC Lab Op 775, 780.

The ALJ concluded that there was nothing on the record to indicate that Charging Party's participation in the October 3, 2001 meeting or his prior service as a union official was in any way related to his suspensions. We agree. Nothing in this record supports Charging Party's contention of anti-union animus as the motive for his suspensions. It is abundantly clear that the suspensions were for a substantial record of tardiness over a protracted period.

Charging Party asserts that his lack of knowledge concerning the hearing procedure prevented him from successfully presenting his case by impeding his ability to enter evidence in support his charges. He states he was unaware that witness affidavits would not be admissible at the hearing and had he known that, he would have subpoenaed the witnesses. He proceeds to speculate that had he been better informed, he would have been able to rebut the Employer's contention that this case involved a bona-fide dispute of contract language interpretation. Because Charging Party acted as his own counsel in this case, he was responsible for knowing the applicable law. See *North Laramie Land Co* v *Hoffman*, 268 US 276 (1925); and *Curley* v *Beryllium Development Corp*, 281 Mich. 554 (1937). It was Charging Party's responsibility to find out what he needed to do to prepare for the hearing.

Commission Rule 176(3), R 423.176 (3) establishes the mandatory requirements for exceptions to decisions and recommended orders of administrative law judges. Charging Party's exceptions fall substantially short of the requirements. The fact that Charging Party acted in pro per does not relieve him of his obligation to comply with the Commission's Administrative Rules. Charging Party is required to identify, in his Exceptions, the legal and factual errors allegedly made by the ALJ, and he has failed to meet that requirement in this matter. *University of Michigan*, 2001 MERC Lab Op 40, 42; *Thirty Sixth District Court*, 2001 MERC Lab Op 92, 93.

We have carefully examined the record, and we agree with the findings and conclusions of the ALJ. It is, therefore, unnecessary for us to address Respondent's argument that the case should be dismissed because the fundamental issue regarding the interpretation of the twelve-month limitation on prior discipline is a contract interpretation issue pending before an arbitrator.

ORDER

We hereby adopt the Administrative Law Judge's Decision and Recommended Order as our final order in this case and dismiss the charges in their entireties.

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

Dated:_____

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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan on May 29, 2002, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 *et seq*. The proceeding was based upon an unfair labor practice charge filed on February 21, 2002, by Jack A. Fleeman, an individual Charging Party, against the Lake Erie Transportation Authority, Respondent. Based upon the record and a post-hearing brief filed by Respondent on July 22, 2002, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA.

The Unfair Labor Practice Charge:

Charging Party claims that Respondent suspended him on January 29, 2002, in retaliation for his past union activities and to discourage future union involvement.

Findings of Fact:

Charging Party has been employed by Respondent as a bus driver for twenty years. He is a member of United Steelworkers Local 2511 and served as a union steward from 1988 to 1996; chief union steward from 1993 to 1996; and board member from 1992 to 1996. Currently, he is a member of the AFO-CIO Central Labor Council for Monroe and Lenawee County.

The United Steelworkers Local 2511 and Respondent are parties to a collective bargaining agreement that covers the period July 1, 1997 to June 30, 2002. It provides for discipline for misconduct. A policy manual published by the Employer pursuant to the agreement provides for progressive discipline for rule violations as follows: first violation – verbal warning; second violation

– written warning; third violation – 2 day suspension; fourth violation – 3 day suspension; and fifth violation – discharge. In determining discipline for minor rule violations, such as tardiness, Respondent is permitted to consider similar violations that occurred during a twelve-month period. The agreement also contains a grievance procedure with binding arbitration as the final step.

During the period between February 12, 2001 and January 26, 2002, Charging Party was suspended three times for being late for work. He was suspended for three days on February 12, 2001; four days on April 25, 2001, and five days on January 26, 2002. According to Charging Party, after his five-day suspension on January 26, 2002, he was told that if he were tardy again within one year, or called in late to report that he was sick, he would be terminated. The Union filed a grievance on Charging Party's behalf contesting his five-day suspension.

In the meantime, on October 3, 2001, Charging Party and the union steward presented an employee petition involving their complaints about the condition of bus seats to Respondent's general manager, maintenance supervisor; and administrative assistant. The general manager inspected the seats prior to receiving the petition and during a five-minute meeting with Charging Party, informed him that new seats had been ordered. According to Charging Party, "the meeting did go relatively smoothly."

Conclusions of Law:

To establish a prima facie case of discrimination under Section 10 of PERA, a party must show: (1) employee, union, or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employee's protected rights; and suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *City of Detroit*, 1992 MERC Lab Op 597.

I find that Charging Party failed to present any evidence that would support a violation of PERA. The record indicates that other than participating in a five-minute meeting on October 3, 2001, Charging Party did not engage in any recent protected activity. He has not held union office since 1996, and there is nothing on the record to indicate that his participation in the October 3, 2001 meeting, or his service as a union official six years ago was in any way related to his suspensions. Although, Charging Party's five-day suspension on January 26, 2002, exceeded the progressive disciplinary guideline set forth in the collective bargaining agreement, Charging Party offered no evidence that the Employer's decision to suspend him for five days rather than two days was the result of union animus or hostility toward his protected rights. Rather, the record shows that Charging Party was suspended because he was violated the attendance policy. I, therefore, recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: _____