STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LAKE ERIE TRANSPORTATION COMMISSION,
Respondent – Public Employer,

Case No. C02 L-259

-and-

JACK A. FLEEMAN,
An Individual Charging Party.

_____/

APPEARANCES:

Steven H. Schwartz & Associates, P.L.C., by Steven H. Schwartz, Esq., for the Respondent

Gottlieb & Goren, P.C., by Elizabeth T. Foster, Esq., for the Charging Party

DECISION AND ORDER

On June 30, 2004, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

Case No. C02 L-259

LAKE ERIE TRANSPORTATION COMMISSION,
Public Employer – Respondent,

-and-

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

APPEARANCES:

Steven H. Schwartz & Associates, P. L. C., by Steven H. Schwartz, Esq., for Respondent

Gottlieb & Goren, P. C., by Elizabeth T. Foster, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210-217, this case was heard in Detroit, Michigan on January 27, 2004, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC). This proceeding was based upon an unfair labor practice charge filed against Respondent Lake Erie Transportation Commission (LETC) by Charging Party Jack A. Fleeman. Based upon the record and post-hearing briefs filed by February 17, 2004, 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:

The charge filed by Charging Party on December 6, 2002, reads:

> On May 29, 2002 I presented charges against my employer, LETC, before ALJ Roy Roulhac, Case #C028-048 [sic]. These charges were based on my belief that management had exceeded the existing labor agreement and policy manual in assigning discipline to me, for minor tardiness, in retaliation for my past union activities.
>
> On May 31, 2002 General Manager Mark Jagodzinski posted a change of the

> tardiness policy that had been in effect for approximately 25 years. (Copy enclosed) I feel that the policy change was in direct retaliation for my filing charges with MERC. On September 30, 2002 I presented Mr. Jagodzinski with a letter of protest concerning this matter after being disciplined for tardiness under the new policy. (copy enclosed). On October 16, 2002, I was 3 minutes late reporting for work and as a result was terminated. I was employed at LETC for over 20 years with an exemplary work record other than minor tardiness. To my knowledge, prior to my termination no other employee in the history of LETC had ever been terminated for tardiness.

Findings of Fact:

The relevant facts are undisputed. Charging Party Fleeman worked for Respondent for over twenty years and was a member of the United Steelworkers Local 2541. Respondent and Local 2541 are parties to a collective bargaining agreement. A policy manual issued by Respondent pursuant to the collective bargaining agreement contains a policy that provides for progressive discipline for violating a seven-minute grace period for reporting to work. Discipline may be imposed for violations that occur within a twelve-month period as follows: first violation – verbal warning; second violation – written warning; third violation – 2-day suspension; fourth violation – 3-day suspension; and fifth violation – discharge.

Charging Party has been a chronic violator of the policy. Between February 3, 2000, and January 22, 2002, he was late by more than seven minutes over fifty times. He was suspended for three days on February 12, 2001, four days on April 25, 2001, and five days on January 29, 2002. After Charging Party's latter suspension, Respondent's general manager Mark J. Jagodzinski warned him as follows:

> Jack, this is as serious as it gets. You will lose your employment with Lake Erie Transit **if you are late one more time.** I expect you will make every effort to be to work on time. (Emphasis in original).

The Union filed a grievance claiming that Charging Party should have been suspended for two days instead of five because his January 22, 2002 tardiness was only his third violation in twelve months. Charging Party also filed an unfair labor practice charge alleging that Respondent suspended him in retaliation for his past union activities and to discourage future union involvement.[1] On May 31, 2002, two days after Charging Party testified at the unfair labor charge hearing, Respondent issued a memorandum to all employees advising them that on July 1, 2002, the seven-minute grace period would be eliminated. Jagodzinski testified that he decided to revise the policy after reviewing time records, which had been requested by the Union to process Charging Party's grievance, and discovering that many bus drivers were abusing the grace period. According to Jagodzinski, the drivers were not leaving themselves enough time to perform safety checks before beginning their routes.[2] The Union and Respondent bargained about the grace

[1] The Commission's Decision and Order finding no violation of PERA is reported at 2003 MERC Lab Op ___, (Case No. C02 B-048, April 2, 2003).

[2] Charging Party attached to his post-hearing brief a copy of the Union's June 24, 2002 request for records of all bargaining unit employees for the past 18 months. I did not consider this document, which was not presented during

period's elimination and the Union also filed a grievance, which it later withdrew.

After the policy change was announced, Charging Party's tardiness continued. He was late on June 8, 2002 and July 5, 2002. On July 9, 2002, Respondent informed Charging Party that it had cause to terminate him, but would hold it in abeyance pending the outcome of his five-day suspension arbitration. Respondent explained to Charging Party that if the arbitrator found that he should have only been suspended for two days, he would receive a written warning for his June 8 tardiness and a two-day suspension for being late on July 5, 2002. But, if the arbitrator upheld the five-day suspension for his January 22, 2002 tardiness, he would be terminated.[3]

After Charging Party was late on August 26, 2002, the fourth time he had been late in seven months, he was suspended for three days and warned that a fifth tardiness would result in his termination. In a September 30, 2002 response, Charging Party claimed, among other things, that the grace period was eliminated to retaliate against him for filing an unfair labor practice charge. Charging Party also wrote that, "you had threatened me with this policy change numerous times over the past years during grievance meetings over discipline for my tardiness. In your own words, 'Everyone would suffer for my actions.'"

Two weeks later, on October 16, 2002, Charging Party was terminated after he reported to work three minutes late. Although Charging Party was the first employee to be terminated for violating the tardiness policy, other employees, including Julie Miazgowicz, Lolita Cooper and Jessie Lathan, were also discharged for violating the policy.[4]

Conclusions of Law:

Charging Party alleges that Respondent discriminated against him in violation of MCL 423.210(1)(d) by eliminating the grace period two days after he testified at a MERC hearing and then terminating him. Section 10(1)(d) makes it unlawful for a public employer to discriminate against a public employee because he has given testimony or instituted proceedings under PERA. The elements of a prima facie case of discrimination are: (1) employee union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility towards the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and to show that the same action would have taken place even in the absence of the protected conduct. The ultimate burden remains with the charging party. *Napoleon Community Schs*, 124 Mich App 398 (1983).

The first two elements of a prima facie case are satisfied. Charging Party engaged in protected activity by filing an unfair labor practice charge against Respondent and testifying in a May 29, 2002 MERC

---

the hearing, in my recommended decision.

[3]The arbitrator sustained the grievance and rescinded the five-day suspension because it did not conform to the progressive disciplinary steps set forth in the policy manual.

[4]According to Jagodzinski, other factors, including having had several accidents while driving a vehicle, contributed to Miazgowicz's termination.

hearing. Charging Party, however, failed to establish that hostility towards his protected rights or suspicious timing was a motivating reason that Respondent eliminated the grace period or terminated him.

The record demonstrates that Charging Party has a long history of tardiness. Between February 3, 2000 and January 22, 2002, he was tardy over fifty times by more than seven minutes and was suspended several times. Charging Party's own evidence shows that Respondent contemplated changing the attendance policy before he filed an unfair labor practice charge or testified at a MERC hearing. In his September 30, 2002 memorandum complaining about Respondent's elimination of the grace period, Charging Party acknowledges that Jagodzinski had threatened to change the tardiness policy "numerous times over the past years during grievance meetings over discipline for my tardiness" and told him that everyone would suffer because of his actions. This admission supports a finding that Respondent was not motivated to announce a change in the policy because Charging Party had testified at a MERC hearing two days earlier. Moreover, the record demonstrates that Charging Party was warned that continued violation of the tardiness policy would result in his termination and that other employees, who did not testify or institute proceedings under the Act, were also terminated for reporting to work late.

Since Charging Party failed to establish a prima facie case that Respondent discriminated against him because he gave testimony or instituted proceedings under PERA, the burden of proof does not shift to Respondent to produce credible evidence of a legal motive and to show that the same action would have taken place even in the absence of the protected conduct. 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

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____